No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., et al., Plaintiffs-Appellees, REBECCA HARPER, et al., Plaintiffs-Appellees, and COMMON CAUSE, Plaintiff-Intervenor-Appellee, v. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al., Defendants-Appellants.	)	From Wake County 21 CVS 015426 21 CVS 500085

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LEGISLATIVE DEFENDANTS' NOTICE OF FILING

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COMES President *Pro Tempore* Philip E. Berger, Senator Warren Daniel, Senator Ralph Hise, Senator Paul Newton, Representative Destin Hall, and Speaker Timothy K. Moore in their official capacities (collectively, "Legislative Defendants") through counsel, pursuant to N.C. R. App. P. 26 and in furtherance of Legislative Defendants' 13 July 2022 Motion to Dismiss their Appeal of the trial court's rulings on the remedial Congressional Plan and Legislative Defendants' Motion to Disqualify, hereby respectfully note the following for the Court:

1. On 27 June 2022, Plaintiff-Intervenor Common Cause filed a Motion for Expedited Hearing and Consideration. On 13 July 2022 Legislative Defendants filed their Motion to Dismiss their Appeal of the trial court's rulings on the remedial Congressional Plan and Legislative Defendants' Motion to Disqualify. And, on 19 July 2022 Legislative Defendants filed a motion to extend time to file their Appellants New Brief up to and including 5 business days after a dispositive ruling on the Motion to Dismiss their appeal, should the result of the dispositive ruling be to deny the Motion to Dismiss.

2. On 25 July 2022, this Court granted, in part, Legislative Defendants' motion to extend time to file their Appellants' Brief by extending time to file that brief up to and including 1 August 2022. Then, on 28 July 2022, this Court granted the motion by Common Cause by scheduling a hearing for the consolidated appeal no later than 18 October 2022. Three justices dissented from that order. This Court

explicitly did not address, and reserved ruling on, Legislative Defendants' Motion to Dismiss.

3. Absent a determination by this Court on the motion to dismiss, Legislative Defendants Appellants' Brief is due today, 1 August 2022.

4. As a result of not having heard from this Court as to the pending motion to dismiss, Legislative Defendants are filing their Appellants Brief contemporaneously with this Notice, but do not intend such filing to be a waiver of their Motion to Dismiss. To the contrary, should this Court grant Legislative Defendants' Motion to Dismiss then Legislative Defendants request that the Clerk's office strike Legislative Defendants' Appellants Brief from the docket as a part of this Court's ruling on the Motion to Dismiss.

Respectfully submitted, this the 1st day of August, 2022.

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

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LEGISLATIVE DEFENDANTS-APPELLANTS' BRIEF

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LEGISLATIVE DEFENDANTS-APPELLANTS' BRIEF

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ISSUES PRESENTED

I. WHETHER THE SUPERIOR COURT ERRED BY FAILING TO GIVE THE CONGRESSIONAL MAP, N.C. SESS. LAW 2022-3, THE DEFERENCE AFFORDED TO LEGISLATIVE ENACTMENTS UNDER THE STATE CONSTITUTION.

II. WHETHER THE SPECIAL MASTERS' FINDINGS REGARDING N.C. SESS. LAW 2022-3 WERE CLEARLY ERRONEOUS.

III. WHETHER THE SUPERIOR COURT ERRED IN REJECTING THE LEGISLATIVELY ENACTED CONGRESSIONAL MAP, N.C. SESS. LAW 2022-3, AND INSTEAD IMPOSING ITS OWN CONGRESSIONAL PLAN.

IV. WHETHER THE SUPERIOR COURT ERRED IN DENYING LEGISLATIVE DEFENDANTS' MOTION TO DISQUALIFY SAM WANG AND TYLER JARVIS AS ASSISTANTS TO THE SPECIAL MASTERS GIVEN THE ASSISTANTS' SUBSTANTIVE EX PARTE COMMUNICATIONS WITH PLAINTIFFS' EXPERTS.

STATEMENT OF THE CASE

After this Court, for the first time, held that the North Carolina Constitution guaranteed "substantially equal voting power on the basis of partisan affiliation" and enjoined all three original redistricting plans passed by the General Assembly, it remanded this case to the three-judge superior court to "oversee the redrawing of the maps by the General Assembly or, if necessary, by the court." (R p 4090); *Harper v. Hall*, 2022-NCSC-17, ¶ 223.

On 8 February 2022, the superior court entered an order stating that it would employ "a Special Master." (R p 3838). The superior court asked the parties for suggestions on Special Masters and asked that when proposed plans were submitted that it include "a written submission" providing "an explanation of the data and other considerations the mapmaker relied upon to create the submitted Proposed Remedial Plan and to determine that the Proposed Remedial Plans are constitutional (i.e., compliant with the Supreme Court's Order)[.]" (*Id.*).

On 9 February 2022, the superior court supplemented its 8 February 2022 Order by offering all parties a day to respond to the special master suggestions of the other parties. (R p 3844).

Each party noted their suggested special master(s). (R pp 3847-48) (Legislative Defendants suggested John Morgan); (R pp 3857-3859) (*Harper* Plaintiffs suggested Professor Nathaniel Persily); (R pp 3881-84) (*NCLCV* Plaintiffs suggested Professor Nathaniel Persily and Professor Bernard Grofman, but also noted that Professors Tyler J. Jarvis, Jonathan Cervas, John F. Nagle, Jonathan Rodden, Jeanne N. Clelland, Larry M. Bartels would be qualified to help); (R pp 3888-90) (Common

Cause Intervenor suggested Professor Nathaniel Persily). And Plaintiffs provided their objections and concerns about the submission of the Legislative Defendants. (R pp 3912-52).

As the General Assembly and Plaintiffs were drawing their plans, this Court entered its 14 February 2022 Opinion, (R pp 3953-4169), and ordered an immediate mandate of the Opinion, (R pp 4170-75).

On 16 February 2022, the superior court appointed three retired jurists as its Special Masters—the Honorables Robert Orr, Robert Edmunds, and Thomas Ross—none of whom were suggested by the parties. (R pp 4176-79). The superior court authorized these Special Masters to "hire research and technical assistants and advisors reasonably necessary to facilitate their work[.]" (R p 4181). The Special Masters ultimately did so, hiring Dr. Tyler Jarvis, Dr. Eric McGhee, Dr. Bernard Grofman, and Dr. Sam Wang as their Assistants. (R pp 4870-71). The Special Masters were instructed to file a report with the superior court that would "provide the Special Masters' analysis of the General Assembly's Proposed Remedial Plans and the compliance of those plans with the Supreme Court's Order and full opinion." (*Id.*). Given the time constraints set by this Court, the superior court noted that it would receive no objections or exceptions to the report of the Special Masters before it made its own determination. (*See* R p 4182).

On 18 February 2022, Plaintiffs and the Legislative Defendants served their written submissions and filed proposed plans, including the remedial plans passed by the General Assembly. The Legislative Defendants' submission included all three

remedial plans, statistics, and data the General Assembly used in preparing the plans. (R pp 4185-4374). Legislative Defendants also included a report from Dr. Michael Barber (R pp 4375-4423), and a supplemental report from Dr. Jeffrey B. Lewis, (R pp 4424-44). *Harper* Plaintiffs submitted their plans for the North Carolina Senate and Congress. (R pp 4445-74). *NCLCV* Plaintiffs submitted their plans for the North Carolina legislature and Congress. (R pp 4475-4553). Their submissions also included an affidavit from Dr. Moon Duchin. (R pp 4553-74). Plaintiff-Intervenor Common Cause also submitted its remedial plans for redrawing one remedial district in the state House plan and one district in the state Senate plan. (R pp 4575-94). Common Cause also included an affidavit from Christopher D. Ketchie. (R pp 4595-4607).

On 21 February 2022, Legislative Defendants filed a response and objections to the plans Plaintiffs proposed. (R pp 4618-54). The same day, Legislative Defendants also filed a motion to disqualify Dr. Sam Wang and Dr. Tyler Jarvis based on their *ex parte* communications with Plaintiffs' experts. (R pp 4655-77). Also on 21 February 2022 the *Harper* Plaintiffs, *NCLCV* Plaintiffs, and Common Cause each filed a response to the proposed maps of the General Assembly, including rebuttal reports from their experts. (R pp 4738-4857).

On 23 February 2022, the superior court entered an order denying Legislative Defendants' motion to disqualify Dr. Sam Wang and Dr. Tyler Jarvis. (R pp 4862-65). The superior court also entered its order on the remedial plans, holding that the Senate and House plans met all requirements of North Carolina's constitution, but

that the congressional plan failed to meet the threshold partisan metrics for a constitutional map and adopted a congressional map of its own. (R pp 4866-89). The superior court included the report of the Special Masters, including the resumes of the assistants hired by the Special Masters. (R pp 4890-5017).

On 25 February 2022, the parties all appealed aspects of the superior court's 23 February Order and decree on the remedial plans, while Legislative Defendants also appealed the superior court's order denying disqualification of Drs. Wang and Jarvis. (R pp 5143-44). As to the remedial plans, the Legislative Defendants appealed the rejection of the congressional plan and adoption of a plan drawn by the Special Masters for the 2022 election. (*Id.*) The *Harper* Plaintiffs appealed the superior court's approval of the North Carolina Senate plan. (R pp 5147-48). *NCLCV* Plaintiffs appealed the order and decree, (R p 5152), and Common Cause did the same, (R pp 5156-57).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The order of Superior Court Judges Shirley, Poovey, and Layton that rejects the General Assembly's remedial congressional plan and adopts a plan proposed by the Special Masters is a final judgment, and appeal therefore lies to this Court pursuant to N.C.G.S. § 7A-31(b) and this Court's 4 February 2022 order and this Court's opinion of 14 February 2022. The same is true of the 23 February 2022 order denying Legislative Defendant's motion to disqualify Drs. Sam Wang and Tyler Jarvis. That order is now final and appeal lies to this Court based on N.C.G.S. § 7A-31(b) and this Court's 4 February 2022 order and the opinion of 14 February 2022.

STATEMENT OF THE FACTS

Following this Court's order that there were statewide constitutional infirmities in the General Assembly's Congressional reapportionment plan, S.L. 2021-174, the General Assembly chose not to start from its previously enacted plan but to start from a blank slate. To remedy the core problem identified by this Court – that the Congressional map was "the product of intentional, pro-Republican partisan redistricting" – the General Assembly drew new districts with the goal of creating districts throughout the state to comply with the constitution as interpreted in this Court's order of 4 February 2022 at paragraphs 4-6 and this Court's opinion of 14 February 2022. The General Assembly understood that this remedial work required the use of partisan election data, where none had been considered previously (FOF ¶86), to intentionally create plans that when compared to the previously enacted plans created more Democratic districts. *Harper v. Hall*, 2022 NCSC 17, ¶ 194. To achieve this task, the General Assembly used a widely accepted districting program called Maptitude to draw and analyze maps. (9d R pp 11640–41 (Affidavit of Raleigh Myers), 15415–18 (Affidavit of R. Erika Churchill)). Non-partisan staff loaded partisan election data into Maptitude to view the projected effect on partisanship that resulted from changes to district lines. (*Id.*). The General Assembly chose to rely on Plaintiffs' expert Dr. Mattingly and chose the set of elections Dr. Mattingly used to analyze the previously Enacted Plans' county groups, which were also approved by this Court.[1]

[1] The elections used by Dr. Mattingly were Lt. Gov 2016, President 2016, Commissioner of Agriculture 2020, Treasurer 2020, Lt. Gov. 2020, US Senate 2020,

In addition to traditional redistricting criteria for drawing districts, each chamber proceeded to make adjustments to "improve" the scores of the mathematical tests the General Assembly considered using Dr. Mattingly's partisan election choices. (9d R pp 14752-54; 14688-89). The General Assembly primarily relied upon the Mean-Median and the Efficiency Gap tests. (9d R pp 14689; 14753). These mathematical tests were chosen because they have been peer-reviewed in numerous articles by numerous scholars, and because there is some (but not uniform) agreement among scholars regarding thresholds for measuring partisanship.[2] For example it is widely considered by academics that a mean- median as close to zero as possible, but under 1% is "presumptively constitutional." *See Harper v. Hall,* 2022-NCSC-17, at ¶166. On the efficiency gap, scholars including *NCLCV*'s Dr. Duchin have opined that anything below 8% is presumptively legal[3] while Dr. Jackman, used

Commissioner of Labor 2020, President 2020, Attorney General 2020, Auditor 2020, Secretary of State 2020, Governor 2020. (R pp 2593-2627).

[2] This Court referenced a "close-votes, close-seats" analysis allegedly performed by Dr. Duchin in this case. This methodology appears to be something performed only by Dr. Duchin and has not been subjected to the same type of repetitive peer review as the other methodologies. In fact, a search of Westlaw reveals only citations to this Court's opinion referencing this test, a Google search reveals no scholarly articles, nor does a search of HeinOnline, reveal any scholarly literature. In contrast, a search for "efficiency gap" produces 476 hits on HeinOnline. The same search produces 31 case citations in Westlaw and 282 hits for Secondary Sources, as well as numerous hits and scholarly work on Google. Further, Dr. Tyler Jarvis noted in his report to the Special Masters that mean-median and efficiency gap are among the "well known and widely used" methodologies for appraising partisan lean. (R p 5109). However, he also noted that "declination is a relatively new measure proposed by Warrington." (*Id.*).

[3] *See* DeFord and Duchin, *Redistricting Reform in Virginia: Districting Criteria in Context,* Virginia Policy Review, Volume XII, Issue II, Spring 2019, https://mggg.org/VA-criteria.pdf p. 14 ("the authors present *EG=0* as ideal, while

as an expert in *Gill v. Whitford*, 138 S. Ct. 1916 (2018), and *Common Cause v. Rucho*, 139 S. Ct. 2484 (2019), opined that anything below 7% was constitutional. This Court adopted Dr. Jackman's threshold. *Id.* at ¶167.

Using these parameters as guides, the Remedial Congressional plan proposed by the Senate Committee on redistricting and elections was adopted by that Committee on 17 February 2022 and passed into law later that same day (S.B. 745; N.C. Sess. Law 2022-3).

In order to comply with the North Carolina Supreme Court's Order, the Senate chose to abandon the previously enacted plan and began from a blank slate. (9d R pp 14729:19-14734:25). The Senate Committee complied with the 12 August 2022 Joint Adopted Criteria, unless those criteria conflicted with the Orders in this case. (9d R pp 14669:25-14670:9; 14699:21-14700:11). Importantly, the Senate strove to achieve efficiency gap and mean-median scores within the range suggested by the North Carolina Supreme Court. (9d R pp 14730:6-21). In fact, in an effort to improve these scores, the Congressional plan was not released until 17 February 2022. (9d R p 14669:6-19). An earlier version was originally released on 16 February, but the Senate Committee displaced that version in effort to come up with an improved map. (*Id.*) Incumbency was considered, and no incumbents were double bunked, but not at

proposing a magnitude of over .08 (or 8%) as part of a legal test for detecting gerrymanders.").

the expense of drawing compact and compliant districts.[4] (*See* 9d R pp 14730:22-14734:25).

On the morning of 17 February 2022, the Senate Committee on Redistricting and Elections convened to discuss a proposed Congressional plan. (9d R p 14725:5-8). Senator Daniel introduced the proposed plan, and confirmed it was drawn to comply with traditional redistricting criteria and the North Carolina Supreme Court's order. (9d R pp 14729:9-14730:13). Senator Daniel testified that the map contains 4 districts that he believed would be some of the most highly competitive in the country. (9d R p 14729:21-24). In support of this assertion Senator Daniel pointed out that redistricting expert Dave Wasserman reported that only 19 congressional districts have been drawn in the country with a 2020 presidential election difference of less than 5%. (9d R pp 14729:20-14730:5). Senator Daniel also stated that the proposed Congressional plan complied with the North Carolina Supreme Court's guidance on the efficiency gap and the mean-median tests. (9d R p 14730:14-21).

Senator Daniel then explained the rational for drawing each Congressional district as follows:

- District 1. District 1 remained a district that is rooted in mostly rural counties in Northeastern North Carolina. Senator Daniel testified that the General Assembly had consistently been told during this process that it is important to keep the counties forming the belt along the northern border of the state together, and that District 1 adhered to that. There is no incumbent in this district as

[4] The following Congressional members are not seeking re-election: Congressmen Price, Butterfield, and Budd and as such were not treated as "incumbents". (*See* 9d R pp 14730:22-14734:25).

Representative Butterfield has announced his intention to retire.

- District 2. District 2 was drawn wholly within Wake County adhering to the original criteria. Unlike the previously enacted map, Senator Daniel pointed out that Wake County was split only once in the proposed map. Senator Daniel also testified that District 2 has a single incumbent in it and she has announced her intention to seek re-election this year.

- District 3. District 3 was drawn to take create a district with much of eastern North Carolina as possible, including the majority of the state's coastline and counties with close proximity to the coast. Senator Daniel testified that district 3 contains one incumbent.

- District 4. District 4 was drawn to contain all of Caswell, Durham, Orange and Person counties and most of Alamance County and Granville County. Senator Daniel testified that this district configuration formed a highly compact district in the northern central counties in the state.

- District 5. District 5 is based in the northwestern corner of North Carolina and is made up of six whole counties. Those counties are Alleghany, Ashe, Forsyth, Stokes, Surry, Watauga and Wilkes. Most of Rockingham County and a portion of Yadkin County make up the rest of the district. Senator Daniel testified that there is only one incumbent in the district.

- District 6. District 6 was drawn to contain all of Chatham, Harnett, Lee and Randolph counties. District 6 also contains most of Guilford County and parts of Alamance and Rockingham counties. Senator Daniel testified that this district contains one incumbent and will be one of the most politically competitive Congressional districts in the country.

- District 7. District 7 was drawn to be based in southeastern NC to contain the rural counties south of Harnett County and to join them to the remaining coastal counties. Proposed District 7 all of Bladen, Brunswick, Cumberland and New Hanover counties and a portion of Columbus County. Senator Daniel testified that this district contains one incumbent and will also be one of the most politically competitive Congressional districts in the country.

- District 8. District 8 was drawn to mostly contain the counties and cities located between the Triad and Charlotte. It contains all of Cabarrus County and portions of Davidson, Rowan and Guilford counties. Senator Daniel testified that this district is home to one incumbent.

- District 9. District 9 was drawn to contain 9 whole counties: Anson, Hoke, Montgomery, Moore, Richmond, Robeson, Scotland, Stanly and Union counties. District 9 also contains portions of Columbus and Davidson counties. Senator Daniel testified that there are no incumbents in this district.

- District 10. District 10 is district based in western North Carolina stretching from Forsyth County west into the mountains. It keeps 8 counties whole (Alexander, Avery, Burke, Caldwell, Catawba, Davie, Iredell and Lincoln). It also contains parts of McDowell, Rowan and Yadkin counties. Senator Daniel testified that there is one incumbent in the district.

- District 11. District 11 was drawn to be a district based on North Carolina mountains. It contains the whole of the 14 westernmost counties in NC. It also contains parts of McDowell and Rutherford counties. Senator Daniel testified that there is one incumbent currently living in the district.

- District 12. District 12 was drawn to contain the northeastern section of Mecklenburg County, including the majority of Charlotte. Senator Daniel testified that the areas in and around Charlotte are too large to be wholly

contained in one Congressional district, and therefore had to be split. Unlike the previously enacted plan, Senator Daniel testified that Mecklenburg County is split only one way in this map. Senator Daniel also testified that there is currently one incumbent living in District 12.

- District 13. District 13 was drawn as the new, open seat created as a result of North Carolina receiving an additional seat in Congress as a result of the 2020 Census. This district contains all of Duplin, Johnston, and Sampson counties and parts of Wake and Wayne counties. Senator Daniel testified that he believed this will be one of the most highly competitive Congressional districts in the country.

- District 14. District 14 was drawn to contain the remainder of Mecklenburg County and stretch west across the southern edge of the state into Rutherford County taking in all of Cleveland and Gaston counties. It is a compact district with only one incumbent. Senator Daniel also expressed his opinion that District 14 would among the most politically competitive Congressional districts anywhere in the United States.

(9d R pp 14730:22-14734:25). When asked about the 15 splits in the proposed Remedial Plan, Senator Daniel stated that the additional split was necessary to comply with the Court's order on partisanship metrics. (9d R pp 14742:19-14743:5). The plan proposed by Senator Daniel passed the Senate Committee on Redistricting and Elections. Later on 17 February 2022, this plan was proposed to the full Senate. (9d R p 14747:4-15).

Ultimately, the Senate passed S.B. 745, and it was enacted after the House passed the Remedial Congressional plan later that day. (9d R p 15016:5-8). Maptitude reports provided by non-partisan staff showed that S.B. 745 had a mean-median score of .61% and an efficiency gap of 5.3%. (9d R pp 15426-28).

Legislative Defendants' expert, Dr. Michael Barber, conducted a mean-median analysis, an efficiency gap analysis, and a partisan symmetry analysis of each of the remedial plans.[5] (R pp 4684-4701). Specifically, Dr. Barber's mean-median analysis of the remedial Congressional plan resulted in a mean-median of -.61%. (R p 4701). Likewise, Dr. Barber's efficiency gap analysis of the remedial Congressional plan found an efficiency gap score of -5.29%. (*Id.*). Additionally, Dr. Barber's partisan symmetry analysis of the remedial Congressional plan shows a small vote bias for 50% of the seats of .6%. (*Id.*). This means that if Democrats win 50.6% of the statewide vote they would win 50% of the Congressional seats. Dr. Barber opines that this means the map is responsive and symmetric. (*Id.*).

ARGUMENT

I. The superior court erred by rejecting the Congressional map, N.C. Sess. Law 2022-3, and imposing an entire plan of its own.

A. The superior court erred by failing to give the Congressional map, N.C. Sess. Law 2022-3, the deference afforded to legislative enactments under our Constitution.

The superior court concluded that "the Remedial Congressional Plan is not presumptively constitutional." (R p 4887). Denying the presumption of constitutionality was error—error that infringes upon the separation of powers.

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[5] Dr. Barber stated in his report that he was not aware of any published work by Dr. Duchin, or anyone else, that laid out the definition of the "close-votes-close-seats." However, drawing upon Dr. Duchin's reports in this matter and a Pennsylvania redistricting case, Dr. Barber was able to conduct an analysis that he believes closely replicates Dr. Duchin's new metric. Under this analysis the remedial Congressional, Senate, and House plans produced a majoritarian outcome in 11/12 elections considered, a significant improvement over the enacted plans. (R pp 4691–93).

The remedial congressional redistricting plan set out in 2022 N.C. Sess. Law 3 is an act of the General Assembly, which would have been effective only upon court approval. By no means is it entitled to less than a presumption of constitutionality because it apportions North Carolina's districts for the United States House of Representatives rather than enacts a new criminal law. Redistricting is quintessentially a lawmaking power. In 1995, the people of North Carolina specifically kept congressional redistricting beyond the power of gubernatorial influence through the veto. *See* 1995 N.C. Sess. Law 5, § 1 (proposing constitutional amendment for veto power of governor but excluding redistricting plans); N.C. Const. Article II, § 22(5)(d). Like any other enacted law, apportionment plans are entitled to deference. Great deference has always been shown to "acts of the legislature—the agent of the people for enacting laws." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989). To ensure lawmaking stays with the General Assembly, the judicial branch has always presumed the session law to be constitutional when it exercised judicial review. *Wayne Cnty. Citizens Ass'n for Better Tax Control v. Wayne Cnty. Bd. of Comm'rs*, 328 N.C. 24, 399 S.E.2d 311, 315 (1991). In fact, because "every presumption favors the validity of a statute, that statute will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." *N.C. State Bd. of Educ. v. State*, 371 N.C. 170, 180, 814 S.E.2d 67, 74 (2018) (quoting *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991)).

The presumption of constitutionality is more than just an evidentiary standard; it is a critical component of the separation of powers. Article I, Section 6 of

the North Carolina Constitution states that the "legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." Harkening to the hyperbolic concern of creating lifetime legislators in *Bayard v. Singleton*, this Court recently claimed that power of judicial review of legislative acts against the Constitution is a fundamental check on lawmaking power. *See Harper v. Hall*, 2022-NCSC-17, at ¶ 118 (quoting *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787)). But "saying what the law is" is not runaway judicial supremacy by another name. The counterbalancing force on the power of judicial review is the deliberate exercise of restraint and deference; without heed to deference courts, through interpretation or remedy, usurp the power of the people themselves to craft laws through their elected representatives. As this Court noted over 100 years ago:

> The power of declaring laws unconstitutional should always be exercised with extreme caution, and every doubt resolved in favor of the statute. As has been well said, these rules are founded on the best of reasons, because, while the supreme judicial power may interfere to prevent the legislative and other departments from exceeding their powers, no tribunal has yet been devised to check the encroachments of the judicial power itself.

Jenkins v. State Bd. of Elections, 180 N.C. 169, 169, 104 S.E. 346, 348 (1920) (internal citations omitted). Resolving every doubt in favor of the constitutionality of an act is not just perfunctory; rather, it is a fundamental acknowledgement that "[t]he role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests." *State v. Bryant*, 359 N.C. 554, 565, 614 S.E.2d 479, 486 (2005) (quotation omitted). "The role of the Court is not to

sit as a super legislature and second-guess the balance struck by the elected officials." *Id*. (quotation omitted).

These principles apply with equal force in evaluating a "remedial" act of the General Assembly. In a review of remedial redistricting maps, the United States Supreme Court has noted that "a court must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus. And the good faith of the state legislature must be presumed." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (cleaned up). "The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination." *Id*. "Past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Id*. Accordingly, even though the General Assembly's congressional plan was enacted as a remedial plan to the 2021 plan held unconstitutional by this Court, the superior court should have nonetheless presumed the remedial plan to be constitutional.

To be sure, the presumption of constitutionality is not wholly unassailable, but this Court has always presumed the law to be constitutional and the law stands as such even when there is some doubt. *See Baker*, 330 N.C. at 334, 410 S.E.2d at 889 (unconstitutionality must be determined *beyond* a reasonable doubt). Does this mean the General Assembly is supposed to prove its enactment to be constitutional *before* it will be entitled to such a presumption? Pursuant to the separation of powers in our Constitution and the historic interpretation of the power of judicial review, the answer must be no. But the superior court found otherwise, noting "disagreement

among the parties as to whether the proposed remedial congressional plan meets the presumptively constitutional thresholds suggested by the Supreme Court." (R p 4893 (Report of Special Masters)). This disagreement – especially when such disagreement far from conclusively establishes a constitutional infirmity, see *infra* I.B; I.C – should have led to a decision in favor of constitutionality. This is especially true here, when the data used by the General Assembly undisputedly falls within the Court's parameters. Doubting the constitutionality of the act and deferring to the mathematical analysis of other parties instead of that of the General Assembly is not showing deference to the General Assembly or resolving every doubt in favor of the statute. *See Jenkins*, 180 N.C. at 169, 104 S.E. at 347.

B. The Special Masters' findings regarding N.C. Sess. Law 2022-3 were clearly erroneous.

In its 4 February 2022 Order, this Court noted that the superior court's trial findings were binding on appeal and adopted them all. (R p 3819, ¶ 2). This Court stated that the "findings [were] supported by competent evidence and [were] therefore not clearly erroneous." (*Id.*). Presumptively, this Court noted such because it has held that when a judge presides over a trial without a jury "the trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding." *Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998); *Stephenson v. Bartlett*, 357 N.C. 301, 309, 582 S.E.2d 247, 252 (2003).

But during the remedial phase there was no trial; there was not even a hearing. And moreover, the superior court employed Special Masters who hired political

scientists and mathematicians to draw the 2022 congressional plan. These political scientists and mathematicians were not subject to cross-examination regarding their analysis and the Special Masters' findings were not presented to the parties for objections before the superior court adopted them. Nonetheless, "it is settled law in this State that the findings of fact by a referee, approved by the trial judge, are conclusive on appeal if supported by any competent evidence." *Clay Hyder Trucking Lines, Inc. v. Gen. Realty & Ins. Corp.*, 250 N.C. 732, 733, 110 S.E.2d 293, 294 (1959). Thus, the superior court's findings of fact will be binding on appeal "unless there is no sufficient evidence to support them, or error has been committed in receiving or rejecting testimony upon which they are based, or some other question of law is raised with respect to said findings." *Biggs v. Lassiter*, 220 N.C. 761, 18 S.E.2d 419, 424 (1942). Here, several of the superior court's findings fail this standard: the findings lack sufficient evidence and it was error to receive certain evidence upon which those findings are based.

In its 14 February Order, this Court determined that four tests "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." (R pp 4057–58, at ¶ 163). Specifically, the Court provided that an efficiency gap of 7% or less and a mean-median of less than 1% are reliable thresholds to indicate a plan is presumptively constitutional. (R pp 4061–62, at ¶¶ 166–67). No such calculable thresholds were provided for partisan symmetry or the

"close votes, close seats" tests. (*See id.*). As shown herein, the remedial congressional plan meets all four tests.

However, as an overarching issue, this Court denied Legislative Defendants' motion to disqualify Dr. Samuel Wang and Dr. Tyler Jarvis based on communications with Plaintiffs' expert witnesses. The superior court erred in denying this motion, as will be demonstrated *infra*, and the analysis of Dr. Wang and Dr. Jarvis should not therefore be competent evidence to support the superior court's findings.

Particularly though, five findings regarding the congressional plan are erroneous: findings of fact 26, 34, 35, 67, and 68:

> 26. The Special Masters' findings demonstrate that the Remedial Congressional Plan does not meet the requirements of the Supreme Court's Remedial Order and full opinion.
>
> 34. The Court finds, based upon the analysis performed by the Special Masters and their advisors, that the Remedial Congressional Plan is not satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion. *See Harper v. Hall*, 2022-NCSC-17, ¶ 166 (mean-median difference of 1% or less) and ¶ 167 (efficiency gap less than 7%).
>
> 35. The Court finds that the partisan skew in the Remedial Congressional Plan is not explained by the political geography of North Carolina.
>
> 67. As part of their Report, the Special Masters have developed a recommended congressional plan ("Interim Congressional Plan") for this Court to consider due to their findings, which the Court has adopted, that the Remedial Congressional Plan does not satisfy the requirements of the Supreme Court Remedial Order and full opinion.

> 68. The Court finds that the Interim Congressional Plan recommended by the Special Masters was developed in an appropriate fashion, is consistent with N.C.G.S. § 120-2.4(a1), and is consistent with the North Carolina Constitution and the Supreme Court's full opinion.

(R pp 4875–76, 4884–85). From these findings it is evident that the superior court incorporated the Special Masters' findings to determine that the General Assembly's congressional redistricting plan was unconstitutional. (*See* R p 4875, FOF 27 ("This Court adopts in full the findings of the Special Masters . . .")). Indeed, other than the above, the superior court—as the only elected judges to review these maps—entered no independent findings determining the remedial congressional plan was unconstitutional.

The superior court attached a Report from the Special Masters to its Judgment. (R pp 4890-95; 4874, FOF 23 ("The Report is attached to this Order as an exhibit and has been filed with the Court.")). While this Report does not consist of numbered paragraphs, nor is it marked as if it were intended to be findings of fact and conclusions of law, the superior court treated it as such.

The Special Masters' Report notes that:

> Unlike the proposed remedial House and Senate plans, there is substantial evidence from findings of the advisors that the proposed congressional plan has an efficiency gap above 7% and a mean-median difference of greater than 1%. The Special Masters considered this evidence along with the advisors' findings on the partisan symmetry analysis and the declination metrics.

(R p 4893). The Special Masters noted that they gave "appropriate deference to the General Assembly," but nonetheless recommended the superior court find the congressional plan unconstitutional. (*Id*.)

From these "findings" it is apparent that superior court deferred to the Special Masters and that the Special Masters deferred to the "advisors' findings." But those "advisors' findings" are not part of the Report. There is no finding on how the General Assembly could correctly calculate the mean-median and efficiency gap of the House and Senate plans and apparently botch the same calculation on the congressional plan. **Neither in the Judgment nor the Report is there a finding of what the superior court found the mean-median and efficiency gap of the General Assembly's congressional plan to be.** Rather, there is just a statement that it was too high. (R 4893). This alleged miscalculation appears to be the key difference between a constitutional plan and unconstitutional plan, but none of the six judges (three judge superior court and three retired judges) examining the plans made any findings marshalling the evidence to show why or how the General Assembly missed the mark.

An examination of the advisors' reports demonstrates flawed analyses, and evidence that should be disregarded. But before looking at those reports it is imperative to mark that the General Assembly—the entity that everyone agrees has the constitutional responsibility to draw redistricting plans—calculated its partisan

data from 12 statewide elections,[6] (R p 4873, FOF 14), and elected to follow this Court's guidance regarding the various plans' mean-median and efficiency gap scores, (R 4876, FOF 33). The superior court approved of these methods. (R p 4873, FOF 15 "The Court finds the General Assembly's use of partisan data in this manner comported with the Supreme Court Remedial Order."). If "every doubt resolved in favor of the statute" were applied, then the selection among a range of alternatives set by this Court as to how to comply with a partisanship should be the Legislature's. *Jenkins,* 180 N.C. at 169, 104 S.E. at 347. Evaluating the plans against various other metrics which, while available, were not politically chosen by the General Assembly and not *required* by the Constitution creates a striking imbalance in the separation of powers. *Wayne Cnty. Citizens Ass'n for Better Tax Control*, 328 N.C. at 29, 399 S.E.2d at 315 ("[S]o long as an act is not forbidden, the wisdom and expediency of the enactment [even as compared to other possible outcomes] is a legislative, not a judicial, decision.").

The General Assembly used a widely accepted districting program called Maptitude to draw and analyze the congressional maps. For any plan loaded into Maptitude, the General Assembly's non-partisan staff could measure Efficiency Gap and Mean-Median scores for that plan. The General Assembly's decision to adopt the remedial congressional plan was buttressed by the Maptitude reports generated by

[6] 2016 Lt. Governor, 2016 President, 2020 Commissioner of Agriculture 2020 Treasurer, 2020 Lt. Governor, 2020 US Senate, 2020 Commissioner of Labor, 2020 President, 2020 Attorney General, 2020 Auditor, 2020, Secretary of State, 2020 Governor. (9d R pp 1640-41; 1514-18).

central staff scoring the remedial congressional plan. The scores demonstrated that the remedial congressional plan has a mean-median score of .61% and an efficiency gap of 5.3%. (9d R pp 15426-28). Both scores fall well within the ranges set by this Court.

Conversely, none of the Special Masters' assistants used Maptitude. In his report, Dr. Grofman included a table of his analysis regarding the General Assembly plans using Dave's Redistricting. This table shows that the "Legislature Congress Plan" had a mean-median distribution of 0.66% and an efficiency gap of 6.37%. (R p 5039). These numbers are within the range this Court noted was constitutional. Further, Dr. Grofman noted that his election data "reflect major statewide races 2016-2020." (R p 5037). Thus, this evidence—measuring the choices of the General Assembly—supports a finding that the congressional plan is constitutional. Dr. Grofman went on to note that the General Assembly's congressional plan may be more biased than the proposed alternatives by others, (R p 5041), but that whether any bias is constitutional or unconstitutional is "a legal determination," (R p 5042).

Dr. Eric McGhee gave a global report and individual reports on each of the three plans. (R pp 5045, 5051, 5063, 5069). Dr. McGhee measured the alleged partisan bias of the plans not just by looking at efficiency gap and mean-median, but also "partisan symmetry" and "declination." (R pp 5045-46). Dr. McGhee chose not to use Maptitude, the platform the General Assembly used, (R p 4873, FOF 14, 15), or Dave's Redistricting to evaluate the data, instead choosing PlanScore. (R 5045). According to Dr. McGhee, when incumbency is included, the General Assembly's

congressional plan has an efficiency gap of 7.6 and a mean-median difference of 1.6.[7] He obviously notes these figures "exceed the 7% and 1% threshold respectively." (R p 5054). But how is that the case when Dr. Grofman's figures noted the congressional plan was within the court-established thresholds? It is the same plan.

The answer may be in the data choices the experts made. The experts appear to have examined different data than that chosen by the General Assembly and examined different data from each other. Dr. McGhee admits that his use of "PlanScore takes a different approach," (R p 5051); an approach that is different from parties who "have tended to use averages of statewide races, disaggregated to individual districts, as a measure of predicted partisan outcomes." (*Id.*) It is not evident what election data Dr. McGhee used, but his PlanScore "estimates a statistical model of elections," (R p 5051); "PlanScore shows what would have happened in an election like the 2020 presidential election if the proposed districts had been used instead," (R p 5052). Importantly, Dr. McGhee notes that "PlanScore also calculates EG [efficiency gap] with results from the last two presidential elections and the last two U.S. Senate elections." (R p 5052).

But the superior court found that the General Assembly's approach of calculating the efficiency gap with twelve (12) elections was appropriate. Using different data is bound to change the result. And using a different program to calculate it may further impact the relevancy of this evidence. Dr. McGhee may have

[7] Exactly how incumbency factors into Dr. McGhee's predictive model is unclear. As explained herein, no other expert weighs incumbency in their efficiency gap analyses.

chosen to vary the data and use PlanScore to evaluate the General Assembly's plans because he is on the board of directors for PlanScore. (R 5051). In short, it appears Dr. McGhee used granny smith apples to evaluate honeycrisp apples and his work is incompetent evidence to support a finding that the General Assembly's congressional plan does not meet the constitutional threshold set by this Court. It was error of the superior court to rely on such incompetent evidence.

Dr. Sam Wang, like Dr. McGhee, also appears to have chosen different partisan data to make his analysis. Instead of the data from the 12 races chosen by the General Assembly and approved by the superior court, Dr. Wang chose 11 races, with one dating back to 2014, and used a composite set of elections that did not include several council of state races. (R p 5078). Using these different elections, Dr. Wang found that the General Assembly's congressional plan had a mean-median difference of 0.7% and an efficiency gap of 7.4% when using the composite set of elections. (R p 5079). Using that set of elections creates a presumptively constitutional plan according to mean-median difference, but a plan just outside the constitutional range set by this Court when looking at efficiency gap. However, the results change when Dr. Wang changes the elections in his dataset: looking at his 10-election average[8] the mean-median difference is 1.2% and the efficiency gap is 6.8%, which flip-flops the results compared

[8] Dr. Wang states he used data from 11 elections, including the 2016 Governor's race, in his dataset. (R p 5078). However, in his "10-election set" the 2016 gubernatorial race is omitted. (R p 5080). It is also omitted in the 2016-2020 composite dataset. (R p 5078). Governor Cooper beat out then-Governor McCrory in 2016 by a margin of just 10,277 votes. *11/8/2016 Official General Election Results - Statewide*, NCSBE, https://er.ncsbe.gov/?election_dt=11/08/2016&county_id=0&office=COS&contest=1016.

to this Court's identified ranges. (R p 5080). Although 0.5% of a percentage shift should be negligible in the context of constitutionality, this Court has held otherwise; and, it is apparent from Dr. Wang's analysis alone that manipulation of the election datasets an evaluator uses can create that much of a shift in partisan metrics. Because the data Dr. Wang used varied from the elections the General Assembly used, which was previously approved by this Court (R p 5078) and the superior court, (R p 4873), his analysis does not constitute competent evidence upon which to base a finding that the General Assembly's congressional plan is outside the presumptively constitutional range.

Dr. Tyler Jarvis purported to calculate the fairness of the Remedial Senate Plan using Dr. Mattingly's model. However, the elections used by Dr. Jarvis are different from the set of contests used by Dr. Mattingly or the General Assembly. Unlike Dr. Mattingly, Dr. Jarvis used a composite of eleven elections: 4 elections from the 2016 cycle (Attorney General, Presidential, Lt. Governor and Governor) and 7 elections from the 2020 election cycle (including Attorney General, Presidential, Lt. Governor, Governor, Treasurer, US Senate, and Secretary of State). (R p 5116). Absent from Dr. Jarvis's historical elections are three races won by Republicans in 2020 that were used by Dr. Mattingly: the Commissioner of Agriculture, Commissioner of Labor, and State Auditor. Instead, Dr. Jarvis substituted the 2016 Attorney General and 2016 Governor races. (*Id.*). Dr. Jarvis does not explain the discrepancies between his election set and Mattingly's, but used the historical

election data "to compare election results under the proposed plans with election results under [Dr. Mattingly's] ensemble." (*Id.*).

Dr. Jarvis found that the General Assembly's remedial congressional plan was "fairly typical in the ensemble distributions for all the measures [he] considered." (*Id.*). While noting that the General Assembly plan favored Republicans, Dr. Jarvis found that the number of seats won by the parties was "fairly typical of the ensemble distribution." (R p 5104). Because the *NCLCV* congressional plan favored democratic candidates more heavily, Dr. Jarvis noted that this was "some evidence of partisan gerrymandering in the [*NCLCV*] plan, but not in the LD and [*Harper*] plans." (*Id.*). Dr. Jarvis also calculated the mean-median difference and efficiency gap of the General Assembly plan and determined the mean-median was less than 1%, but the efficiency gap was 8.8%. (R pp 5114-15). Given his conclusions as to how the General Assembly's congressional plan stacked up against the ensemble maps, an efficiency gap score of more than 7% did not change Dr. Jarvis's conclusion that there was a lack of evidence of partisan gerrymandering in the General Assembly's congressional plan. As noted with others, the change is most likely a function of evaluating a different dataset than that of the General Assembly when drawing the map.

Drs. Jarvis, Wang, and McGhee all chose to conduct their partisan analysis of the General Assembly's congressional plan using different election data than the General Assembly used in passing its plans. This analytical choice makes an impact. For instance, Dr. Michael Barber, evaluated the mean-median difference and efficiency gap using the same elections as the General Assembly and that were

approved by the courts. (R p 4683). His conclusions demonstrate the remedial legislative plan has a mean-median difference of -0.61%, (R p 4688) and an efficiency gap of -5.29%, (R p 4690). The General Assembly's Maptitude reports similarly showed a mean-median score of .61% and an efficiency gap of 5.3%. (9d R pp 15426-28). These figures are presumptively constitutional. In contrast, Drs. Herschlag and Mattingly used a sixteen-election dataset in the remedial phase, (R p 4755), adding four more elections to the election set Dr. Mattingly used to run the county groupings in the merits phase of this case. (R pp 2593-2627). The choice to add those four elections pushed the congressional plan just beyond this Court's threshold with a mean-median difference of 1.01% and an efficiency gap of 7.312%. (R p 4756).

Given that the superior court approved the partisan election data chosen by the General Assembly, competent evidence upon which to base a determination would be analysis of the plans using that same data—not different data. For example, if one was asked to measure the length of the average vehicle in North Carolina, the choice of roads sampled would make a big difference. Using more interstates than residential streets would change the result even if every statistician was using the same equipment and methodology to measure. Only the analyses that use similar datasets as the General Assembly—the plan that is being evaluated for its constitutionality—should be competent evidence. Similarity is far from an unworkable principle for the competency of evidence. *See State v. Carpenter*, 361 N.C. 382, 389, 646 S.E.2d 105, 110 (2007) (1996 sale of cocaine lacked sufficient similarity with 2004 alleged crime of possession with intent to sell or deliver cocaine to be

competent evidence under Rule 404(b)); *Redevelopment Comm'n of Winston-Salem v. Hinkle*, 260 N.C. 423, 424, 132 S.E.2d 761, 762 (1963) ("No evidence was offered tending to show similarity of conditions [at the property] at the different times [the value was being offered]."); *N.C. State Highway Comm'n v. Pearce*, 261 N.C. 760, 762, 136 S.E.2d 71, 73 (1964) ("In this case the evidence of similarity between the defendants' property and the lots purchased by Carr Drug and by Humble Oil, was not sufficient to require the court to admit evidence of the prices at which they sold."); *Perfecting Serv. Co. v. Prod. Dev. & Sales Co.*, 259 N.C. 400, 412, 131 S.E.2d 9, 19 (1963) ("In the law of evidence an experiment ordinarily involves the re-enactment of an occurrence under circumstances substantially similar to those which attended the actual occurrence, and for the experiment to be competent those attending circumstances must be understood and simulated with reasonable certainty . . . ."). For instance, this Court has noted that in attorney malpractice actions, competent evidence regarding opinions on the standard of care must be those who are "members of the profession in the same or similar locality under similar circumstances." *Rorrer v. Cooke*, 313 N.C. 338, 356, 329 S.E.2d 355, 366 (1985).[9] It is not sufficient to find

[9] In *Rorrer*, this Court held an affidavit on summary judgment inadmissible for failing to meet the standard of care. Its rationale was a straightforward understanding of the standard for a malpractice action.

> The mere fact that one attorney-witness testifies that he would have acted contrarily to or differently from the action taken by defendant is not sufficient to establish a prima facie case of defendant's negligence. The law is not an exact science but is, rather, a profession which involves the exercise of individual judgment. Differences in opinion are consistent with the exercise of due care.

just any lawyer to testify that they would have done it differently than another lawyer—the law looks for honeycrisp apple to honeycrisp apple comparisons for admissibility. *See, e.g., DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 690, 565 S.E.2d 140, 151 (2002) (similar incidents of product failure are admissible in liability actions when accompanied by proof of substantially similar circumstances and reasonable proximity in time).

C. The superior court erred in failing to defer to the General Assembly's methods for achieving this Court's partisan metric standards.

This Court determined it was not prudent or necessary to establish a conclusive metric or precise mathematical threshold that demonstrates or disproves "the existence of an unconstitutional partisan gerrymander." *Harper*, 2022-NCSC-17, ¶ 163. In so doing, it left for later, if necessary, the fine-tuning of any standard. But by noting that any combination of metrics could work, *id.*, and particularly referencing a mean-median of 1% or less and an efficiency gap of 7% or less as showing a politically balanced plan, this Court left some latitude for the General Assembly to develop its methodology for meeting the new constitutional standards. The superior court's error in rejecting the General Assembly's remedial congressional plan interfered with policymaking latitude this Court noted was available, and in so doing infringed on the power of the General Assembly.

Rorrer, 313 N.C. at 357, 329 S.E.2d at 367 (1985). If on a constitutional challenge however, where the Court is pressed to give all reasonable deference to the constitutionality of an act of the General Assembly, is one expert's calculation different from that of the General Assembly's enough to support unconstitutionality beyond a reasonable doubt?

Courts are certainly not immune from separation of powers concerns. "The inherent power of the court must be exercised with as much concern for its potential to usurp the powers of another branch as for the usurpation it is intended to correct." *In re Alamance Cnty. Ct. Facilities*, 329 N.C. 84, 100, 405 S.E.2d 125, 133 (1991). A key component of the separation of powers doctrine is not preventing one branch from exercising its own constitutional power. *Cooper v. Berger*, 376 N.C. 22, 44, 852 S.E.2d 46, 63 (2020) ("A violation of the separation of powers clause occurs when one branch of government attempts to exercise the constitutional powers of another or when the actions of one branch prevent another branch from performing its constitutional duties.") (cleaned up).

A recent example of this prevention analysis has been in the context of the General Assembly's law-making power and the policy views that the Governor would prefer to implement. In *Cooper v. Berger*, 370 N.C. 392, 809 S.E.2d 98 (2018) this Court addressed the constitutionality of a series of laws that created a bipartisan state board to implement ethics and elections. The Court recognized that certain policymaking decisions, typically reserved for the Legislature, were in that situation delegated from the Legislature to state agencies. *Id.* at 416, n.11, 809 S.E.2d at 113 (2018). This Court later clarified that a constitutional violation could occur if one branch of government attempted to manage the decision-making of the other branch between the established parameters of policymaking the agency enjoyed.

> In other words, our decision in *Cooper I* held that, having delegated 'interstitial' discretionary authority to make policy decisions to the executive branch rather than making those policy decisions itself, the General Assembly

> was not then entitled to 'impermissibly interfere' with the manner in which the Governor opted to execute the authority that had been granted to the executive branch by the General Assembly.

Cooper, 376 N.C. at 45–46, 852 S.E.2d at 64.

Here, as part of its redistricting criteria during the remedial process, the General Assembly elected to, among other things, enact a congressional plan that satisfied this Court's reference of a mean-median of less than 1% and an efficiency gap of 7% or less. This Court held there was a multitude of ways to measure a constitutional plan, and the General Assembly chose its combination of metrics to meet this Court's standards. In fact, the superior court approved of the Legislative choice of partisan data used in the legislative redistricting process, (R p 4873) and raised no concern with the General Assembly's decision-making to measure mean-median and efficiency gap, (R pp 4876, 4879, 4882).

Within the latitude of how to show a plan is not a partisan gerrymander, the General Assembly also exercised its legislative authority and identified the partisan data to rely on in drawing the remedial maps. That data was not plucked from thin air. During the legislative debate over proposed remedial maps, the General Assembly used the same ensemble of 12 statewide elections offered by Dr. Mattingly, used by the Superior Court, and subsequently affirmed by the North Carolina Supreme Court. The General Assembly determined that all three proposed remedial plans satisfied the metrics outlined by the Supreme Court by running Maptitude reports. (9d R pp 15426-28). The superior court, despite recognizing and approving of this partisan data, then based its finding that the General Assembly congressional

plan fell outside constitutional parameters on the opinions of mathematicians and political scientists using different data. That constitutes not just an evidentiary error but a concern over the separation of powers because the Court interfered with the legislative choice of how to best meet the constitutional standards. The presumption of constitutionality and the separation of powers concerns it protects cannot so easily fall to a sophisticate's ability to juke the stats. Constitutional law should not be reduced to a game of statistical manipulation. Based on these procedural findings and evidentiary support for the partisan analysis of the plans being within this Court's standards, as noted *supra*, the superior court erred in denying that the General Assembly's plan was constitutional.

II. The superior court erred in denying Legislative Defendants' Motion to Disqualify Sam Wang and Tyler Jarvis as Assistants to the Special Masters given the Assistants' substantive *ex parte* communications with Plaintiffs' experts.

On 20 February 2022, Legislative Defendants learned, for the first time, that three (3) of Plaintiffs' experts—Drs. Mattingly, Herschlag, and Pegden—engaged in substantive *ex parte* communications with two of the assistants to the Special Masters, Dr. Tyler Jarvis and Dr. Sam Wang. (*See* R pp 4655-73). As set forth in Legislative Defendants' Motion to Disqualify Sam Wang and Tyler Jarvis as Assistants to the Special Masters, the communications materially violated the superior court's 16 February 2022 order and biased the recommendations made by the Special Masters to the court. (*Id.*). As such, the superior court abused its discretion in failing to disqualify Drs. Wang and Jarvis for their material *ex parte* communications with Plaintiffs' experts. (*See id.*; R pp 4862-65).

Generally, "[a] ruling committed to a superior court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been a result of a reasoned decision." *Davis v. Davis*, 360 N.C. 518, 631 S.E.2d 114, 118 (2006) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). It is within the superior court's discretion "to see to it that each side has a fair and impartial trial." *Miller v. Greenwood*, 218 N.C. 146, 150, 10 S.E.2d 708, 711 (1940).

"Improper *ex parte* communications can occur when contact between a litigating party and a court-appointed expert inhibits the expert's ability to 'provide the court with . . . unbiased information.'" *Point Intrepid, LLC v. Farley*, 215 N.C. App. 82, 88–89, 714 S.E.2d 797, 802 (2011) (citing *Bd. of Managers of Bay Club Condo. V. Bay Club of Long Beach Inc.*, 827 N.Y.S.2d 855, 858 (N.Y. Super. Ct. 2007)). As a preliminary matter, any *ex parte* communications clearly violate the superior court's 16 February 2022 order. (*See* R pp 4655-73). When the superior court appointed the Special Masters on 16 February 2022, the court stressed that "Parties and non-parties may not engage in any *ex parte* communication with the Special Masters about the subject matter of this litigation." *Cf. id.* at 802, 714 S.E.2d at 89 (noting the superior court "expressly permitted communications between the litigating parties and the court-appointed expert."). (*See* R pp 4655-73). The Special Masters' Report does not dispute the breach, but claims it was technical. (*See* R pp 4890–91). The Report does not reflect the facts available to the superior court.

The superior court's decision to keep Drs. Wang and Jarvis as assistants to the Special Masters shows the improper bias against Legislative Defendants in the Special Masters' determination of the unconstitutionality of the congressional plan. Drs. Wang and Jarvis only communicated with Plaintiffs' experts—showing the one-sided nature of their inquiry.[10] Dr. Wang corresponded with Plaintiffs' expert Dr. Pegden on 18 February 2022 through 19 February 2022 regarding what "benchmark" or "metrics" Dr. Wang should use to assess the remedial legislative plans. (R pp 4664–66). Dr. Wang also communicated with Dr. Mattingly, starting on 18 February 2022 before the parties were informed of his appointment. (R pp 4669–70). On 20 February 2022, Dr. Mattingly notified Dr. Wang that he was "told that the court order forbids [Dr. Mattingly] and [Dr. Herschlag] from engaging with the special masters team." (R p 4668). Dr. Wang ceased communications with Plaintiffs' experts only after Dr. Mattingly informed him of the advice of counsel. (*See id.*).[11]

Furthermore, a comparison of Drs. Wang and Jarvis's invoices for their work for the Special Masters and the *ex parte* communications show the material effect

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[10] In fact, Dr. Wang tweeted a criticism of Dr. Barber, Legislative Defendants' expert, during the January trial in this matter. Specifically, the tweet read: "In today's North Carolina gerrymandering trial, the defense witness is owned by opposing mathematician/redistricting expert @WesPegden, who corrects the witness's math for him" and links to a spectator's live-tweet of the 3 January 2022 trial testimony in the superior court. *See* https://twitter.com/SamWangPhD/status/1478192492432535558.

[11] This case is not the first time Dr. Wang's actions have been scrutinized. *See Princeton redistricting expert who analyzed NC voting maps faces university investigation*, WRAL (Apr. 29, 2022), https://www.wral.com/princeton-redistricting-expert-who-analyzed-nc-voting-maps-faces-university-investigation/20256616/.

that the communications with Plaintiffs' experts had on the case. A true and correct copy of the 12 July 2022 Notice of Receipt and Acceptance for Filing by the superior court and the corresponding invoices are attached hereto as Exhibit A.[12] The invoices show that a substantial amount of work was completed by Drs. Wang and Jarvis contemporaneously with their communications with Plaintiffs' experts. For example, Dr. Wang had performed 22.25 hours out of his overall 27.75 hours (or 82%) of his analysis by the time that the *ex parte* communications were reported. (Exhibit A at 7). Similarly, Dr. Jarvis had performed about 21 hours of out of his overall 46.5 hours of analysis by the time that the *ex parte* communications were reported. (*Id.* at 9).

Specifically, Dr. Jarvis's time entries show that his analysis was not independent, and his analysis of the congressional plans was wholly reliant on Dr. Mattingly and Dr. Herschlag's opinions. On 19 February 2022, Dr. Jarvis asked Dr. Herschlag specific questions regarding Dr. Mattingly's ensemble, particularly in relation to the congressional plan analysis. (R pp 4672–73). Dr. Jarvis's corresponding invoice entries for the same date show the reliance on communications with Plaintiffs' expert and Plaintiffs' expert report. Such entries from 19 February 2022 include:

- "Research other available NC ensemble data";
- "Acquire, clean, and prepare Duke ensemble dataset for analysis. Evaluate properties, quality, and suitability of this dataset for the current problem"; and

[12] This Court may take judicial notice of subsequent proceedings of the superior court, even if outside the record on appeal. *State ex rel. Utilities Commission v. Southern Bell Tel. & Tel. Co.*, 289 N.C. 286, 287, 221 S.E.2d 322, 323–24 (1976) (taking judicial notice of a subsequent Utilities Commission Order on appeal).

- "Write code to use the data for analysis".

(Exhibit A at 9). Dr. Jarvis's work continued into 20 February 2022 with specific reliance upon Dr. Herschlag's communications regarding Dr. Mattingly's report and analysis. (*Id.* ("Compute scores and generate plats from ensemble data"), ("Analyze results for congressional plans and some Senate plans.")). Dr. Jarvis also admitted to his reliance in his report. (R p 5103). The Special Masters found that "the communications sought background information pertaining to the earlier analysis of the 2021 Redistricting Plans performed by Drs. Pegden, Mattingly, and Herschlag in the merits stage of this case." (R pp 4890–91; *see also* R p 4862–65). That finding falls flat in the face of the invoices, which show material reliance on Plaintiffs' experts by Drs. Wang and Jarvis for their reports. The superior court abused its discretion in failing to disqualify Drs. Wang and Jarvis given their material *ex parte* communications with Plaintiffs' experts.

CONCLUSION

The superior court failed to exclude conflicted experts and relied on incompetent evidence to support its erroneous findings that the remedial congressional plan passed by the General Assembly failed to meet this Court's standards for measuring partisan bias. In concluding that a different plan—a plan of its own making—was necessary for the 2022 elections of North Carolina's congressional representatives, the superior court failed to show necessary deference to the Legislature and infringed on the lawmaking process. This Court should reverse the superior court's determination that the General Assembly's remedial congressional plan was unconstitutional.

Respectfully submitted, this the 1st day of August, 2022.

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

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Exhibit A

STATE OF NORTH CAROLINA

COUNTY OF WAKE

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, et al.,

Plaintiffs,

and

COMMON CAUSE,

Plaintiff-Intervenor,

vs.

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

Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 015426

STATE OF NORTH CAROLINA

COUNTY OF WAKE

REBECCA HARPER, et al.,

Plaintiffs,

vs.

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

Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 500085

NOTICE OF RECEIPT AND ACCEPTANCE FOR FILING

The Court hereby gives notice of receipt and has accepted for filing the following attached documents:

1. Invoice of Dr. Tyler Jarvis;
2. Invoice of Dr. Eric McGhee;
3. Invoice of Dr. Samuel Wang.

This 12th day of July, 2022.

A. Graham Shirley, Superior Court Judge

Nathaniel J. Poovey, Superior Court Judge

Dawn M. Layton, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via electronic transmission by e-mail addressed as follows:

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 12th day of July 2022.

Kellie Z. Myers
Court Administrator - 10th Judicial District
Kellie.Z.Myers@nccourts.org

Accepted for filing by the court on 7/12/2022 at 11:26 a.m.

INVOICE

Eric McGhee
5807 Morpeth St
Oakland, CA 94618
emcghee73@gmail.com
510.725.8020 c

Date: Feb 24, 2022
Due Date: Mar 24, 2022
Invoice Number: 001

For: Evaluation of initial remedial maps in *NCLCV* v *Hall* and *Harper* v *Hall*

Total Due: $12,075.00

DATE	START	END	TIME	CHARGES ($450/HR)	ACTIVITY
2/18/22	15:40	17:10	1:30	$675	Composing memo summarizing the metrics
2/18/22	17:35	19:35	2:00	$900	Composing memo summarizing the metrics
2/18/22	19:50	22:50	3:00	$1,350	Composing memo summarizing the metrics
2/19/22	7:30	9:45	2:15	$1,013	Processing files and running calculations
2/19/22	10:00	13:00	3:00	$1,350	Processing files and running calculations
2/19/22	13:20	18:20	5:00	$2,250	Composing memo on congressional plans
2/19/22	19:05	22:05	3:00	$1,350	Composing memo on congressional plans
2/19/22	23:45	24:00	0:15	$113	Composing memo on congressional plans
2/20/22	10:00	12:00	2:00	$900	Composing memo on state house plans
2/20/22	12:30	14:15	1:45	$788	Composing memo on state senate plans
2/20/22	14:25	15:55	1:30	$675	Composing memo on state house plans
2/20/22	16:10	17:45	1:35	$713	Composing memo on state senate plans
	TOTAL		**26:50**	**$12,075**	

Payment due 30 days from invoice date

Please include invoice number with payment

Total Due: $12,075.00

INVOICE

Accepted for filing by the Court on 7/12/2022 at 11:26 am AGS

June 24, 2022

To the Court:

In the matter of the Harper case, I worked for a total of 27.75 hours during the period of February 18 through 21, 2022, as follows:

- On February 18, I reviewed the various plans that were presented to me for analysis, for a total of 3.5 hours.
- On February 19, I designed the overall statistical analysis that I used in the preparation of my report, for a total of 3.5 hours.
- On February 19, I continued with an analysis on the plans, compiling statistical measures as needed for the report, for an additional 10.75 hours.
- On February 20, I completed the statistical analysis, taking 5.0 hours.
- On February 21, I wrote the report, taking 5.0 hours.

The exact times when I did this work are listed on the attached sheet.

Thank you for the opportunity to serve. It was an honor to work with the Court.

Yours sincerely,

Samuel S.-H. Wang

Samuel S.-H. Wang, Ph.D.
Princeton, New Jersey

NC Harper			
Date	**Activity**	**Start**	**Hours**
18-Feb-2022	Review plans	7:30 PM	3.50
19-Feb-2022	Design analysis	6:00 AM	2.00
19-Feb-2022	Design analysis	8:00 AM	1.50
19-Feb-2022	Perform analysis	10:00 AM	1.00
19-Feb-2022	Perform analysis	11:00 AM	3.00
19-Feb-2022	Perform analysis	2:30 PM	0.75
19-Feb-2022	Perform analysis	4:00 PM	6.00
20-Feb-2022	Perform analysis	10:00 AM	5.00
21-Feb-2022	Prepare report	4:30 AM	5.00
		Total hours	**27.75**

Accepted for filing by the Court on 7/12/2022 at 11:38 am. MCL

Tyler J. Jarvis, PhD
811 E 2680 N
Provo, UT 84604

23 June 2022

VIA EMAIL
Attn: Rachel Posey

Invoice for Work and Expenses

This invoice covers my hours and expenses during the period February 18–22, 2022 for redistricting data analysis and support as an advisor to the North Carolina Special Masters in *Harper v. Hall* and *NCLCV v. Hall*. Four research assistants supported the project, working under my direction.
Details of the services rendered are included on the second page of this invoice.

	Hours	Rate	Total
Tyler Jarvis	46.50	$450/hr	$20,925.00
Research assistants	73.25	$75/hr	$5,493.75
Supercomputer time	56.00	72¢/hr	$40.32
Total due			$26,459.07

Tyler J. Jarvis

Detailed Services Rendered

Date	Work done	Time spent
18 Feb 2022	Acquire, clean, and prepare data (transfer 11 historical election results from 2016 and 2020 to the 2022 census blocks, and build adjacency graphs.) Research *Stephenson* and other NC law relevant to generating and analyzing ensembles in NC. Research academic work on implementation of NC law in redistricting ensemble analysis. Review the parts of the case documents relevant to ensemble analysis. Write code to generate ensembles consistent with NC law and the needs of the special masters.	8h
19 Feb 2022	Analyze preliminary results of generated ensembles. Research other available NC ensemble data. Acquire, clean and prepare *Duke* ensemble dataset for analysis. Evaluate properties, quality, and suitability of this dataset for the current problem. Write code to use the data for analysis.	12h 55m
20 Feb 2022	Compute scores and generate plots from ensemble data Analyze results for Congressional plans and some Senate plans Prepare preliminary report.	10h 40m
21 Feb 2022	Prepare and submit preliminary report: Congressional and (partial) Senate (submitted 8:06 am EST). Complete Senate analysis and prepare report on Senate (updated report sent 12:18 pm EST). Answer questions from special masters by email and telephone. Analyze house results, prepare report on house plans.	12h 25m
22 Feb 2022	Finish final report (submitted 12:16 pm EST)	2h 30m
Total		46h 30m

Research Assistants

Name	Work done	Time spent
Broderick Craig	Research, data cleaning and preparation.	16h 20m
Annika King	Data cleaning and preparation, data analysis.	24h 30m
Jacob Murri	Coding for ensemble generation and plots, data analysis.	17h 55m
William Terry	Coding for ensemble generation and plots.	14h 30m
Total		73h 15m