No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR., et al.,

Plaintiffs,

REBECCA HARPER, et al.,

Plaintiffs,

COMMON CAUSE,

Plaintiff-Intervenor,

v.

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

Defendants.

From Wake County

****

REPLY BRIEF OF PLAINTIFFS-APPELLANTS NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., ET AL.

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ARGUMENT

This Court has established a clear standard for redistricting plans: They must "give … voters of all political parties substantially equal opportunity to translate votes into seats," and any "meaningful … skew" is constitutional only if it "necessarily results from North Carolina's unique political geography." *Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, ¶ 163 (2022).

The Legislative Senate Plan fails this test. Every expert retained by the Special Masters concluded that the plan substantially favors Republicans over Democrats. (R pp 5042–43, 5072, 5074, 5085, 5116, 5119) These experts found that the plan bears "strong evidence of partisan gerrymandering," is "very lopsidedly Republican," a "pro-Republican gerrymander" with "***substantial*** pro-Republican bias," "often a significant outlier in favor of the Republicans," and "likely to favor Republicans throughout the decade." (R pp 5042–43, 5072, 5119 (emphasis in original)) Moreover, as is clear from the fact that the NCLCV Plaintiffs submitted an alternative plan that performed better on traditional districting criteria while also treating voters of all political parties equally (R pp 4808, 4814; NCLCV Br. 20, 22), the partisan skew in the Legislative Senate Plan does not "necessarily result[] from North Carolina's unique political geography," *Harper*, 2022-NCSC-17, ¶ 163.

In their response brief ("LD Br."), Legislative Defendants ask this Court to, in effect, jettison the Court's holding that the North Carolina Constitution

requires "substantially equal voting power." *Harper*, 2022-NCSC-17, ¶ 160 (quoting *Stephenson v. Bartlett*, 355 N.C. 354, 382, 562 S.E.2d 377, 396 (2002)). In its stead, they urge this Court to adopt statistical safe harbors that would give a free pass to partisan gerrymandering up to certain thresholds. LD Br. 21, 24, 28. And because Legislative Defendants also argue that courts must "defer[]" to the General Assembly in its choice of those thresholds, *id.* at 22, the gerrymandering this safe-harbor approach will invite would be severe.

Accepting Legislative Defendants' proposed approach would undermine this Court's merits decision and the Constitution's bedrock guarantee of "substantially equal voting power" to all North Carolina voters. *Harper*, 2022-NCSC-17, ¶ 145 (quoting *Stephenson*, 355 N.C. at 379, 562 S.E.2d at 394). Because the Legislative Senate Plan substantially discriminates against voters of one political party, it is not a lawful remedy. The trial court's contrary decision must be reversed.

I. The Legislative Senate Plan Denies Voters of One Political Party a Substantially Equal Opportunity to Translate Votes Into Seats.

The Legislative Senate Plan violates this Court's mandate that voters of all political persuasions must have substantially equal voting opportunity. *Id.* ¶¶ 145, 163. Instead of meaningfully defending the plan's compliance with that standard, Legislative Defendants seek to replace this Court's mandate with cherry-picked statistical safe harbors that would bless even significant

partisan gerrymanders, including the Legislative Senate Plan. LD Br. 21–22. That approach is inconsistent with this Court's decision on the merits and violates our Constitution's promise of equal voting power.

A. The *Harper* Standard Asks Whether a Map Gives Voters Substantially Equal Opportunity to Translate Votes Into Seats.

In its decision on the merits, this Court set forth a clear standard: Redistricting plans must "give … voters of all political parties substantially equal opportunity to translate votes into seats." *Harper*, 2022-NCSC-17, ¶ 163; R pp 3821–22. The Court thus held that a redistricting plan is "presumptively constitutional" only if "there is a significant likelihood" that "voters of all political parties [will have] substantially equal opportunity to translate votes into seats across the plan." *Harper*, 2022-NCSC-17, ¶ 163. If the plan "makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters," the plan is subject to "strict scrutiny" and lawful only if the General Assembly shows that the plan's "partisan skew necessarily results from North Carolina's unique political geography." *Id.* ¶¶ 163, 180.

Legislative Defendants do not dispute that the trial court failed to apply this standard. Nor could they: The trial court did not ask whether the Legislative Senate Plan gives "voters of all political parties substantially equal opportunity to translate votes into seats"; it asked only whether the plan

satisfied two specific statistical thresholds that the court treated as safe harbors. (R p 4879)

Legislative Defendants assert that the trial court had no obligation to look further than those two "statistical ranges"—for the mean-median difference and the efficiency gap—which the General Assembly used in drawing the plan. (R p 4879; LD Br. 21–24) This assertion is irreconcilable with this Court's express statement that it was ***not*** identifying "precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Harper*, 2022-NCSC-17, ¶ 163. It is also irreconcilable with the fact that this Court did not rely solely on these two thresholds in its decision on the merits. As the Court explained, although many metrics may be useful in determining whether a plan is entitled to a presumption of constitutionality, *id.*, "[w]hat matters" is whether "each voter's vote carries roughly the same weight," *id.* ¶ 169, and whether "voters of all political parties [have] substantially equal opportunity to translate votes into seats across the plan," *id.* ¶ 163.

Accepting Legislative Defendants' rewriting would eviscerate our Constitution's promise of "substantially equal legislative representation" and greenlight all but the most severe partisan gerrymanders. *Id.* ¶ 160 (quoting *Stephenson*, 355 N.C. at 382, 562 S.E.2d at 396). Individual metrics can be gamed, and a narrow focus on two metrics handpicked by the General

Assembly will not stop legislators from enacting plans that systematically advantage voters of one political party over the electorate as a whole.

Experts, including those in this case, have explained how particular metrics can be manipulated. For instance, Dr. Bernard Grofman, a professor of political science at the University of California, Irvine (R pp 4871, 5027), explained the danger of relying solely on the mean-median gap to measure the existence of a partisan gerrymander:

> While the mean-median gap is a very useful and easy to calculate tool … , it cannot stand as the sole statistical measure of partisan gerrymandering. …
>
> [T]he mean-median gap may be easier to manipulate by mapmakers than some other measures, e.g., by assuring that in the particular district which is the median, the mean-median gap is not that big even though the map as a whole remains a clear partisan gerrymander.

R p 5030. Likewise, Professor Benjamin Plener Cover of the University of Idaho College of Law has identified limitations of relying solely on the efficiency gap:

> Endorsing the efficiency gap as the definitive measure may unintentionally encourage mapmakers to draw uncompetitive plans that produce a high number of uncontested races, and courts may struggle to evaluate the resulting plans ….”

Benjamin Plener Cover, *Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal*, 70 STAN. L. REV. 1131, 1188–89 (2018).

Indeed, this case vividly illustrates these dangers: Regardless of Legislative Defendants' claim—which is incorrect on its own terms, *infra* p. 12—that the Legislative Senate Plan satisfies particular mean-median-difference and efficiency-gap thresholds, the plan creates a substantial and persistent partisan skew that will deliver Republicans a consistent 4- to 5-seat advantage in the Senate, as the next section details.

B. Undisputed Evidence Shows That the Legislative Senate Plan Fails the Standard This Court Established.

Because it applied the wrong standard, the trial court did not address whether the Legislative Senate Plan gives "voters of all political parties substantially equal opportunity to translate votes into seats." *Harper*, 2022-NCSC-17, ¶ 163. The undisputed record evidence confirms that the plan cannot satisfy this standard and instead systematically advantages Republicans at the expense of Democratic voters.

When looking generally at how the Legislative Senate Plan would have translated votes in past elections into seats, the plan's skew is 4 to 5 seats. (R pp 4790, 4808; NCLCV Br. 19) For instance, in statewide general elections decided by less than one percentage point, where one would expect each political party to carry roughly 25 of the Senate's 50 seats, the Legislative Senate Plan delivers to Republicans an average of 27 seats, while limiting Democrats to an average of only 23 seats. (R p 4808) Democrats are limited

to 23 seats even in close elections where voters statewide prefer Democrats by a margin of up to one percentage point. (R p 4808)

The asymmetry persists across different electoral scenarios. When Republicans win statewide by up to a four-point margin, they receive an average of 28.5 Senate seats. (R p 4808) When Democrats win statewide by the same margin, they average a mere 24 seats—a ***Republican*** majority. (R p 4808) As Special Masters' expert Dr. Eric McGhee reported, Democrats "would need to win as much as 53 percent of the vote" (that is, a six-point margin) just "to claim 25 seats." (R p 5074). A districting plan that makes it this much harder for voters of one party to win just a tie does not guarantee "voters of all political parties substantially equal opportunity to translate votes into seats." *Harper*, 2022-NCSC-17, ¶ 163.

Again, every expert retained by the Special Masters agreed that the Legislative Senate Plan privileges Republicans. (R pp 5042–43, 5072, 5074, 5085, 5116, 5119) Dr. Grofman explained that the plan is "very lopsidedly Republican" and contains a "***substantial*** pro-Republican bias." (R p 5042 (emphasis in original)) Dr. McGhee found that the plan makes it substantially harder for Democrats to win a majority—so much so that "in a tied election Republicans would still hold 27 or 28 [of the Senate's 50] seats." (R p 5074) Dr. Tyler Jarvis compared the plan to tens of thousands of nonpartisan plans and concluded that the Legislative Senate Plan is "often a significant outlier

in favor of Republicans." (R p 5116) Dr. Samuel Wang found that, as a general matter, Republicans will win more Senate seats than Democrats given an identical vote share. (R p 5085)

Under this Court's decision on the merits, this type of substantial partisan skew renders the Legislative Senate Plan "presumptively unconstitutional," which means Legislative Defendants have the burden of showing that the skew "necessarily results from North Carolina's unique political geography." *Harper*, 2022-NCSC-17, ¶¶ 163, 170, 180. Legislative Defendants, however, cannot make that showing. This is because the plan's bias was not "necessary" or driven by any legitimate traditional districting criterion: The uncontested record evidence shows that the NCLCV Plaintiffs' alternative map reduces partisan bias while ***improving*** upon the Legislative Senate Plan's compliance with traditional districting criteria. NCLCV Br. 22.

In response to this evidence, Legislative Defendants simply state that their expert, Dr. Michael Barber, found no vote bias and that "[t]here can be no better example of perfect symmetry" than the Legislative Senate Plan. LD Br. 23–24. In fact, Dr. Barber's analysis actually shows a substantial partisan asymmetry favoring Republicans. (R p 4726) For instance, Dr. Barber's partisan-symmetry graphic illustrates that, to carry 27 seats, Democrats would need more than 54% of the vote but Republicans would need barely 50%. (R p 4726; *see also* R p 4750) That is why, when every other expert at the

remedial stage of this case—the four Special Masters' experts, the NCLCV Plaintiffs' expert, Dr. Moon Duchin, and Common Cause and *Harper* Plaintiffs' experts, Dr. Jonathan Mattingly and Dr. Gregory Herschlag—evaluated the Legislative Senate Plan, they all independently found that the plan substantially favors Republicans over Democrats. (R pp 4759–60, 4814, 5042–43, 5072, 5074, 5085, 5116, 5119)

C. Legislative Defendants' Threshold-Based Arguments Are Inconsistent with the Court's Merits Decision and the Record.

Instead of defending their plan's compliance with this Court's decision on the merits, Legislative Defendants reiterate that the Legislative Senate Plan has a mean-median difference of less than 1% and an efficiency gap of less than 7%. LD Br. 17, 21–24, 27–28. As already explained, that argument misunderstands this Court's opinion, which built its standard not on cherrypicked statistics and safe harbors, but on constitutional principle. *Supra* pp. 3–6. But Legislative Defendants' argument fails for three additional reasons, too.

1. Statistical Thresholds Cannot Establish a Plan's Constitutionality.

First, as this Court explained in its merits decision, statistics could at most show that a plan is "***presumptively*** constitutional." *Harper*, 2022-NCSC-17, ¶ 163 (emphasis added). The ultimate question is always whether

the plan protects voters' rights to "substantially equal voting power" regardless of partisan affiliation. *Id.* ¶¶ 160, 163, 169 (quoting *Stephenson*, 355 N.C. at 382, 562 S.E.2d at 396). And on this record, any presumption of constitutionality has been more than overcome. *Supra* pp. 6–9.

2. Legislative Defendants Fail to Address Two Methods and Approaches.

Second, this Court's opinion discussed ***four*** statistical methods and approaches—not just the two that Legislative Defendants rely on here. *Harper*, 2022-NCSC-17, ¶¶ 165–168. In addition to the mean-median bias and the efficiency gap, this Court also discussed the close-votes-close-seats approach and ensemble analysis. *Id.* ¶¶ 165, 168. The Legislative Senate Plan fails on both metrics, which underscores the flaws in Legislative Defendants' assertions that the North Carolina Constitution adopts statistical safe harbors ***and*** that Legislative Defendants get to pick and choose which metrics count toward those safe harbors. LD Br. 22.

The close-votes-close-seats approach asks whether a plan "persistently result[s] in the same level of partisan advantage to one party when the vote [is] closer than 52% [to 48%]." *Harper*, 2022-NCSC-17, ¶ 165. Under the Legislative Senate Plan, when Republicans win statewide by up to a four-point margin (52% to 48%), they receive an average of 28.5 Senate seats. (R p 4808) When Democrats win statewide by the same margin, Republicans ***still*** win a

majority, with an average of 26 seats (with Democrats winning only 24).[1] (R p 4808) Again, as Dr. McGhee found, Democrats "would need to win as much as 53 percent of the vote" just to achieve a seat tie in the Senate. (R p 5074)

The plan fares no better under an ensemble analysis: Comparing the Legislative Senate Plan to "computer simulations" drawn "solely on the basis of traditional redistricting criteria" shows similarly skewed outcomes. *Harper*, 2022-NCSC-17, ¶ 168. Special Masters' expert Dr. Jarvis undertook this analysis and found that the Legislative Senate Plan "is often a significant outlier in favor of the Republicans." (R p 5116)

It is not hard to guess why Legislative Defendants focus exclusively on the 1% mean-median difference and 7% efficiency gap, or why the mapmakers "chose to utilize them predominantly." LD Br. 22. As noted, the mean-median difference can be "easier to manipulate by mapmakers than some other measures." (R p 5030) Nor is an efficiency gap of 7% anything close to the hallmark of a fair plan. An efficiency gap greater than 7% can provide confirmation that a partisan gerrymander is so extreme that it "will continue to favor [one] party over the [full] life of the plan." *Harper*, 2022-NCSC-17, ¶

[1] Legislative Defendants claim that their expert, Dr. Barber, found that the Legislative Senate Plan produced "majoritarian outcomes in 11 of the 12 elections considered." LD Br. 24 n.15. But Dr. Barber failed to "consider" six recent statewide elections where the Legislative Senate Plan translates Democratic vote majorities into Republican seat majorities. (R pp 4722, 4808)

167 (quoting *Whitford v. Gill*, 218 F. Supp. 3d 837, 905 (W.D. Wis. 2016)). But an efficiency gap of less than 7% does not prove that a plan provides voters of both parties with substantially equal voting power.[2]

3. Legislative Defendants' Arguments Rest on a Clearly Erroneous Factual Finding.

Third, even as to these two isolated metrics, the trial court relied on a clearly erroneous finding that "a majority of the Special Masters' expert assistants found that the Legislative Senate Plan had a mean-median difference of less than 1%." (R p 4892) In fact, only two expert assistants calculated mean-median differences of less than the trial court's 1% threshold. (R pp 5072, 5124) And taking the average of all four Special Masters' experts' scores produces a mean-median difference of 1.29%, well over the supposed 1% threshold. (R pp 5039, 5072, 5086, 5124) That Legislative Defendants' expert Dr. Barber found a mean-median difference of less than 1% is irrelevant. Dr. Barber's finding was based on an "unreasonable averaging method that makes the systematic advantage for Republicans disappear" (R p 4818), and the trial court and Special Masters were correct not to rely on it.

To be clear, none of this is to dispute that mean-median differences and efficiency gaps are relevant. Of course they are—but only as two of several

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[2] Indeed, Dr. McGhee found that "[t]he odds are about three to one that Republicans would maintain [their] advantage [under the Legislative Senate Plan] throughout the decade." (R p 5074)

evidentiary considerations in assessing the ultimate question of whether a plan gives "voters of all political parties substantially equal opportunity to translate votes into seats." *Harper*, 2022-NCSC-17, ¶ 163. The trial court's error, which Legislative Defendants have compounded, was to treat artificial thresholds based on these two metrics as substitutes for the Constitution's guarantee of "substantially equal voting power" and "substantially equal legislative representation." *Id.* ¶¶ 160, 169 (quoting *Stephenson*, 355 N.C. at 382, 562 S.E.2d at 396).

II. Legislative Defendants' Other Arguments Also Lack Merit.

Unable to defend the Legislative Senate Plan's compliance with the standard that this Court has established, Legislative Defendants raise various other arguments aimed at avoiding reversal. None succeeds.

A. Deference Cannot Save the Legislative Senate Plan.

Legislative Defendants argue at length that this Court must defer to their choices in the Legislative Senate Plan. LD Br. 19, 22. In considering this case on the merits, this Court heard and rejected the same arguments, which fare no better the second time around. *Harper*, 2022-NCSC-17, ¶ 7.

1. North Carolina Statutes Expressly Authorize North Carolina Courts to Review and Remedy Unlawful Redistricting Plans.

Legislative Defendants premise their deference argument on the claim that, when courts review redistricting plans for compliance with the North

Carolina Constitution, they endanger—or even violate—the separation of powers. LD Br. 18–19, 63. Legislative Defendants have told the U.S. Supreme Court the same. *See* Petition for Writ of Certiorari at 32–33, *Moore v. Harper*, No. 21-1271 (U.S. Mar. 17, 2022).

That premise is incorrect. Legislative Defendants' argument ignores not only the established power of judicial review that North Carolina courts have exercised since our State's inception,[3] but also the specific North Carolina statutes that expressly authorize state courts to review and remedy unlawful redistricting plans. Courts do not endanger the separation of powers when they do exactly what the General Assembly authorized.

North Carolina statutes expressly provide for state courts to review legislatively enacted redistricting plans for compliance with the North Carolina Constitution and to remedy any violations. *See* N.C. Gen. Stat. § 1-267.1(a) ("[A]ction[s] challenging the validity of any act … that apportions or redistricts State legislative or congressional districts [are to] be filed in the Superior Court of Wake County and [are to] be heard and determined by a three-judge panel."); *id.* § 1-81.1(a) (establishing venue "in any action

[3] *See Bayard v. Singleton*, 1 N.C. 5, 7 (1787) (recognizing North Carolina courts' power of judicial review and authority to void unlawful legislative acts); *see also Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) ("The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone … invested ... with the powers of the State.").

concerning any act … apportioning or redistricting State legislative or congressional districts"). North Carolina statutes also prescribe the particulars of the remedial process, providing that a court must "first give[] the General Assembly" at least two weeks "to remedy any defects" in its plan, *id.* § 120-2.4(a), and if "the General Assembly does not act to remedy any identified defects to its plan …, the court may impose an interim districting plan," *id.* § 120-2.4(a1); *see also id.* § 120-2.4(b) (barring the State Board of Elections from using "any plan … other than a plan imposed by a court under this section or a plan enacted by the General Assembly").

Pursuant to this legislative authorization, this Court has already once reviewed and found unconstitutional the General Assembly's original redistricting plans in February 2022. And it is now presented with the question whether the General Assembly has "act[ed] to remedy any identified defects" in the Legislative Senate Plan. *Id.* § 120-2.4(a1). Making this legislatively prescribed—indeed, ***required***—determination vindicates rather than undermines the separation of powers.

2. The Legislative Senate Plan Is Not Entitled to a Presumption of Constitutionality.

Legislative Defendants also press this Court to defer to their unlawful remedial plan by citing the presumption of constitutionality that sometimes attaches to legislative enactments. LD Br. 19. But this presumption has no

place here. As this Court explained in its decision on the merits, the presumption applies in the redistricting context only if "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." *Harper*, 2022-NCSC-17, ¶ 163. If this test is not satisfied—as is the case here—then the presumption does not apply. *See supra* pp. 6–9.

Indeed, on the facts here, the opposite presumption applies. In its merits decision, this Court explained that if a plan "makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters," then strict scrutiny applies, and the plan is presumed to be ***unconstitutional*** unless the General Assembly can "establish that it is narrowly tailored to advance a compelling governmental interest." *Harper*, 2022-NCSC-17, ¶¶ 180–181 (quoting *Stephenson*, 355 N.C. at 377, 562 S.E.2d at 393). "Partisan advantage" does not count as a compelling governmental interest. *See id.* ¶ 181. Legislative Defendants have not even attempted to show that the partisan skew in the Legislative Senate Plan—which is designed to systematically favor Republicans, *see supra* pp. 6–9—advances ***any*** governmental interest, let alone a compelling one. Unable to contend with this Court's holding, Legislative Defendants simply ignore it.

Legislative Defendants' invocation of a presumption of constitutionality is particularly misplaced given that this Court has already concluded as a

matter of law that the General Assembly acted unconstitutionally "beyond a reasonable doubt." *Harper*, 2022-NCSC-17, ¶ 94. North Carolina statutes reinforce the point. Once the General Assembly's plans have been found unconstitutional, and once the General Assembly has already had a chance to remedy the plans, North Carolina courts have a duty to ensure that constitutional remedial maps are adopted. No deference to the General Assembly is warranted under these state statutes. *See supra* pp. 14–15; *see also, e.g.*, *Gannon v. State*, 368 P.3d 1024, 1043 (Kan. 2016) (*per curiam*) ("[W]e reject the State's claims that the presumption of constitutionality that generally applies to our initial review of statutes should extend to the remedial phase."); *DeRolph v. State*, 699 N.E.2d 518, 518–19 (Ohio 1998) (mem.) (holding, at the remedial stage, that the "state has the burden of production and proof and must show by a preponderance of the evidence that the constitutional mandates have been satisfied").[4] And again, even if any such presumption could be applied at the remedial stage, it would be overcome by

[4] The decision in *Abbott v. Perez*, 138 S. Ct. 2305 (2018), which Legislative Defendants cite, LD Br. 19, says nothing to the contrary. *Perez* explained that plaintiffs challenging a redistricting plan in federal court on racial-discrimination grounds must prove discriminatory intent. 138 S. Ct. at 2324–25. In *Perez*, unlike here, there had been no judicial finding that the legislature's redistricting plan had been motivated by discriminatory intent. *Id.* at 2316–17. And *Perez*'s comment that ***federal*** courts should continue to apply a "presumption of ***legislative good faith***" to districting plans enacted by a ***state*** legislature, *id.* at 2324 (emphasis added), does not support the ***presumption of constitutionality*** that Legislative Defendants urge here.

the overwhelming evidence that the Legislative Senate Plan privileges one group of voters over another. *Supra* pp. 6–9.

B. Legislative Defendants' Intent Arguments Are Irrelevant.

Legislative Defendants fare no better with their argument that the Legislative Senate Plan is constitutional because there was no evidence that they intended to disadvantage Democratic voters. LD Br. 20.

To begin, ample evidence shows that Legislative Defendants intended to do just what they did—deprive disfavored voters of substantially equal voting power. Since the start of this litigation in November 2021, NCLCV Plaintiffs have presented an alternative Senate map that treats both parties evenhandedly and fully complies with traditional districting criteria. (R pp 34, 4814; NCLCV Br. 22) After this Court invalidated Legislative Defendants' original Senate plan, Legislative Defendants closely monitored partisan metrics and crafted a remedial map that decisively favors Republicans—and then passed that skewed plan on a pure party-line vote (even as the remedial House plan drew bipartisan support). (R pp 4873, 4878, 4881; LD Br. 22–23) Legislative Defendants cannot be taken seriously when they suggest, in these circumstances, that they were blind to the partisan effects of the Legislative Senate Plan. The "probability that this partisan bias arose by chance, without an intentional effort by the General Assembly, is 'astronomically small.'"

Harper, 2022-NCSC-17, ¶ 39; *cf. State v. Elliot*, 232 N.C. 377, 378, 61 S.E.2d 93, 95 (1950).

Legislative Defendants, moreover, are wrong that Plaintiffs "must establish 'intentional, purposeful discrimination' to assert a violation of the constitutional provisions *Harper* construed." LD Br. 20. First, the Free Elections Clause does not require an affirmative showing of intent.[5] When a law implicates that Clause, "it is the effect of the act, and not the intention of the Legislature, which renders it void." *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 225 (1875). That is why this Court held that "[s]howing that a reapportionment plan makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters … ***suffices*** to establish the diminishment or dilution of a voter's voting power on the basis of his or her views," (R p 3821 (emphasis added)), and why this Court's decision on the merits focused on "discriminatory ***effect***," *Harper*, 2022-NCSC-17, ¶ 169 (emphasis added).

[5] Though Legislative Defendants claim that Plaintiffs' arguments in the appeal on the merits "depended on a showing of intent and effect," LD Br. 20 n.13, NCLCV Plaintiffs actually argued that "[p]artisan-gerrymandering claims under the Free Elections Clause should not require an affirmative showing of intent," Brief of NCLCV Plaintiffs at 55 n.16, *Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17 (No. 413PA21) (filed 21 Jan. 2022); *accord* Reply Brief of NCLCV Plaintiffs at 22, *Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17 (No. 413PA21) (filed 31 Jan. 2022).

This approach is all the more appropriate at the remedial stage, after this Court has already held that the General Assembly acted with unlawful, discriminatory purpose to achieve unlawful, discriminatory ends. The Court has already explained what the General Assembly must do to correct its constitutional harm: enact a districting plan that "give[s] the voters of all political parties substantially equal opportunity to translate votes into seats across the plan." (R pp 3822) The Court's order did not direct Plaintiffs to re-prove liability, and the sole question at this phase is whether the General Assembly has complied with this remedial order. *See Stephenson v. Bartlett*, 357 N.C. 301, 314, 582 S.E.2d 247, 254 (2003).

III. The Court Can and Should Order the Adoption of Lawful Maps that Safeguard Voters' Constitutional Rights Until the Next Decennial Census.

Legislative Defendants also fail with their arguments aimed at limiting this Court's remedial authority. The General Assembly has already been given an opportunity to remedy its constitutional violations, and it has failed in that endeavor. As a result, this Court can and should impose a new, constitutional map that remedies the deficiencies in the Legislative Senate Plan. And given the Constitution's prohibition against mid-decade redistricting, that new plan must remain in place until the next decennial census.

A. This Court Can and Should Order the Adoption of a Constitutional Remedial Map.

The proper remedy is for this Court to reverse the trial court's ruling upholding the General Assembly's unlawful Senate plan and order the trial court to adopt the NCLCV Senate Map or another lawful map that complies with the constitutional standard this Court has set. This is the procedure expressly set forth in N.C. Gen. Stat. § 120-2.4, which provides that if the General Assembly fails to enact a lawful redistricting plan, "the court may impose" a new plan for purposes of "remedy[ing] any defects identified by the court." N.C. Gen. Stat. § 120-2.4(a1). It is that simple.[6]

Nowhere does North Carolina law say that the General Assembly must be given yet another chance once the Court finds its redrawing unlawful. LD Br. 56. Legislative Defendants contend that every time the Court concludes that a General Assembly-devised plan is unlawful, the General Assembly must be given another chance to redraw. But the statute the General Assembly passed, N.C. Gen. Stat. § 120-2.4, states just the opposite. It provides that when the General Assembly fails to remedy the defects in its unlawful redistricting plan, it is the ***court's*** duty to "impose" a new, lawful redistricting plan. N.C. Gen. Stat. § 120-2.4(a1). This statute forecloses Legislative

[6] Although Section 120-2.4(a1) purports to limit the judiciary's remedial power to imposing only an "interim" map, such a limitation—if enforced—would violate the Constitution. *Infra* pp. 24–25.

Defendants' argument that ***only*** the General Assembly may draw remedial plans. LD Br. 56, 58. In any event, Legislative Defendants' reading of the statute is implausible. On their theory, every unconstitutional redrawing would require another trip to this Court and another "bite[] of the apple" for the General Assembly, with no prospect of relief for the voters who are denied substantially equal voting power. LD Br. 60.[7]

Unable to contend with the plain text of Section 120-2.4, Legislative Defendants gesture to the *Stephenson* line of cases to argue that "only the General Assembly has the authority to enact" apportionment plans. LD Br. 58. But as Legislative Defendants recognize, these cases predate the enactment of the North Carolina statutes that specifically authorize judicial review of and relief from unlawful redistricting plans. LD Br. 60–61. What's more, in *Stephenson*, the trial court ***did*** institute its own remedial plans after the General Assembly's redraws were found to be constitutionally inadequate. *See Stephenson*, 357 N.C. at 304, 582 S.E.2d at 249. Likewise in *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007), *aff'd sub nom. Bartlett v.*

[7] Contrary to Legislative Defendants' assertions, no party has asked this Court to "deny the General Assembly an opportunity to correct constitutional defects." LD Br. 61. The General Assembly has already been given this opportunity in this case, and it failed to adopt a constitutionally compliant remedial plan for Senate districts. Neither Section 120-2.4 nor the North Carolina Constitution requires this Court to give the General Assembly additional "bites of the apple" so that it may run out the redistricting clock for the next ten years. LD Br. 60.

Strickland, 556 U.S. 1 (2009), this Court gave the General Assembly one opportunity to remedy a constitutional defect—but it never held that the General Assembly is entitled to unlimited opportunities to redraw district plans or that North Carolina courts lack the authority to impose remedial maps. *Id.*, 361 N.C. at 510, 649 S.E.2d at 376.

Equally misguided are Legislative Defendants' claims that the Governor and Attorney General have acted inconsistently. The Attorney General's 2017 decision "not [to] object to an order by the superior court affording the General Assembly" an initial "opportunity to correct the constitutional deficiencies" in its legislative plans, LD Br. 62, was consistent with Section 120-2.4 (and the remedial opportunity that the General Assembly was given here). And neither the Governor nor the Attorney General has ever taken the extreme position that only the General Assembly may draw remedial plans in ***all*** cases in ***all*** future redistricting cycles.

More fundamentally, these claims illustrate exactly why this Court must enforce the Constitution's guarantees regardless of which politicians hold office. At any time, elected officials will have their own parochial interests, which they will pursue through litigation in the courts and politics in the Capitol. The Constitution's dictates, by contrast, endure despite everyday politics. These dictates emphatically underscore this Court's duty to enforce the Constitution's commands. *See Bayard v. Singleton*, 1 N.C. 5, 7 (1787).

B. This Court Can and Should Confirm that the Constitutional Remedial Map Will Remain in Place Until the Next Census.

To effectuate its judgment that the Legislative Senate Plan violates the Constitution, this Court should clarify that a constitutional remedial map will remain in effect for the remainder of the decade, consistent with Article II, Sections 3 and 5, of the Constitution. These sections provide that "[w]hen established, the senate [and representative] districts and the apportionment of Senators [and Representatives] ***shall remain unaltered*** until the return of another decennial census of population taken by order of Congress." N.C. CONST. art. II, §§ 3(4), 5(4) (emphasis added). Once this Court orders the adoption of a remedial map, that map will be "established," and under the plain language of Sections 3 and 5, the General Assembly may not change those district lines.

This Court should reject Legislative Defendants' invitation to add language to Sections 3 and 5 to provide that only the General Assembly can "establish[]" districts. LD Br. 58. While the Constitution gives the General Assembly the first opportunity to draw districts "after the return of [the] decennial census," it does not bar courts from enforcing constitutional guarantees when the General Assembly violates them.[8]

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[8] Contrary to Legislative Defendants' suggestions, the NCLCV Plaintiffs are not making arguments that "have not previously been made in this case." LD Br. 57. The NCLCV Plaintiffs presented these arguments in their briefing

And contrary to Legislative Defendants' assertion, LD Br. 57, Section 120-2.4(a1) does not limit this Court's authority. If this Court concludes that the Legislative Senate Plan is unconstitutional, then it is this Court's duty to decide how that constitutional violation must be remedied and to issue an order accordingly. This duty necessarily includes issuing a directive to the trial court about the effect of any remedial map that this Court orders the trial court to "impose" under Section 120-2.4(a1). If the Constitution requires a constitutional map to be fixed in place for the remainder of the decade—as it does—then that requirement is a necessary component of any judgment resolving this appeal.

CONCLUSION

The decision below should be reversed and the case remanded to the trial court with instructions to adopt the NCLCV Senate Map or another remedial map that complies with the standard that this Court set—guaranteeing North Carolina voters substantially equal voting power consistent with their

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before the trial court (R p 4800), and in their initial application to this Court seeking a stay of the trial court's remedial order pending appeal, *see* NCLCV Plaintiffs' Emergency Application for Stay Pending Appeal, Petition for Writ of Supersedeas, Mandamus, and/or Prohibition, Alternative Petition for Writ of Certiorari, Motion to Suspend Appellate Rules, and Motion for Preliminary Injunction at 5, *Harper v. Hall*, 868 S.E.2d 100 (N.C. 2022) (mem.) (No. 413PA21) (filed 23 Feb. 2022).

constitutional rights under the Free Election Clause, the Equal Protection Clause, and the Free Speech and Assembly Clauses.

Respectfully submitted this 15th day of August, 2022.

ROBINSON, BRADSHAW & HINSON, P.A.

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CERTIFICATE OF SERVICE

Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I hereby certify that the foregoing document has been filed with the Clerk of the North Carolina Supreme Court by electronic submission. I further certify that a copy of this document has been duly served upon the following counsel of record by email:

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This the 15th day of August, 2022.

Electronically Submitted
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Attorney for NCLCV Plaintiffs

No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR., et al.,

Plaintiffs,

REBECCA HARPER, et al.,

Plaintiffs,

COMMON CAUSE,

Plaintiff-Intervenor,

v.

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

Defendants.

From Wake County

****

APPENDIX TO REPLY BRIEF OF PLAINTIFFS-APPELLANTS NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., ET AL.

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CONSTITUTIONAL PROVISIONS

STATUTES

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Proposed Legislation

West's North Carolina General Statutes Annotated
Constitution of North Carolina
Article II. Legislative (Refs & Annos)

N.C.G.S.A. Art. II, § 3

§ 3. Senate districts; apportionment of Senators

Currentness

The Senators shall be elected from districts. The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the senate districts and the apportionment of Senators among those districts, subject to the following requirements:

(1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Senator represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district;

(2) Each senate district shall at all times consist of contiguous territory;

(3) No county shall be divided in the formation of a senate district;

(4) When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress.

<Article I, §§ 1 to 22, appears in this volume>

<Adoption of the Constitution of 1970>

<A complete revision to the North Carolina Constitution of 1868 was proposed in Laws 1969, c. 1258 for submission to the voters at the general election of 1970. The revision was adopted by the electorate at the election of November 3, 1970 to take effect on July 1, 1971. In addition to this revision, amendments separately submitted at the November, 1970, were also adopted and are incorporated in the 1970 Constitution.>

Notes of Decisions (44)

N.C.G.S.A. Art. II, § 3, NC CONST Art. II, § 3
The statutes and Constitution are current through S.L. 2022-54 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West's North Carolina General Statutes Annotated
Constitution of North Carolina
Article II. Legislative (Refs & Annos)

N.C.G.S.A. Art. II, § 5

§ 5. Representative districts; apportionment of Representatives

Currentness

The Representatives shall be elected from districts. The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the representative districts and the apportionment of Representatives among those districts, subject to the following requirements:

(1) Each Representative shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Representative represents being determined for this purpose by dividing the population of the district that he represents by the number of Representatives apportioned to that district;

(2) Each representative district shall at all times consist of contiguous territory;

(3) No county shall be divided in the formation of a representative district;

(4) When established, the representative districts and the apportionment of Representatives shall remain unaltered until the return of another decennial census of population taken by order of Congress.

<Article I, §§ 1 to 22, appears in this volume>

<Adoption of the Constitution of 1970>

<A complete revision to the North Carolina Constitution of 1868 was proposed in Laws 1969, c. 1258 for submission to the voters at the general election of 1970. The revision was adopted by the electorate at the election of November 3, 1970 to take effect on July 1, 1971. In addition to this revision, amendments separately submitted at the November, 1970, were also adopted and are incorporated in the 1970 Constitution.>

Notes of Decisions (26)

N.C.G.S.A. Art. II, § 5, NC CONST Art. II, § 5
The statutes and Constitution are current through S.L. 2022-54 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

West's North Carolina General Statutes Annotated
Chapter 1. Civil Procedure
Subchapter IV. Venue
Article 7. Venue (Refs & Annos)

N.C.G.S.A. § 1-81.1

§ 1-81.1. Venue in apportionment or redistricting cases; certain injunctive relief actions

Effective: August 7, 2014
Currentness

(a) Venue lies exclusively with the Wake County Superior Court in any action concerning any act of the General Assembly apportioning or redistricting State legislative or congressional districts.

(a1) Venue lies exclusively with the Wake County Superior Court with regard to any claim seeking an order or judgment of a court, either final or interlocutory, to restrain the enforcement, operation, or execution of an act of the General Assembly, in whole or in part, based upon an allegation that the act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law. Pursuant to G.S. 1-267.1(a1) and G.S. 1-1A, Rule 42(b)(4), claims described in this subsection that are filed or raised in courts other than Wake County Superior Court or that are filed in Wake County Superior Court shall be transferred to a three-judge panel of the Wake County Superior Court if, after all other questions of law in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any issues in the case.

(b) Any action brought concerning an act of the General Assembly apportioning or redistricting the State legislative or congressional districts shall be filed in the Superior Court of Wake County.

Credits
Added by S.L. 2003-434 (Ex. Sess.), § 11(a), eff. Nov. 25, 2003. Amended by S.L. 2014-100, § 18B.16(b), eff. Aug. 7, 2014.

Notes of Decisions (6)

N.C.G.S.A. § 1-81.1, NC ST § 1-81.1
The statutes and Constitution are current through S.L. 2022-54 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

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KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedPrior Version Limited on Constitutional Grounds by Stephenson v. Bartlett, N.C., Apr. 22, 2004

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West's North Carolina General Statutes Annotated
Chapter 1. Civil Procedure
Subchapter VIII. Judgment
Article 26a. Three-Judge Panel for Redistricting Challenges and for Certain Challenges to State Laws (Refs & Annos)

N.C.G.S.A. § 1-267.1

§ 1-267.1. Three-judge panel for actions challenging plans apportioning or redistricting State legislative or congressional districts; claims challenging the facial validity of an act of the General Assembly

Effective: January 1, 2019
Currentness

(a) Any action challenging the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts shall be filed in the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County organized as provided by subsection (b) of this section.

(a1) Except as otherwise provided in subsection (a) of this section, any facial challenge to the validity of an act of the General Assembly shall be transferred pursuant to G.S. 1A-1, Rule 42(b)(4), to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County, organized as provided by subsection (b2) of this section.

(b) Whenever any person files in the Superior Court of Wake County any action challenging the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts, a copy of the complaint shall be served upon the senior resident superior court judge of Wake County, who shall be the presiding judge of the three-judge panel required by subsection (a) of this section. Upon receipt of that complaint, the senior resident superior court judge of Wake County shall notify the Chief Justice, who shall appoint two additional resident superior court judges to the three-judge panel of the Superior Court of Wake County to hear and determine the action. Before making those appointments, the Chief Justice shall consult with the North Carolina Conference of Superior Court Judges, which shall provide the Chief Justice with a list of recommended appointments. To ensure that members of the three-judge panel are drawn from different regions of the State, the Chief Justice shall appoint to the three-judge panel one resident superior court judge from the First through Third Judicial Divisions and one resident superior court judge from the Fourth through Fifth Judicial Divisions. In order to ensure fairness, to avoid the appearance of impropriety, and to avoid political bias, no member of the panel, including the senior resident superior court judge of Wake County, may be a former member of the General Assembly. Should the senior resident superior court judge of Wake County be disqualified or otherwise unable to serve on the three-judge panel, the Chief Justice shall appoint another resident superior court judge of Wake County as the presiding judge of the three-judge panel. Should any other member of the three-judge panel be disqualified or otherwise unable to serve on the three-judge panel, the Chief Justice shall appoint as a replacement another resident superior court judge from the same group of judicial divisions as the resident superior court judge being replaced.

(b1) Any facial challenge to the validity of an act of the General Assembly filed in the Superior Court of Wake County, other than a challenge to plans apportioning or redistricting State legislative or congressional districts that shall be heard pursuant to subsection (b) of this section, or any claim transferred to the Superior Court of Wake County pursuant to subsection (a1) of this section, shall be assigned by the senior resident Superior Court Judge of Wake County to a three-judge panel established pursuant to subsection (b2) of this section.

(b2) For each challenge to the validity of statutes and acts subject to subsection (a1) of this section, the Chief Justice of the Supreme Court shall appoint three resident superior court judges to a three-judge panel of the Superior Court of Wake County to hear the challenge. The Chief Justice shall appoint a presiding judge of each three-judge panel. To ensure that members of each three-judge panel are drawn from different regions of the State, the Chief Justice shall appoint to each three-judge panel one resident superior court judge from the First or Second Judicial Division, one resident superior court judge from the Third or Fourth Judicial Division, and one resident superior court judge from the Fifth Judicial Division. Should any member of a three-judge panel be disqualified or otherwise unable to serve on the three-judge panel or be removed from the panel at the discretion of the Chief Justice, the Chief Justice shall appoint as a replacement another resident superior court judge from the same group of judicial divisions as the resident superior court judge being replaced.

(c) No order or judgment shall be entered affecting the validity of any act of the General Assembly that apportions or redistricts State legislative or congressional districts, or finds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law, except by a three-judge panel of the Superior Court of Wake County organized as provided by subsection (b) or subsection (b2) of this section. In the event of disagreement among the three resident superior court judges comprising a three-judge panel, then the opinion of the majority shall prevail.

(d) This section applies only to civil proceedings. Nothing in this section shall be deemed to apply to criminal proceedings, to proceedings under Chapter 15A of the General Statutes, to proceedings making a collateral attack on any judgment entered in a criminal proceeding, or to civil proceedings filed by a taxpayer pursuant to G.S. 105-241.17.

Credits

Added by S.L. 2003-434 (Ex. Sess.), § 7(a), eff. Nov. 25, 2003. Amended by S.L. 2014-100, § 18B.16(a), eff. Aug. 7, 2014; S.L. 2015-264, § 1(a), eff. Oct. 1, 2015; S.L. 2018-145, § 8(b), eff. Jan. 1, 2019; S.L. 2018-146, § 4.10(a), eff. Jan. 1, 2019.

Notes of Decisions (17)

N.C.G.S.A. § 1-267.1, NC ST § 1-267.1

The statutes and Constitution are current through S.L. 2022-54 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

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Proposed Legislation

West's North Carolina General Statutes Annotated
Chapter 120. General Assembly
Article 1. Apportionment of Members; Compensation and Allowances

N.C.G.S.A. § 120-2.4

§ 120-2.4. Opportunity for General Assembly to remedy defects

Effective: December 27, 2018
Currentness

(a) If the General Assembly enacts a plan apportioning or redistricting State legislative or congressional districts, in no event may a court impose its own substitute plan unless the court first gives the General Assembly a period of time to remedy any defects identified by the court in its findings of fact and conclusions of law. That period of time shall not be less than two weeks, provided, however, that if the General Assembly is scheduled to convene legislative session within 45 days of the date of the court order that period of time shall not be less than two weeks from the convening of that legislative session.

(a1) In the event the General Assembly does not act to remedy any identified defects to its plan within that period of time, the court may impose an interim districting plan for use in the next general election only, but that interim districting plan may differ from the districting plan enacted by the General Assembly only to the extent necessary to remedy any defects identified by the court.

(b) Notwithstanding any other provision of law or authority of the State Board of Elections under Chapter 163 of the General Statutes, the State Board of Elections shall have no authority to alter, amend, correct, impose, or substitute any plan apportioning or redistricting State legislative or congressional districts other than a plan imposed by a court under this section or a plan enacted by the General Assembly.

Credits
Added by S.L. 2003-434 (Ex. Sess.), § 9, eff. Nov. 25, 2003. Amended by S.L. 2016-125, § 20(a), eff. Dec. 16, 2016; S.L. 2018-146, § 4.7, eff. Dec. 27, 2018.

Notes of Decisions (1)

N.C.G.S.A. § 120-2.4, NC ST § 120-2.4
The statutes and Constitution are current through S.L. 2022-54 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

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