No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

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JOINT BRIEF OF PLAINTIFFS-APPELLEES

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INTRODUCTION

In February 2022, this Court invalidated the General Assembly's congressional and state legislative redistricting plans as "extreme partisan outliers" and held that, under our State's Constitution, a lawful remedial plan must give "voters of all political parties substantially equal opportunity to translate votes into seats across the plan." *Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, ¶¶ 27, 163, 182, *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022) (mem.). Applying N.C. Gen. Stat. § 120-2.4(a), the Court gave the General Assembly an "opportunity to submit new congressional and state legislative districting plans." (R p 3823)[1] These new maps, the Court emphasized, must "ensure that the channeling of 'political power' from the people to their representatives … is done on equal terms," "so that ours is a 'government of right' that 'originates from the people' and speaks with their voice." *Harper*, 2022-NCSC-17, ¶ 223 (quoting N.C. CONST. art. I, § 2). The Court remanded the case to the trial court "to oversee the redrawing of the maps by the General Assembly or, if necessary, by the court." *Id.*

[1] References in this Brief are made to documents in the printed record ("R") and Rule 9(d) exhibits ("Doc. Ex."), and the Appendix ("App."). References to the trial court's judgment of 23 February 2022, reproduced at R pp 4866–89 and App. 49–72, are given by paragraph number in the court's findings of fact ("FOF") and conclusions of law ("COL").

The General Assembly was given two weeks to "remedy [the] defects identified by [this C]ourt." N.C. Gen. Stat. § 120-2.4(a); R pp 3823–24. But instead of working to draw a congressional plan that respected North Carolinians' "right to vote on equal terms," *Harper*, 2022-NCSC-17, ¶ 148 (quoting *Stephenson v. Bartlett*, 355 N.C. 354, 378, 562 S.E.2d 377, 393 (2002) ("*Stephenson I*")), the General Assembly again enacted an unconstitutional plan. That plan—S.L. 2022-3, or the "Remedial Congressional Plan"—created such a large and persistent partisan skew that one independent expert characterized it as a "very lopsidedly Republican" plan with "***substantial*** pro-Republican bias" that should "be viewed as a pro-Republican partisan gerrymander." (R p 5040–42 (emphasis in original))

The trial court, drawing on the work of three Special Masters, found that the Remedial Congressional Plan contained a "partisan skew" that was "not explained by the political geography of North Carolina." App. 60, FOF 35. The court "conclude[d] that the Remedial Congressional Plan does not satisfy the Supreme Court's standards" and, pursuant to N.C. Gen. Stat. § 120-2.4(a1), "modif[ied] the … Plan to bring it into compliance with the Supreme Court's order." App. 69–70, COL 7–8.

On appeal, the Legislative Defendants seek to relitigate the trial court's findings and demand that this Court defer to the Legislative Defendants' own choice of remedy. Neither effort has merit. The trial court's findings about the

Remedial Congressional Plan are based on competent evidence and are conclusive on appeal. And because there is no "significant likelihood" that the plan will "give the voters of all political parties substantially equal opportunity to translate votes into seats," it is not entitled to deference or a presumption of constitutionality. *Harper*, 2022-NCSC-17, ¶ 163.

Indeed, the Legislative Defendants' arguments are especially meritless because the trial court ***in fact exhibited*** substantial deference to the General Assembly. In line with N.C. Gen. Stat. § 120-2.4(a), the trial court afforded the General Assembly "a reasonable opportunity" to "adopt[] a substitute" redistricting plan rather than "devis[ing] … its own plan." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978). When the trial court weighed the plan the General Assembly enacted, the court presumed that the General Assembly had acted in good faith, notwithstanding its history of unconstitutional partisan gerrymanders, and "g[ave] deference to the General Assembly." R p 4893; App. 58, FOF 27. The trial court required only that the General Assembly ***actually*** "cure [the] constitutional … defects" this Court had found. *Upham v. Seamon*, 456 U.S. 37, 43 (1982). And when the trial court found the General Assembly had failed to do so, it acted—again, pursuant to N.C. Gen. Stat. § 120-2.4—to institute a limited remedy "to ensur[e] that … [P]laintiffs were relieved of the burden of" only those "injuries [that] [P]laintiffs established." *North Carolina v. Covington*, 138 S. Ct. 2548, 2554 (2018). "Being mindful that the

Constitution of North Carolina provides that the General Assembly has the responsibility of redistricting," the trial court's Special Masters "worked solely with" their expert advisor Dr. Bernard Grofman and his assistant "to amend the Legislative Defendants' [plan]," rather than accepting one of the Plaintiffs' plans or devising its own plan from whole cloth. (R pp 4893–94)

The Legislative Defendants' attacks on the trial court's restrained, deferential orders utterly fail, particularly given the standard of review. The judgment below should be affirmed.

ISSUES PRESENTED

1. Did competent evidence support the trial court's decision that the Remedial Congressional Plan fails to satisfy the standard this Court set, where the work of every single expert showed that the plan failed to provide voters substantially equal voting power?
2. Did the trial court act within its broad discretion in denying the motion to disqualify two of the Special Masters' expert advisors, where the communications at issue were immediately disclosed, where those communications sought publicly available information, and where the work of those experts was not material to the trial court's conclusions?

STATEMENT OF THE CASE

This brief addresses the Legislative Defendants' appeal of the remedial order entered by a three-judge panel of the Superior Court in Plaintiffs'

consolidated challenge to the General Assembly's 2021 congressional redistricting plan.

A. Trial Court Liability-Phase Proceedings

On 16 November 2021, Plaintiffs North Carolina League of Conservation Voters, Inc., et al. ("*NCLCV* Plaintiffs") filed an action challenging the General Assembly's 2021 congressional, House, and Senate redistricting plans ("2021 Enacted Plans"), along with a motion for a preliminary injunction. (R pp 30–127) Two days later, Plaintiffs Rebecca Harper et al. ("*Harper* Plaintiffs") filed a challenge to the 2021 Enacted Congressional Plan and also sought preliminary injunctive relief. (R pp 128–76, 208) On 19 November 2021, the Chief Justice assigned Judges A. Graham Shirley, Nathaniel J. Poovey, and Dawn M. Layton to serve on a "Three-Judge Panel for Redistricting Challenges, as defined in N.C.G.S. § 1-267.1." (R p 177) The three-judge panel consolidated the two actions and denied Plaintiffs' request for injunctive relief. (R pp 867–69, 883)

On 8 December 2021, this Court reversed the three-judge panel's ruling and issued a preliminary injunction barring the General Assembly from using the 2021 Enacted Plans and moving the primary election to 17 May 2022. (R pp 893–95) The Court ordered the three-judge panel to issue a final judgment on Plaintiffs' claims by 11 January 2022. (R p 894) On remand, *Harper* Plaintiffs amended their complaint to include challenges to the 2021 Enacted

Senate and House Plans. (R pp 897–964) Plaintiff-Intervenor Common Cause sought and obtained permission to intervene in the consolidated actions. (R pp 965, 1237)

From 3 January to 6 January 2022, the three-judge panel held a bench trial and heard evidence from expert and fact witnesses from the parties. (R p 3523) On 11 January 2022, the panel issued its liability ruling. (R p 3769) The panel found that the 2021 Enacted Plans "resiliently safeguard electoral advantage for Republican[s]" and ensure that Republicans retain majorities in North Carolina's congressional delegation and the General Assembly even "when voters clearly prefer the other party." (R pp 3577, 3579–80) The panel also found that the 2021 Enacted Plans were among the most "extreme" gerrymanders possible and were more "carefully crafted for Republican advantage" than 99.9999% of possible congressional maps, 99.9% of possible Senate maps, and 99.9999% of possible House maps. (R pp 3574–75, 3577) Nonetheless, the panel entered judgment for Defendants, holding that partisan-gerrymandering claims are not justiciable under the North Carolina Constitution. (R pp 3753, 3769)

B. Liability-Phase Appeal

All Plaintiffs appealed, and this Court reversed. (R pp 3772, 3776, 3780) Pursuant to N.C. Gen. Stat. § 120-2.3, this Court held that the 2021 Enacted Plans were unconstitutional partisan gerrymanders in violation of the North

Carolina Constitution's Free Elections Clause, Equal Protection Clause, and Free Speech and Assembly Clauses. R pp 3818–24; *Harper*, 2022-NCSC-17, ¶ 94. The Court explained that these constitutional provisions prohibit the General Assembly from "diminish[ing] or dilut[ing] any individual's vote on the basis of partisan affiliation" because the "fundamental right to vote includes the right to enjoy 'substantially equal voting power and substantially equal legislative representation.'" (R p 3820 (quoting *Stephenson I*, 355 N.C. at 382, 562 S.E.2d at 396)) "Based on the trial court's factual findings," this Court "conclude[d] that the congressional and legislative maps enacted" by the General Assembly were "unconstitutional beyond a reasonable doubt" under the Free Elections Clause, the Equal Protection Clause, and the Free Speech and Assembly Clauses and "enjoin[ed] the use of these maps in any future elections." (R pp 3819–20)

The Court also rejected the Legislative Defendants' arguments that a presumption of constitutionality applied to the General Assembly's gerrymandered plans. As the Court held, where the "General Assembly diminished and diluted the voting power of voters affiliated with one party on the basis of party affiliation," the "plan is subject to strict scrutiny" and is presumed "unconstitutional unless the General Assembly can demonstrate that the plan is 'narrowly tailored to advance a compelling government interest.'" R p 3821 (quoting *Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393);

Harper, 2022-NCSC-17, ¶¶ 180–181. "Achieving partisan advantage incommensurate with a political party's level of statewide voter support," the Court explained, "is neither a compelling nor a legitimate governmental interest." R p 3821; *Harper*, 2022-NCSC-17, ¶ 161.

The Court held that in the redistricting context, a presumption of constitutionality applies ***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. And while the Court identified several methods and metrics that could indicate unconstitutional gerrymandering, the Court expressly declined to "identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Id.* Instead, the Court explained, the ultimate inquiry is always whether a plan treats voters equally, *id.* ¶ 169, such that voters of all political parties have "substantially equal opportunity to translate votes into seats across the plan," *id.* ¶ 163.

The Court rejected the Legislative Defendants' arguments that the federal Constitution's Elections Clause forbids North Carolina courts "from reviewing a congressional districting plan" that "violates the state's own constitution." *Id.* ¶ 175. The Court first held that the Legislative Defendants did not preserve this argument for appeal—noting that this argument was "not

presented at the trial court"—and then ruled that in any event, the argument failed on the merits, because it was "inconsistent with nearly a century of precedent of the Supreme Court of the United States" and "repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts." *Id.*

Finally, the Court rejected the Legislative Defendants' separation-of-powers arguments, explaining that under longstanding precedent, "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens," *id.* ¶ 118 (quoting *Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992)), and that the legislature's "power to apportion legislative and congressional districts … is subject to other 'constitutional limitations,' including the Declaration of Rights," *id.* ¶ 119.

Consistent with its duty under North Carolina law, and in accordance with the procedures set forth by the General Assembly for the judicial review of congressional redistricting plans in N.C. Gen. Stat. §§ 120-2.3 and 120-2.4, this Court's Order and Opinion identified the defects in the 2021 Enacted Plans and directed the three-judge panel to conduct remedial proceedings. R pp 3816–24; *Harper*, 2022-NCSC-17, ¶¶ 27–72, 178–216. The Court ordered that "[i]n accordance with N.C.G.S. § 120-2.4(a), the General Assembly shall have the opportunity to submit new congressional and state legislative districting plans that satisfy all provisions of the North Carolina Constitution" and,

pursuant to the remedial process set forth in Section 120-2.4(a), the "trial court will approve or adopt compliant congressional and state legislative districting plans" by 23 February 2022. R pp 3823–24; *see Harper*, 2022-NCSC-17, ¶ 223.

C. Trial Court Remedial Proceedings

On 17 February 2022, the General Assembly enacted new congressional, House, and Senate plans. (R pp 4185, 4868) While the Remedial House Plan was enacted with bipartisan support, the Remedial Congressional and Senate Plans were passed on a party-line basis, with only Republican lawmakers voting in support. R pp 4876, 4878, 4881; S.L. 2022-2; S.L. 2022-3; S.L. 2022-4. The General Assembly provided that all three plans would be "contingent upon [their] approval or adoption by the Wake County Superior Court." SL-2022-2 § 2; SL-2022-3 § 2; SL-2022-4 § 2.

The trial court appointed Justice Robert F. Orr (Ret.), Justice Robert H. Edmunds, Jr. (Ret.), and Judge Thomas W. Ross (Ret.) to serve as Special Masters to assist with assessing and potentially developing remedial plans. (R pp 4179–80) Consistent with this Court's order, the Special Masters engaged four expert advisors—Dr. Bernard Grofman of the University of California, Irvine, Dr. Tyler Jarvis of Brigham Young University, Dr. Eric McGhee of the Public Policy Institute of California, and Dr. Samuel Wang of Princeton University—to assist. (R p 4871)

The parties submitted comments to the three-judge panel, along with expert reports, addressing whether the proposed remedial plans complied with the standard set forth by this Court in its liability-phase ruling. (R pp 4618–54, 4678–857) Plaintiffs explained that the Remedial Congressional Plan failed to do so (R pp 4445–607, 4738–857) and submitted alternative proposed remedial plans (R pp 4445–607).

NCLCV Plaintiffs' expert, Dr. Moon Duchin, found that, based on recent electoral scenarios, under the Remedial Congressional Plan, Republicans could win a majority of North Carolina's 14 congressional seats even if they ***lost*** the statewide vote by a 3.72-point margin; Democrats, by contrast, could not win a majority of seats unless they won statewide by a 2.32-point margin. (R p 4808) Likewise, Dr. Duchin found that the plan translates Democratic statewide vote majorities into seat majorities just 31.25% of the time, while translating Republican statewide vote majorities into seat majorities 100% of the time. (R p 4808) Common Cause and *Harper* Plaintiffs' experts, Drs. Jonathan Mattingly and Gregory Herschlag, concluded that the Remedial Congressional Plan would deliver Republicans on average 1.575 more seats than it would deliver Democrats, given an identical vote share. (R p 4756)

All three experts agreed that on a whole host of metrics—mean-median difference, efficiency gap, close-votes-close-seats, and partisan bias—the Remedial Congressional Plan consistently fails common thresholds of partisan

favoritism. (R pp 4756, 4813) All three experts also agreed that this degree of skew was unnecessary and that Plaintiffs' alternative maps treated both parties far more fairly while also excelling on traditional districting principles such as compactness and respect for counties. (R pp 4757, 4808, 4813, 4819)

On 23 February 2022, the Special Masters issued a report and recommendation, as well as reports from each of the four expert advisors. (R p 4890) Even after "giving appropriate deference to the General Assembly," the Special Masters concluded that its "proposed remedial congressional plan fails to meet the threshold of constitutionality." (R p 4893) Their expert advisors reinforced that conclusion. Dr. Grofman found that the Remedial Congressional Plan would on average deliver Republicans 55.27% of seats in a tied election, showing a "***substantial*** pro-Republican bias." (R pp 5037, 5041 (emphasis in original)) Dr. Grofman concluded that the evidence "strongly suggest[s] the conclusion that this congressional map should be viewed as a pro-Republican partisan gerrymander." (R p 5042) Each of the three other Special Masters' expert advisors agreed that the Legislative Defendants' plan would disproportionately favor Republicans. (R pp 5060, 5081, 5114)

On the same day, the trial court issued its remedial order, approving the Remedial House and Senate Plans but finding that the Remedial Congressional Plan did not comply with the standard this Court had set. App. 59–60, FOF 34–35; App. 69–70, COL 3–8. In accordance with N.C. Gen. Stat.

§ 120-2.3, the trial court detailed the defects in the Remedial Congressional Plan that made it an unconstitutional partisan gerrymander, adopting the findings of the Special Masters and drawing on the work of their expert advisors. App. 58–60, FOF 26–27, 34–35; App. 69–70, COL 7–8.

Because the General Assembly did not act to remedy the defects that this Court identified in the 2021 Enacted Congressional Plan, the trial court moved to adopt a constitutionally compliant congressional map, as required by N.C. Gen. Stat. § 120-2.4(a), and this Court's liability-phase ruling. App. 70, COL 8–11. The trial court declined to adopt any of Plaintiffs' proposed remedial plans. App. 70, COL 8. Instead, the court modified the General Assembly's Remedial Congressional Plan "to bring it into compliance with the Supreme Court's order"—creating what this brief refers to as the "Modified Remedial Congressional Plan." App. 70, COL 80. Those modifications by the Special Masters and their expert Dr. Grofman dramatically improved the plan's scores on every metric of partisan advantage. (R pp 4894, 4902) Dr. Grofman concluded that the Modified Remedial Congressional Plan "is the most non-dilutive plan in partisan terms of any map that has been submitted to the Court." (R p 4902)

The trial court also denied the Legislative Defendants' motion to disqualify two of the Special Masters' expert advisors. After their engagement, Drs. Wang and Jarvis sent emails to three of Plaintiffs' experts to seek publicly

available data pertinent to the remedial-plan analyses of two of the Special Masters' experts. (R p 4898) In particular, Dr. Wang contacted Drs. Mattingly and Wesley Pegden to request publicly available "background information pertaining to the earlier analysis of the 2021 Redistricting Plan." (R p 4899) Dr. Jarvis contacted Drs. Mattingly and Herschlag seeking the same. (R p 4899) Upon discovering the communication, *Harper* Plaintiffs' counsel immediately notified all parties and the court. (R p 4608) The Legislative Defendants moved to disqualify Drs. Wang and Jarvis. (R p 4655) After the Special Masters determined that "the information sought by Dr. Wang and by Dr. Jarvis was publicly available" and that their work "was not determinative of any recommendations made by the Special Masters," the trial court denied the motion. R p 4899; App. 45–46.

D. Remedial Appeal and U.S. Supreme Court Proceedings

Later that day, on 23 February 2022, the Legislative Defendants filed a notice of appeal from the trial court's remedial ruling and moved for a stay of the Modified Remedial Congressional Plan. (R p 5143) This Court denied the stay motion that evening. *Harper v. Hall*, 868 S.E.2d 95, 97 (N.C. 2022) (mem.). The appeal remained pending.

Two days later, on 25 February 2022, the Legislative Defendants filed a motion in the U.S. Supreme Court seeking an emergency stay of the Modified Remedial Congressional Plan. LD Emergency App. for Stay Pending Pet. for

Writ of Certiorari, *Moore v. Harper*, No. 21A455 (U.S. Feb. 25, 2022). The Legislative Defendants asserted that the federal Constitution's Elections Clause barred North Carolina courts from reviewing the General Assembly's congressional redistricting plan for compliance with the North Carolina Constitution and from adopting a remedial map. *Id.* at 10–24. The Legislative Defendants also argued to the U.S. Supreme Court that this Court had violated separation-of-powers principles under North Carolina law, even though this Court had repeatedly rejected those same separation-of-powers arguments. *Id.* at 17–22; *Harper*, 2022-NCSC-17, ¶¶ 112–120 (citing cases).

Plaintiffs and the State Defendants opposed the stay application, explaining that this Court and the trial court had followed North Carolina law, including the General Assembly's own statutes allowing North Carolina courts to review and modify congressional districting plans. State Resp'ts Resp. in Opp'n to Emergency Appl., *Moore v. Harper*, No. 21A455 (U.S. Mar. 2, 2022); *NCLCV* Resp'ts Resp. in Opp'n to Emergency Appl., *Moore v. Harper*, No. 21A455 (U.S. Mar. 2, 2022); *Harper* Resp'ts Resp. in Opp'n to Emergency Appl., *Moore v. Harper*, No. 21A455 (U.S. Mar. 2, 2022); Resp't Common Cause Opp'n to Emergency Appl., *Moore v. Harper*, No. 21A455 (U.S. Mar. 2, 2022). On 7 March 2022, the U.S. Supreme Court denied the stay application. Order, *Moore v. Harper*, No. 21A455 (U.S. Mar. 7, 2022).

On 17 March 2022, the Legislative Defendants filed a petition for a writ of certiorari in the U.S. Supreme Court, again invoking the federal Elections Clause. Pet. for Writ of Certiorari, *Moore v. Harper*, No. 21-1271 (U.S. Mar. 17, 2022). The Legislative Defendants again misconstrued North Carolina law and ignored that the General Assembly had expressly authorized state-court review of redistricting plans in N.C. Gen. Stat. §§ 120-2.3 and 120-2.4. *Id.* at 31–38. Plaintiffs and the State Defendants again opposed. State Resp'ts Br. in Opp'n, *Moore v. Harper*, No. 21-1271 (U.S. May 20, 2022); *NCLCV* Br. in Opp'n, *Moore v. Harper*, No. 21-1271 (U.S. May 20, 2022); *Harper* Br. in Opp'n, *Moore v. Harper*, No. 21-1271 (U.S. May 20, 2022); Common Cause Br. in Opp'n, *Moore v. Harper*, No. 21-1271 (U.S. May 20, 2022). On 30 June 2022, the U.S. Supreme Court granted the petition, even as the Legislative Defendants' appeal of the trial court's remedial ruling remained pending in this Court. *Moore v. Harper*, 142 S. Ct. 2901 (2022) (mem.).

On 13 July 2022, the Legislative Defendants filed a motion asking this Court to dismiss the appeal of the Modified Remedial Congressional Plan that they had filed more than four months before. LDs' Mot. to Dismiss Appeal, *Harper v. Hall*, No. 413PA21 (N.C. July 13, 2022). *NCLCV* and *Harper* Plaintiffs opposed the motion to dismiss, on the grounds that the Legislative Defendants were seeking to prevent this Court from correcting the Legislative Defendants' misconstruction of North Carolina law in the U.S. Supreme

Court—namely, preventing the Court from clarifying that North Carolina statutes expressly authorize North Carolina courts to review congressional districting maps and adopt constitutionally compliant maps if the General Assembly fails to do so. *Harper* & *NCLCV* Pls.' Resp. in Opp'n to Mot. to Dismiss Appeal & Cross-Mot. for Summ. Affirmance, *Harper v. Hall*, No. 413PA21 (N.C. July 18, 2022). On 28 July 2022, this Court deferred ruling on the motion to dismiss. Order, *Harper v. Hall*, No. 413PA21 (N.C. July 28, 2022). Four days later, the Legislative Defendants filed their opening brief in this appeal, omitting any mention of the Elections Clause argument that they had previously raised before this Court, and which was the basis for their petition for certiorari in the U.S. Supreme Court.

On 29 August 2022, the Legislative Defendants continued to misconstrue North Carolina law in their merits brief in the U.S. Supreme Court and asserted that the North Carolina courts had "nullif[ied] the General Assembly's chosen 'Regulations' of the 'Manner of holding Elections,' U.S. Const. art. I, § 4, cl. 1." Pet'rs Br. 50, *Moore v. Harper*, No. 21-1271 (U.S. Aug. 29, 2022) ("*Moore* Pet. Br."); *accord* Pet'rs Mot. for Leave to Dispense with Preparation of a J.A. 1, *Moore v. Harper*, No. 21-1271 (U.S. Aug. 19, 2022).

STANDARD OF REVIEW

On appeal, "[c]onclusions of law are reviewed de novo." *Dickson v. Rucho*, 367 N.C. 542, 551, 766 S.E.2d 238, 245 (2014), *summarily vacated on*

other grounds, 575 U.S. 959 (2015). The trial court's factual findings are binding so long as they are "supported by competent evidence, even if … there is evidence to the contrary." *Tillman v. Comm. Credit Loans, Inc.*, 362 N.C. 93, 100–01, 655 S.E.2d 362, 369 (2008) (alteration in original) (quoting *Lumbee River Elec. Membership Corp. v. City of Fayetteville*, 309 N.C. 726, 741, 309 S.E.2d 209, 219 (1983)).

SUMMARY OF ARGUMENT

In its liability-phase ruling, this Court set forth a clear standard for evaluating districting plans: A plan must afford "voters of all political parties substantially equal opportunity to translate votes into seats across the plan." *Harper*, 2022-NCSC-17, ¶ 163. Competent evidence supports the trial court's conclusion that the Remedial Congressional Plan fails to meet this standard. Each of the Special Masters and each of their expert advisors agreed that the Remedial Congressional Plan systematically advantages Republican voters over Democratic voters. And as shown by the far more evenhanded modified map developed by the Special Masters themselves, this partisan skew is not preordained by North Carolina's political geography.

Similarly unavailing is the Legislative Defendants' resort to the presumption of constitutionality and the separation of powers. This Court has already explained that a districting plan is entitled to a presumption of constitutionality only if "there is a significant likelihood that [it] will give the

voters of all political parties substantially equal opportunity to translate votes into seats." *Id.* The Remedial Congressional Plan fails to satisfy that standard and, under this Court's decision, is presumptively ***un***constitutional and subject to strict scrutiny. *Id.* ¶ 170.

Nor is there merit to the Legislative Defendants' contention that the trial court committed reversible error when it declined to disqualify two of the Special Masters' expert advisors for seeking publicly available information from Plaintiffs' experts. The Special Masters found that the communications from the two advisors did "not appear to be made in bad faith" and that the two advisors' analysis "was not determinative of any recommendations made by the Special Masters to the court." (R p 4899) The Legislative Defendants come nowhere close to identifying any actual bias on behalf of the assistants, let alone on behalf of the Special Masters themselves.

Finally, the Legislative Defendants' tactical decision to waive their federal Elections Clause argument in their opening brief has consequences: The Legislative Defendants have abandoned this argument not only with respect to the Remedial Congressional Plan, but also with respect to this Court's interlocutory decision invalidating the 2021 Enacted Congressional Plan. Moreover, if this Court chooses to grant the Legislative Defendant's motion to dismiss this appeal rather than resolving it on the merits, it should clarify the terms of dismissal to avoid prejudice to Plaintiffs. In particular, the

Court should make clear that any dismissal leaves in effect the trial court's final order adopting the Remedial Congressional Plan and renders that order a final judgment, and that the final judgment precludes the Legislative Defendants from relitigating all issues necessary to the outcome, including any argument under the federal Elections Clause.

ARGUMENT

I. Competent Evidence Supports the Trial Court's Finding that the Remedial Congressional Plan Fails to Satisfy the Standard this Court Set.

The trial court correctly held that "the Remedial Congressional Plan does not meet [this Court's] requirements" because it contains a degree of "partisan skew" that is "not explained by the political geography of North Carolina." App. 58–60, FOF 26, 34–35. The Legislative Defendants do not and cannot meet their heavy burden of showing that ***no*** competent evidence supports the court's finding of an unnecessary partisan skew. *Tillman*, 362 N.C. at 100–01, 655 S.E.2d at 369. The Legislative Defendants contend, incorrectly, that this Court's opinion set forth "statistical ranges" that definitively establish a plan's constitutionality. LD Br. 20–21. But even if those statistical ranges were controlling, the trial court found that the Remedial Congressional Plan failed to meet them. Competent evidence supported those findings, and they are "conclusive" on appeal. *Tillman*, 362 N.C. at 100, 655 S.E.2d at 369.

Indeed, overwhelming record evidence shows that the Remedial Congressional Plan systematically advantages voters of one political party over another. And overwhelming evidence likewise confirms that this skew did not derive from political geography: The trial court had before it multiple plans that give "voters of all political parties substantially equal opportunity to translate votes into seats" while performing better on traditional districting principles—one modified plan developed by the Special Masters and Dr. Grofman, and two plans proposed by Plaintiffs. *Harper*, 2022-NCSC-17, ¶ 163.

A. Redistricting Plans Must Provide Voters of All Political Parties Substantially Equal Opportunity to Translate Votes into Seats.

This Court set forth a clear standard in its liability-phase ruling: Redistricting plans must "give … voters of all political parties substantially equal opportunity to translate votes into seats." *Id.*; R pp 3821–22. As the Court explained, that standard requires districting plans to treat voters symmetrically, regardless of partisan preference: Voters who prefer one party in a given election "are entitled to have substantially the same opportunity to elect[] a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised [the same] percentage of the statewide vote." *Harper*, 2022-NCSC-17, ¶ 169.

Thus, the Court held that a redistricting plan is "presumptively constitutional" only if the evidence shows that "there is a significant likelihood"

that "voters of all political parties [will have] substantially equal opportunity to translate votes into seats across the plan." *Id.* ¶ 163. By contrast, if the plan fails to treat all voters equally, "mak[ing] it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters," strict scrutiny applies, and the plan is constitutional only if the General Assembly can prove that the plan's partisan skew is "necessary to promote a compelling governmental interest"—such as keeping districts compact and respectful of "political subdivisions" like counties. *Id.* ¶¶ 170, 180.

In evaluating whether a districting plan is entitled to a presumption of constitutionality, this Court explained that courts may consider various statistical approaches and metrics. *Id.* ¶¶ 163, 180. But this Court made clear that it was not "identify[ing] an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Id.* ¶ 163. That is because "there are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander" and various "combination[s] of these metrics" that can "demonstrate[] ... a significant likelihood" that a plan affords "voters of all political parties substantially equal opportunity to translate votes into seats." *Id.* "What matters," the Court explained, "is that each voter's vote carries roughly the same weight when drawing a districting plan that translates votes into seats in a legislative body." *Id.* ¶ 169.

B. The Trial Court's Findings Are Supported by Competent Evidence.

The Legislative Defendants do not address the constitutional standard this Court adopted. Instead, they focus on two statistical thresholds: a mean-median difference of less than 1% and an efficiency gap of 7% or less. But competent evidence supports the trial court's finding that the Remedial Congressional Plan exceeded even those thresholds. Competent evidence also shows that the plan violates the ultimate constitutional standard set by this Court.

1. Competent Evidence Shows the Remedial Congressional Plan Fails to Treat Voters of Both Parties Equally.

To begin, the trial court found that the plan failed to satisfy even the two statistical thresholds that the General Assembly now urges should be treated as conclusive—a mean-median difference of less than 1% and an efficiency gap of 7% or less. App. 59, FOF 34. As a result, the trial court held that the Remedial Congressional Plan "does not meet the … standards and requirements in [this Court's] Remedial Order and full opinion," even on the Legislative Defendants' interpretation, and is "subject to strict scrutiny." App. 70, COL 9. That finding is amply supported by "competent evidence" in the record and must be upheld. *Tillman*, 362 N.C. at 101, 655 S.E.2d at 369.

Three of the four Special Masters' expert advisors reported efficiency-gap values for the Remedial Congressional Plan of more than 7%. Dr. Wang

found an average efficiency gap of 7.4%. (R p 5079) Dr. Jarvis found an average efficiency gap of 8.8%. (R p 5115) And Dr. McGhee found an efficiency-gap range of 6.4% to 7.6%. (R p 5054) The final expert—Dr. Grofman—found an efficiency gap so close to 7% that he concluded that "the legislative map drawers … sought to draw a congressional map that just narrowly pass[ed] a supposed threshold test for partisan gerrymandering" and warned the Special Masters and the trial court that this figure was not "proof that there is no vote dilution" in the plan. (R p 5042)

Likewise, ample evidence shows that the Remedial Congressional Plan's mean-median difference exceeded 1%. Dr. McGhee calculated a mean-median score range of 1.1% to 1.6%. (R p 5054) Dr. Jarvis examined 11 statewide elections and found that the mean-median difference exceeded 1% in four elections. (R p 5114) In the ten elections Dr. Wang examined, the mean-median difference averaged 1.2% and exceeded 1% five times. (R p 5080) And again, Dr. Grofman, the only Special Masters' expert advisor to find a mean-median score consistently below 1%, warned that this finding in isolation carried little weight and could "present a misleading picture of the partisan consequences of the map as a whole." (R pp 5030, 5039) Ample competent evidence thus supports the finding that the Remedial Congressional Plan exceeds the thresholds the Legislative Defendants urge should apply.

Moreover, the holistic analysis this Court's opinion ***actually*** requires—which considers the additional metrics this Court identified as probative, like "partisan symmetry analysis" and "comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect"—overwhelmingly confirms that the Remedial Congressional Plan does not give voters "substantially the same opportunity to elect[] a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised [the same] percentage of the statewide vote." *Harper*, 2022-NCSC-17, ¶¶ 169, 180. The work of every expert below—including the Legislative Defendants' expert—shows that the Remedial Congressional Plan fails this standard.

Dr. Grofman found that the Remedial Congressional Plan would on average give Republicans 55.27% of seats in a tied election, showing a "***substantial*** pro-Republican bias." (R pp 5037, 5041 (emphasis in original)) As Dr. Grofman concluded, the plan is "very lopsidedly Republican," and the evidence as a whole "strongly suggest[s] the conclusion that this congressional map should be viewed as a pro-Republican partisan gerrymander." (R pp 5040, 5042) Indeed, Dr. Grofman powerfully underscored that point. The Remedial Congressional Plan created "6 Republican leaning districts that, based on averaged recent data will, barring a political tsunami, elect Republicans; 3

Democratic leaning districts that will, barring a political tsunami, elect Democrats; and 5 competitive districts." (R p 5040) To illustrate the partisan skew of a map with twice as many Republican-leaning districts as Democratic-leaning districts (six to three), Dr. Grofman suggested a "sports analogy":

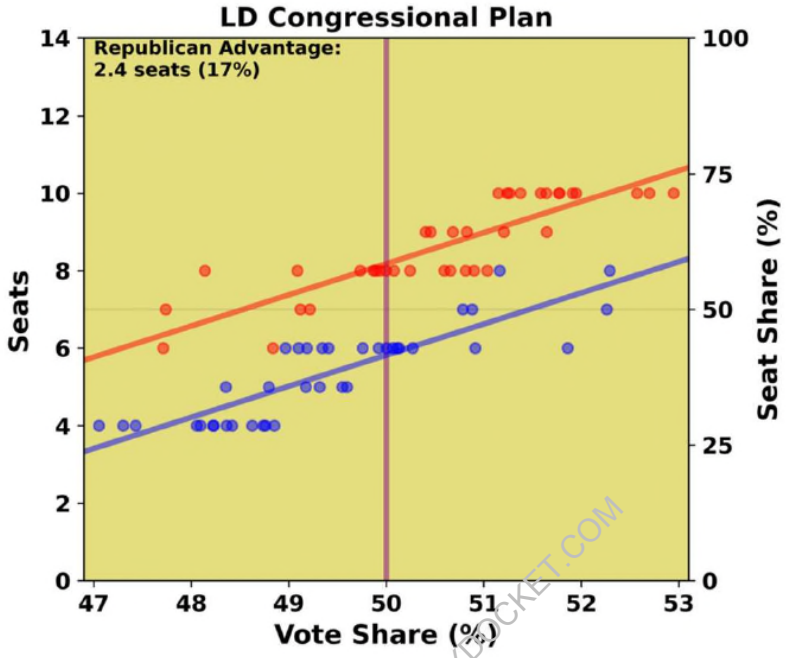
> Imagine a playoff series of 14 games of which a majority (9 of 14) have already been played, with five games still to go. The team that has won only 3 of the 9 games would need to win all five of the remaining games in order to win the series, and it would need to win four of the five just to get a tie. If the teams were evenly matched in the remaining games of the series the likelihood of winning all five is under 5%.

(R pp 5040–41) Statistical analysis, Dr. Grofman explained, confirmed that the bias in the Remedial Congressional Plan was "extreme." (R p 5041)

Consistent with Dr. Grofman's conclusion, Dr. McGhee found that the Remedial Congressional Plan retains about half of the unconstitutional bias in the invalidated congressional plan and thus "still favor[s] Republicans." (R p 5060) Dr. Wang concluded that the "Legislative Defendants' remedial plan contains an average advantage of approximately 1.7 Congressional seats for Republicans, and this advantage persists across a wide range of likely scenarios that may arise." (R p 5081) And Dr. Jarvis found that the Remedial Congressional Plan nearly always gives Republicans an extra seat in a tied election—creating a persistent two-seat advantage (with eight Republican seats to only six Democratic seats). (R p 5114)

These findings are consistent with the work of the parties' experts. *NCLCV* Plaintiffs' expert, Dr. Duchin, evaluated how the Remedial Congressional Plan would have translated votes into seats under every single statewide contested partisan election over the last decade. (R p 4808) She found that Democrats would not win a majority of North Carolina's 14 congressional seats unless they won statewide by a 2.32-percentage-point margin. (R p 4808) By contrast, Republicans could win a majority of seats even if they ***lost*** the statewide vote by a 3.72-point margin. (R p 4808) In nearly tied elections decided by less than one percentage point, the plan created an average of 5.8 Democratic seats and 8.2 Republican seats. (R p 4808) This asymmetry persisted even when voters across the state clearly prefer one party over another. (R p 4808) The result was a persistent 2.4-seat advantage for Republicans, across a wide variety of electoral environments.

Figure 1: Vote Shares & Seat Shares Under the Remedial Congressional Plan in Recent Statewide Elections

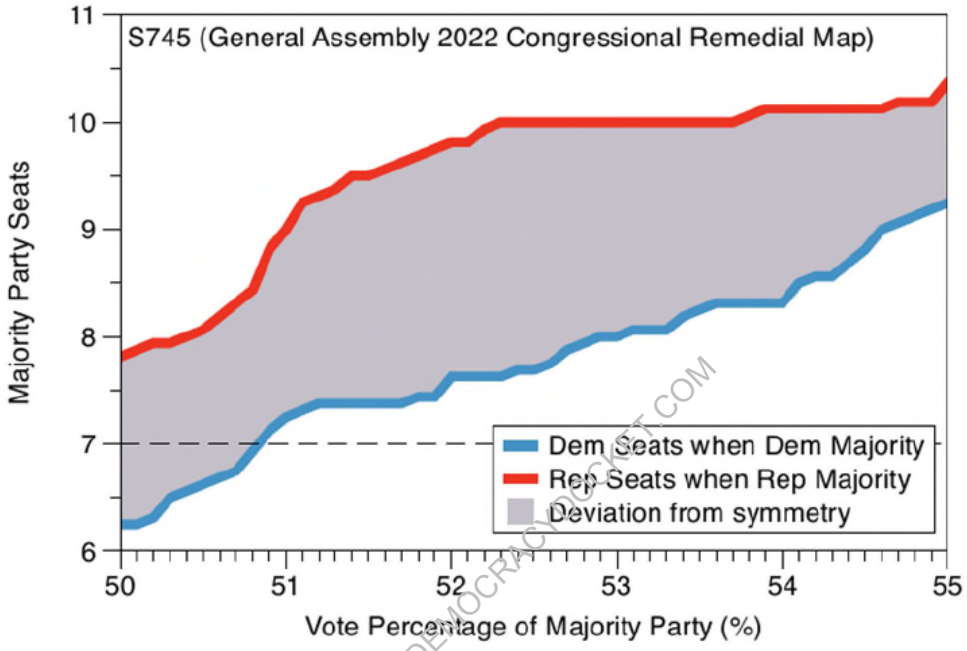


Source: R pp 4785, 4808.

The experts for Common Cause and *Harper* Plaintiffs—Drs. Mattingly and Herschlag—found the same problem. They tested the partisan symmetry of the Remedial Congressional Plan by taking 16 recent elections and then applying a "uniform swing" to see how the plan's seat shares would have changed had the vote share been somewhat different in each election, across the entire state. (R p 4755) Both concluded that Republicans would on average win 1.575 more congressional seats than Democrats given an identical vote share. (R pp 4756–57) To illustrate this bias, Drs. Mattingly and Herschlag averaged the seat results of their uniform-swing analysis for each given vote share. (R p 4757) As Figure 2 shows, unlike a symmetrical map, where the

blue and red lines would coincide, the Remedial Congressional Plan consistently gives Republicans a significant seat advantage.

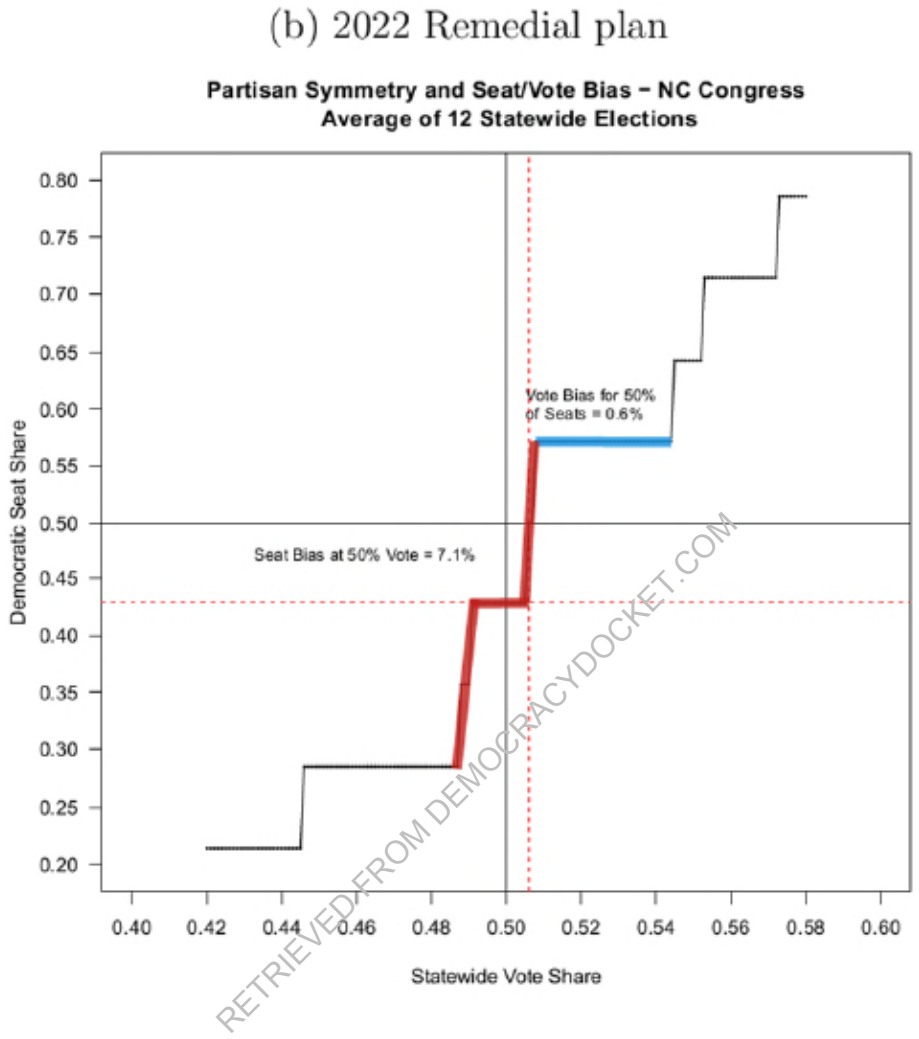
Figure 2: Vote Shares & Average Seat Shares Under Uniform-Swing Analysis



Source: R p 4757.

Even the Legislative Defendants' expert, Dr. Michael Barber, confirmed this discrepancy. He evaluated partisan symmetry in the Remedial Congressional Plan and found that when Democrats increase their vote share to nearly 55%, they win only eight congressional seats. (R p 4394) By contrast, as Figure 3 illustrates, when Republicans increase their vote share to just 51%, they win ***ten*** congressional seats. (R p 4394)

Figure 3: Dr. Barber's Partisan-Symmetry Analysis Based on Selected Elections



Source: R p 4745.

All this evidence supports the trial court's conclusion that the "Remedial Congressional Plan does not meet the … standards and requirements in [this Court's February 2022] Remedial Order and full opinion" and is thus presumptively unconstitutional and "subject to strict scrutiny." App. 70, COL 9.

2. Competent Evidence Supports the Trial Court's Finding that the Remedial Congressional Plan Fails Strict Scrutiny.

Competent evidence also supports the trial court's finding that this substantial partisan skew failed strict scrutiny. *See* App. 60, FOF 35; App. 70, COL 10. In evaluating whether partisan skew is narrowly tailored to serve a compelling government interest, the trial court was tasked with "assessing whether the mapmaker adhered to traditional neutral districting criteria" such that "a meaningful partisan skew ***necessarily results*** from North Carolina's unique political geography." *Harper*, 2022-NCSC-17, ¶ 163 (emphasis added); *see also id.* ¶ 163 n.15 ("[A]dherence to neutral districting criteria primarily goes to whether the map is justified by a compelling governmental interest …."). As the trial court found, the plan's "partisan skew … is not explained by the political geography of North Carolina," and thus the plan failed strict scrutiny. App. 60, FOF 35. The Legislative Defendants cannot carry their burden of showing that this finding was unsupported by competent evidence. In fact, the record renders the trial court's finding inescapable.

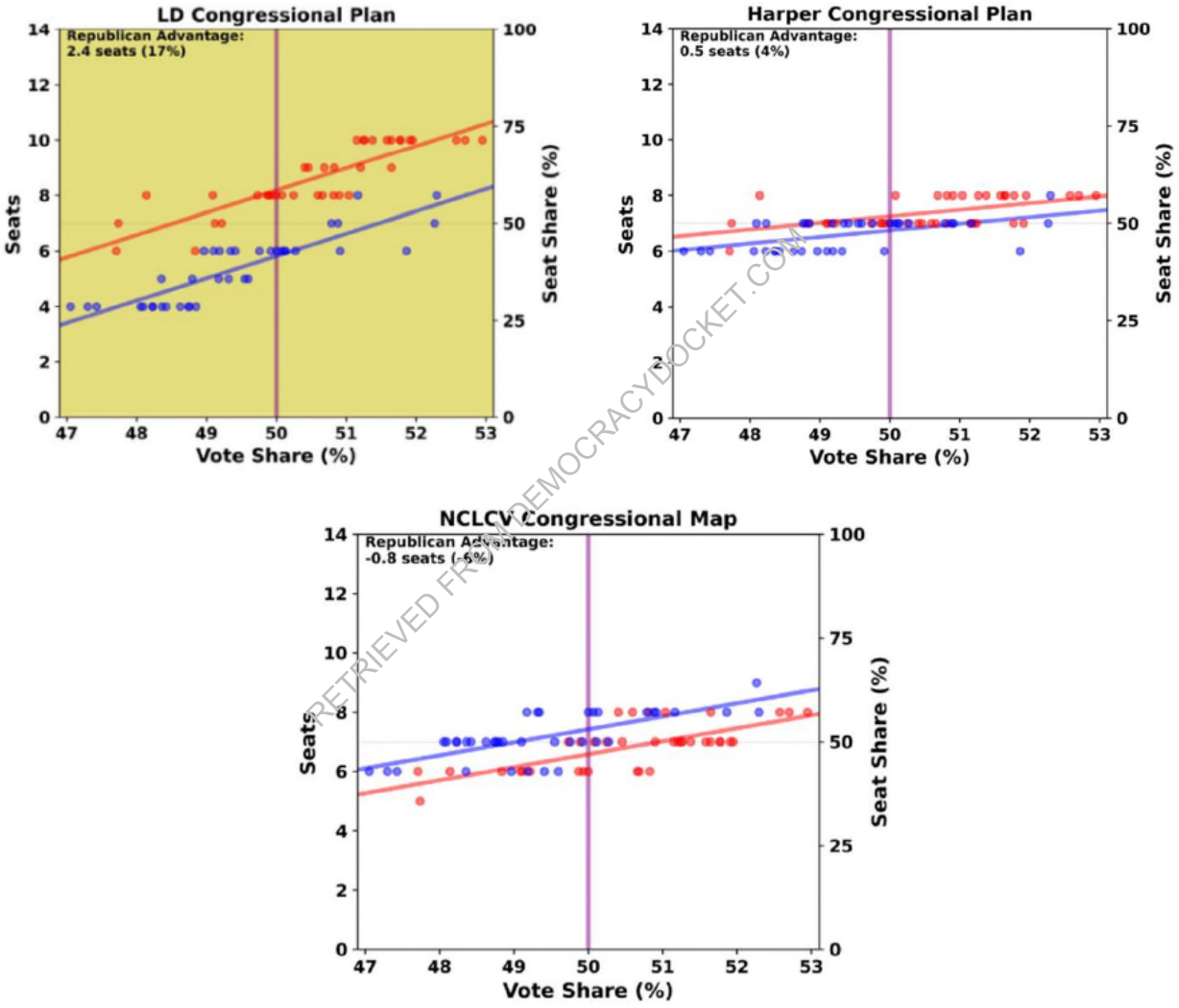
Dispositive evidence confirming this point comes from the Special Masters' Modified Remedial Congressional Plan, which dramatically reduced the Remedial Congressional Plan's partisan skew while maintaining adherence to traditional neutral districting principles. Upon finding that the Remedial Congressional Plan "fails to meet the threshold of constitutionality,"

the Special Masters, with Dr. Grofman's assistance, modified the plan to reduce its substantial partisan bias. (R p 4893) As the Special Masters explained, the Modified Remedial Congressional Plan reduced the efficiency gap from to 0.63%, the seat bias to 0.28%, and the vote bias to 0.10%—improving each of these metrics by better than 90%—all while "maintaining the number of county splits [and] retaining equal population, compactness, and contiguity, as well as respecting municipal boundaries." (R p 4902) Based on Dr. Grofman's calculations, the Special Masters' remedial plan "is the most non-dilutive plan in partisan terms of any map submitted to the Court" (R p 4902).

In addition, Plaintiffs submitted two congressional maps that treat voters of both parties fairly while meeting or exceeding the Remedial Congressional Plan's adherence to traditional neutral districting principles. Dr. Grofman explained that "it is … clear that the legislatively proposed congressional map is much more extreme with respect to partisan bias" than the more neutral maps proposed by Plaintiffs. (R p 5041) Dr. McGhee found that Plaintiffs' alternative maps created "less than half" the Republican advantage than the Remedial Congressional Plan did. (R p 5061) Dr. Wang reviewed Plaintiffs' proposed congressional maps and found that both reduced seat partisan asymmetry, partisan bias, and the efficiency gap when compared to the Remedial Congressional Plan. (R p 5082)

These conclusions were buttressed by analysis from Plaintiffs' experts. Dr. Duchin concluded that both of Plaintiffs' maps reduced bias on every single metric she studied. (R p 4813)

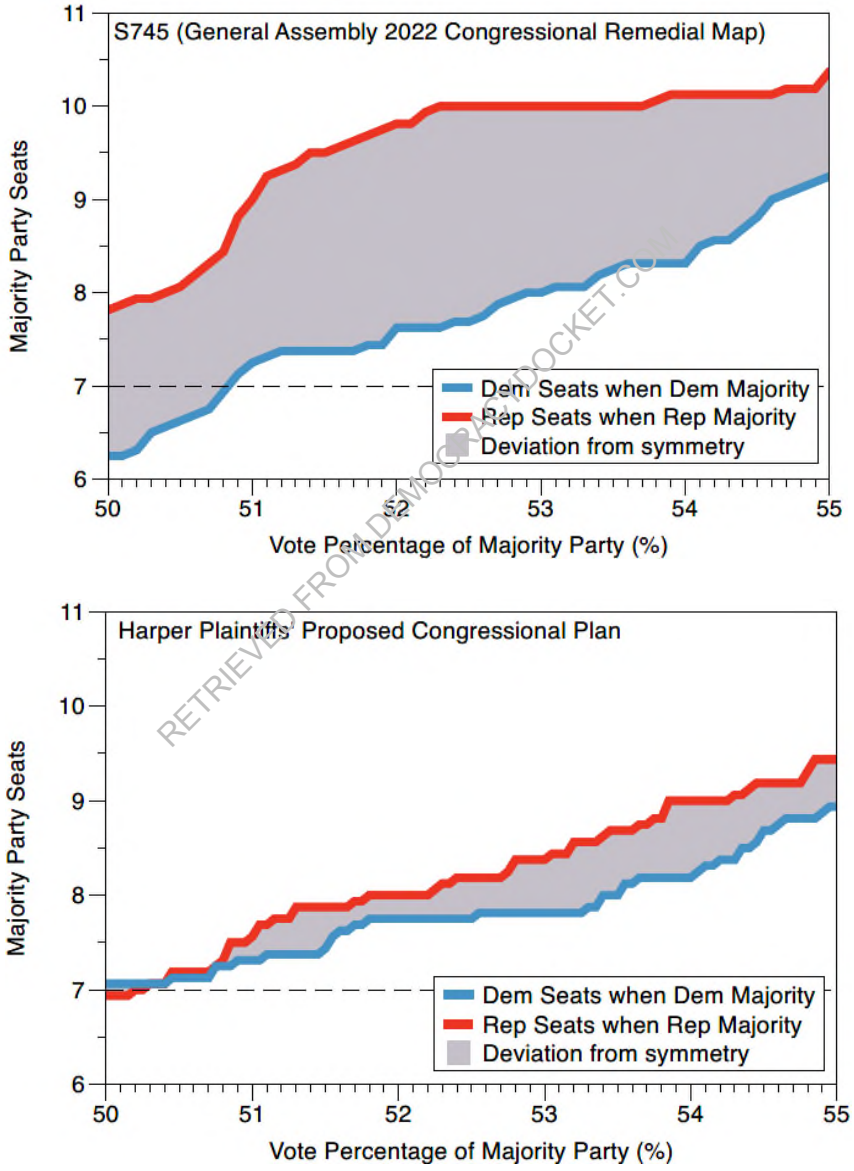
Figure 4: Seat Advantage Under Remedial Congressional Plan and Plaintiffs' Proposed Maps



Source: R pp 4785, 4808.

Likewise, *Harper* Plaintiffs' experts, Drs. Mattingly and Herschlag, concluded, based on their uniform-swing analysis, that the *Harper* proposed map came far closer to symmetry than did the Remedial Congressional Plan.

Figure 5: Partisan Symmetry Under Remedial Congressional Plan and Harper *Plaintiffs' Proposed Map*



Source: R p 4757.

And like the Modified Remedial Congressional Plan, Plaintiffs' plans were similar or superior to the Remedial Congressional Plan on traditional districting principles.[2]

In short, nothing about North Carolina's political geography justifies—much less necessitates—the partisan skew in the Remedial Congressional Plan. The Legislative Defendants do not argue otherwise. Nor do they identify any other compelling governmental interest that could justify the partisan skew in the Remedial Congressional Plan. The trial court therefore properly determined that this map failed strict scrutiny.

C. The Legislative Defendants' Efforts to Second-Guess the Trial Court's Factual Findings Are Unavailing.

The Legislative Defendants raise several arguments to try to overturn the trial court's findings of fact. None succeeds.

Principally, the Legislative Defendants argue that the trial court clearly erred when it found that the "Remedial Congressional Plan is not satisfactorily

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[2] In particular, the *NCLCV* and *Harper* maps had average Reock compactness scores of 0.47 and 0.45, respectively, and an average Polsby-Popper compactness score of 0.38 and 0.36 (where higher numbers indicate more compact districts). (Doc. Ex. 15518, 15691) These scores well exceeded the Remedial Congressional Plan's average Reock score of 0.38 and Polsby-Popper score of 0.30. (Doc. Ex. 13478) Likewise, whereas the Remedial Congressional Plan split 45 municipalities, the *NCLCV* and *Harper* maps split only 27 and 37, respectively. (Doc. Ex. 13528, 15457–72, 15649) And each of Plaintiffs' plans split no more counties than did the Remedial Congressional Plan. (Doc. Ex. 13507–13, 15449–52, 15631)

within the statistical ranges set forth in the Supreme Court's full opinion." App. 59, FOF 34. Per the Legislative Defendants, when the trial court evaluated whether the Remedial Congressional Plan satisfied those "statistical ranges," it had to limit itself to the Legislative Defendants' own calculations. LD Br. 18–31.

This argument fails, first, because it ignores, and inverts, the standard of review. The trial court's findings of fact in this case are "conclusive on appeal if supported by competent evidence, ***even if … there is evidence to the contrary***." *Tillman*, 362 N.C. at 100–01, 655 S.E.2d at 369 (alteration in original) (emphasis added) (quoting *Lumbee River Elec. Membership Corp.*, 309 N.C. at 741, 309 S.E.2d at 219). The question on appeal is thus not whether the Legislative Defendants submitted evidence to support their position. It is whether any competent evidence supports the trial court's conclusion that the Remedial Congressional Plan fails to meet the standard this Court set. That question has a straightforward answer: Substantial expert evidence supported the trial court's conclusion that the Remedial Congressional Plan did not have an efficiency gap of less than 7% or a mean-median difference of less than 1% and did not give voters of both parties equal opportunity to translate votes into seats. *Supra* pp. 23–30.

The Legislative Defendants' arguments also underscore why this Court expressly eschewed "identify[ing] an exhaustive set of metrics or precise mathematical thresholds." *Harper*, 2022-NCSC-17, ¶ 163.

If the General Assembly had the power to select the metrics for partisan fairness, along with the sets of elections and other parameters to use when calculating those metrics, then it would be free to ignore the principled standard this Court set. While the Legislative Defendants admit that "analytical choice makes an impact," LD Br. 28, they insist that any "analytical choice" made by the General Assembly is immune from judicial review, regardless of any data manipulation embedded within that choice. Such manipulation is precisely what the Legislative Defendants accomplished here, where they reduced their efficiency-gap and mean-median difference figures substantially by cherry-picking certain statewide elections, but nonetheless produced a plan with an exceptional partisan skew. *Infra* pp. 38–39. The potential for such manipulation underscores why this Court instead grounded its liability-phase ruling on constitutional principle and emphasized that the dispositive question is always whether a 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, 180; *supra* pp. 21–22.

Given all that, the Legislative Defendants' observations that the various experts below each used different methods and sets of elections, *see* LD Br. 25–

29, only underscores the importance of a holistic view of the competent evidence. The diversity of available methods is a feature, not a bug. Far from a reason to discard these experts' work, the fact that six different experts used a variety of methodologies and independently found values higher than those asserted by the Legislative Defendants is a powerful reason to question the Legislative Defendants' claims that their remedial plan complied with even the two statistical thresholds they now urge this Court to rely on to the exclusion of all other analyses. The same is true of the Legislative Defendants' unsupported suggestion that the trial court should simply have accepted the General Assembly's reported statistics because legislators used a program called Maptitude. If anything, the fact that every one of the Special Masters' expert advisors disagreed with the Maptitude calculation merits affording less weight to these reported statistics.

Moreover, as the Legislative Defendants themselves admit, Maptitude calculations depend on the electoral data that the user selects, and the General Assembly selected a limited set of 12 elections. LD Br. 7, 25; Doc. Ex. 11641, 15416. Notably, in selecting those elections, the General Assembly omitted two up-ballot races—the 2016 races for Governor and Attorney General—where the Remedial Congressional Plan would have translated statewide Democratic vote majorities into Republican seat majorities. (Doc. Ex. 15416; R p 4808)

The Legislative Defendants imply that Dr. Mattingly omitted these same elections in evaluating the 2021 Enacted Plans. LD Br. 7. But Legislative Defendants cite a portion of Dr. Mattingly's report that analyzes cluster-specific results under state legislative plans. LD Br. 7; R pp 2593–627. To evaluate the 2021 Enacted Congressional Plan as a whole, Dr. Mattingly used a broader set of 16 elections that included the two contests that generated counter-majoritarian results, and which the Legislative Defendants now omit. (R pp 2639, 4746) As the Legislative Defendants concede, using Dr. Mattingly's 16 elections would push the mean-median difference and the efficiency gap beyond the Legislative Defendants' own thresholds. LD Br. 29; *see also* R pp 4746, 4758. Notably, Dr. Duchin evaluated every single one of the 52 statewide contested partisan races over the last decade (R p 4808) and concluded that the Remedial Congressional Plan has an efficiency gap of 9.3% and a mean-median difference of 1.5% (R p 4813).

The Legislative Defendants also incorrectly assert that the trial court "approved" their methods and therefore was required to accept the Legislative Defendants' cherry-picked metrics on remand. LD Br. 23, 26, 29. The trial court did no such thing. It merely held that the Legislative Defendants had acted permissibly in considering some partisan data during the redrawing. App. 56, FOF 15. The court did not endorse the relevance or persuasiveness of the specific electoral data the Legislative Defendants used. Nor did it hold, as

the Legislative Defendants now claim, that the metrics on which the Legislative Defendants now rest their entire case alone sufficed to demonstrate the constitutionality of the Remedial Congressional Plan.

Finally, the Legislative Defendants incorrectly argue that the trial court made no finding on the mean-median difference and efficiency gap in the Remedial Congressional Plan. LD Br. 22. But as an initial matter, neither this Court's liability-phase ruling nor N.C. Gen. Stat. § 120-2.4 required the trial court to enumerate the mean-median difference or efficiency gap for any proposed plan. More to the point, the trial court ***did*** enumerate its findings on those statistics: It found that the mean-median difference exceeded 1% and that the efficiency gap was not "less than 7%," and it relied on those findings to hold that the Remedial Congressional Plan does not satisfy the "standards and requirements" that this Court established. App. 59, FOF 34, 68; App. 70, COL 9.

Given all this, the Legislative Defendants fail to carry their heavy burden to show that no competent evidence supports the decision below.

II. The Legislative Defendants' Deference Arguments Do Not Support Overturning the Decision Below.

A. The Trial Court Correctly Determined that the Remedial Congressional Plan Was Not Presumptively Constitutional.

For three reasons, this Court should reject the Legislative Defendants' invocations of deference and arguments that the trial court failed to apply a

"presumption of constitutionality" to the Remedial Congressional Plan. LD Br. 14–18.

First, this Court's liability-phase ruling explained exactly when a plan is "presumptively constitutional": namely, 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." *Harper*, 2022-NCSC-17, ¶ 163. This Court emphasized that this framework for analyzing the General Assembly's plans would apply specifically during the litigation's remedial phase. *Id.* ¶ 223. After this Court found the 2021 Enacted Congressional Plan unconstitutional, the trial court was required on remand to determine whether any remedial plan enacted by the General Assembly satisfied "all provisions of the North Carolina Constitution" before accepting it. *Id.* ¶ 178. The trial court understood that it could approve or adopt only "***compliant*** congressional and state legislative districting plans." (R p 3823 (emphasis added)) So did the General Assembly, which expressly stated that its congressional plan was "contingent upon its approval or adoption by the Wake County Superior Court." S.L. 2022-3 § 2. Because the Remedial Congressional Plan did not meet that standard, it is not entitled to a presumption of constitutionality.

Second, the Court need not decide whether the General Assembly was entitled to deference, because the trial court gave the Legislative Defendants more than their due and ***afforded*** them deference: The Special Masters'

findings—which the trial court adopted in full, App. 58, FOF 27—show that even after "giving appropriate deference to the General Assembly," the Special Masters found "that the proposed remedial congressional plan fails to meet the threshold of constitutionality." (R p 4893)

Third, the Legislative Defendants' invocations of deference are especially meritless because they were ***already*** found to have engaged in intentional discrimination in enacting all three of the now-invalidated 2021 plans. This Court held that the "Legislative Defendants presented no evidence at trial to disprove[] the extensive findings of fact of the trial court[] to the effect that the enacted plans are egregious and intentional partisan gerrymanders, designed to enhance Republican performance." *Harper*, 2022-NCSC-17, ¶ 8. Hence, if anything, the standard for assessing their proposed remedy should be ***more*** stringent than in the liability phase, to ensure that the constitutional harm has been fully cured. *See Stephenson v. Bartlett*, 357 N.C. 301, 307, 314, 582 S.E.2d 247, 251, 254 (2003) ("*Stephenson II*") (affirming trial-court holding that "the 2002 revised redistricting plans are constitutionally deficient" because the plans "fail to attain 'strict compliance' with [*Stephenson I*]").

Following analogous findings of intentional discrimination in districting, courts have placed the burden on the legislature to show that its proposed remedial plan will be effective in eliminating the prior discrimination. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 371 (Fla. 2015)

(holding that "[o]nce a direct violation of the Florida Constitution's prohibition on partisan intent in redistricting was found, the burden should have shifted to the Legislature to justify its decisions in drawing the congressional district lines"); *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 phase, 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").

The case law the Legislative Defendants rely on is inapposite: *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989), was a ***liability***-phase decision in which the Court considered the constitutionality of an apportionment act in the first instance; the Court was not reviewing the constitutionality of a proposed ***remedial*** plan, as is the case here. *See id.*, 325 N.C. at 449, 385 S.E.2d at 479. And here, the evidence before the trial court satisfied even the standard the Legislative Defendants incorrectly seek to derive from *Preston*, as it demonstrates that the Remedial Congressional Plan

was "plainly and clearly" unconstitutional. *Id.*, 325 N.C. at 449, 385 S.E.2d at 478.[3]

B. The Degree of Deference the Legislative Defendants Urge Would Violate the Separation of Powers.

To buttress their arguments for deference and a presumption of constitutionality, the Legislative Defendants invoke the "separation of powers." LD Br. 14, 15, 17, 23, 32, 34. They suggest that, when North Carolina courts review and remedy unconstitutional redistricting plans, they endanger the separation of powers—and that the only way to vindicate our State's separation of powers is to treat as conclusive the General Assembly's

[3] None of the other cases that the Legislative Defendants cite support their contentions. In *Abbott v. Perez*, 138 S. Ct. 2305 (2018), the U.S. Supreme Court was motivated by a concern about ***federal*** "intrusion" into state redistricting, *id.* at 2324 (quoting *Miller v. Johnson*, 515 U.S. 900, 915 (1995)). And its comment that federal courts should apply a "presumption of legislative ***good faith***" to state redistricting plans does not help the Legislative Defendants here. *Id.* The trial court ***did*** presume the General Assembly's good faith, and this Court's liability-phase ruling identified when districting plans are entitled to a presumption of constitutionality. Indeed, in enacting the plans at issue in *Perez*, the legislature was enacting remedial plans developed ***by a federal court***. *Id.* at 2325. Thus, even if *Perez* applied here, the case would support only a presumption of good faith for the future enactment of the ***Modified*** Remedial Congressional Plan.

The Legislative Defendants' remaining cases do not involve redistricting. *See 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 (1991) (challenge to installment purchase contract); *N.C. State Bd. of Educ. v. State*, 371 N.C. 170, 814 S.E.2d 67 (2018) (challenge to public education bill); *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479 (2005) (criminal matter); *Jenkins v. State Bd. of Elections*, 180 N.C. 169, 104 S.E. 346 (1920) (challenge to law affecting absentee ballots).

"analytical choice[s]." LD Br. 28. These arguments failed before this Court in the liability phase, and the Court should reject them again. *Harper*, 2022-NCSC-17, ¶ 113 (rejecting the argument that "reapportionment is committed to the sole discretion of the General Assembly" as "flatly inconsistent with our precedent interpreting and applying constitutional limitations on the General Assembly's redistricting authority").

1. The Legislative Defendants' Separation-of-Powers Arguments Ignore the Statutes Authorizing North Carolina Courts to Review and Remedy Unlawful Districting Plans.

To begin, the Legislative Defendants' arguments conflict with the North Carolina statutes specifically authorizing judicial review of congressional redistricting. The General Assembly has enacted statutes authorizing three-judge courts like the trial court below to hear "action[s] challenging the validity of any act … that … redistricts … congressional districts," N.C. Gen. Stat. § 1-267.1(a); to issue "judgment[s] declaring unconstitutional … any act … that … redistricts … congressional districts," *id.* § 120-2.3; and to implement "an interim districting plan" if the General Assembly does not "remedy any defects" in its plan within two weeks, *id.* § 120-2.4(a), (a1). Those statutes expressly authorize North Carolina's courts to review whether congressional districting plans comply with the North Carolina Constitution, and to remedy plans that violate the North Carolina Constitution as interpreted by North Carolina's

courts. North Carolina's courts do not endanger the separation of powers when they carry out judicial review that the General Assembly has expressly and specifically authorized. Far from suggesting that congressional districting plans deserve any special deference from North Carolina's courts, these statutes confirm that the normal standards of judicial review apply.

Plaintiffs expect that the Legislative Defendants will argue in reply that these statutes do not authorize judicial review; that they only "govern the ***procedure*** that applies in whatever districting challenges may be authorized by other, substantive provisions of law"; and that they are "best read as … govern[ing] [only] a ***federal*** constitutional challenge brought in state court." *Moore* Pet. Br. 47–48 (emphasis in original). The Legislative Defendants have raised those arguments in the U.S. Supreme Court in their attempt to resist the plain language and implication of the above-cited North Carolina statutes, which foreclose their federal Elections Clause claims: Because the General Assembly itself via these statutes has "prescribed" judicial review of, and remedies for, congressional districting plans that violate the state constitution, the North Carolina courts' actions in this case comported with the federal Elections Clause even under the Legislative Defendants' own interpretation of that Clause. *See generally Harper* and *NCLCV* Plaintiffs-Appellants' Resp. in Opp. to Mot. to Dismiss Appeal at 4–5, 6–8 (July 18, 2022) ("MTD Opp.").

But the Legislative Defendants' strained interpretation of these state statutes is incorrect. These statutes on their face contemplate, and authorize, that North Carolina state courts will (for example) issue "judgment[s] declaring unconstitutional … any act … that … redistricts … congressional districts," N.C. Gen Stat. § 120-2.3, and implement "an interim districting plan" if the General Assembly does not "remedy any defects" in its plan within two weeks, *id.* § 120-2.4(a), (a1). These statutes, moreover, are not limited to federal constitutional challenges but apply equally to state constitutional challenges. That is why North Carolina's courts have acted pursuant to these statutes to hear state constitutional challenges to congressional districting plans. *E.g.*, *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Sept. 3, 2019).

Indeed, *Stephenson v. Bartlett*, 358 N.C. 219, 595 S.E.2d 112 (2004) (*"Stephenson III"*), forecloses the Legislative Defendants' crabbed interpretation of these statutes and underscores how these statutes vindicate, rather than undermine, the separation of powers. There, this Court applied those statutes to a *state* constitutional challenge to legislative districts (contradicting the Legislative Defendants' arguments that they apply only to federal challenges). And in rejecting the argument that these statutes violated the separation of powers, this Court explained that "[i]n passing these statutes, the General Assembly has recognized the unique nature of these infrequent

but potentially divisive cases [*i.e.*, redistricting cases] and has set out a workable framework for judicial review that reduces the appearance of improprieties" and "allow[s] the General Assembly to exercise its proper responsibilities." *Id.*, 358 N.C. at 229–30, 595 S.E.2d at 119. That understanding of these statutes—that they establish a "framework for judicial review"—cannot be squared with the Legislative Defendants' argument that these statutes only concern narrow questions of venue and procedure. *Id.* These statutes affirm that this State's courts may continue, with the General Assembly's blessing, to review and remedy unlawful redistricting plans.

These on-point statutes, and this Court's interpretations of them in the face of a prior constitutional challenge, are fatal to the Legislative Defendants' separation-of-powers arguments in this Court. And only this Court, as the ultimate arbiter of the meaning of North Carolina's statutes, can authoritatively interpret the statutes that the Legislative Defendants continue to mischaracterize. *See* MTD Opp. at 6–8; *cf. Berger v. N.C. State Conf. of NAACP*, 142 S. Ct. 2191, 2202 (2022) (interpreting North Carolina law absent guidance from this Court and concluding that state law authorizes "legislative leaders [to] defend laws" in federal court as state agents).

2. The Legislative Defendants' Arguments Undermine Rather than Vindicate the Separation of Powers.

Even aside from these dispositive statutes, the Legislative Defendants' arguments are inconsistent with North Carolina's constitutional separation of powers and would undermine the North Carolina Constitution's fundamental guarantees on all matters related to redistricting.

By asserting that courts should defer to the "mathematical analysis" and metrics "politically chosen by the General Assembly," LD Br. 18, 23—instead of independently evaluating whether an apportionment plan provides North Carolina's citizens substantially equal voting power—the Legislative Defendants propose a framework that would effectively prevent the judiciary from performing its core constitutional duty: to "construe the limits on the powers of the branches of government created by our Constitution." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 2021-NCSC-6, ¶ 14. The result of such an approach is contrary to the separation of powers. *See* N.C. CONST. art. I, § 6; *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."). Indeed, the General Assembly itself recognized as much when it provided that the Remedial Congressional Plan's effectiveness

would be "contingent upon its approval or adoption by the Wake County Superior Court." SL-2022-3 § 2; *see also* SL-2022-2 § 2; SL-2022-4 § 2. The Legislative Defendants again cannot claim that the trial court endangered the separation of powers by carrying out the review the General Assembly itself prescribed.

The Legislative Defendants' approach would also run contrary to the framework set forth by this Court in evaluating unconstitutional partisan gerrymandering. In its liability-phase ruling, this Court referenced one-person, one-vote as a framework for developing specific metrics to assess unconstitutional partisan gerrymandering in a "reasoned elaboration of increasingly precise standards." *Harper*, 2022-NCSC-17, ¶ 168 (citing *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983)). As this Court recognized, it is the courts (and not legislators) that work to develop a "body of doctrine on a case-by-case basis" to arrive at "detailed constitutional requirements in the area of ... apportionment." *Reynolds v. Sims*, 377 U.S. 533, 578 (1964); *Harper*, 2022-NCSC-17, ¶ 163 ("As in *Reynolds*, '[l]ower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation." (alteration in original) (quoting *Reynolds*, 377 U.S. at 578)).

In developing one-person, one-vote jurisprudence, federal courts over time established a 10% threshold for presumptively constitutional "minor

deviations" in state-legislative apportionment plans—but they decidedly did not defer to legislatures to decide what amount of deviation was permissible under the Fourteenth Amendment. *See Brown*, 462 U.S. at 842 ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.").[4] The Court should similarly reject the Legislative Defendants' requests for blind deference to the General Assembly's choice of metrics here.

III. The Trial Court Did Not Abuse Its Discretion in Declining to Disqualify Two of the Special Masters' Expert Advisors.

A. The Trial Court's Decision Must Be Upheld Unless the Trial Court Abused Its Discretion.

The trial court's denial of the motion to disqualify two of the Special Masters' four expert advisors, Drs. Wang and Jarvis, is reviewed for abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016); *Point Intrepid, LLC v. Farley*, 215 N.C. App. 82, 86, 714 S.E.2d 797, 800 (2011). "A ruling committed to a trial 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

[4] The U.S. Supreme Court's decision in *Evenwel v. Abbott*, 578 U.S. 54 (2016), further supports this conclusion. In *Evenwel*, the Court rejected the claim that the federal Constitution's Equal Protection Clause requires equalizing districts' voter-eligible populations (instead of total populations) based upon an analysis of the constitutional history of the Clause and the Court's own precedent, not any notion of "legislative deference"—a phrase that appears nowhere in the opinion. *Id.* at 64–73.

have been the result of a reasoned decision." *In re Proposed Foreclosure of a Claim of Lien Filed on George*, 377 N.C. 129, 2021-NCSC-35, ¶ 23.

B. The Trial Court Did Not Abuse Its Discretion in Denying the Motion to Disqualify.

The Legislative Defendants fail to show that the trial court's denial was "manifestly unsupported by reason" as is necessary to demonstrate an abuse of discretion. *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006). The Special Masters' Report, which the trial court reviewed and adopted in its order denying the motion to disqualify (App. 45–46), sets forth the numerous and well-reasoned grounds to deny the motion to disqualify Drs. Wang and Jarvis.

First, the Special Masters found that "the analysis provided by Drs. Wang and Jarvis ... was not determinative of any recommendations made by the Special Masters to the court." This, standing alone, justifies the decision to deny the motion. R p 4891; *see Point Intrepid*, 215 N.C. App. at 89, 714 S.E.2d at 802 ("We examine the facts of the present case to determine whether [the special master's] neutrality was impacted by any ex parte communications.").

Second, as the Special Masters found, the communications "were solely for the purpose of proceeding as quickly as possible within the abbreviated time frame allotted for the remedial process" and "do not appear to be made in bad

faith." (R p 4891) The Special Masters and their expert advisors had a mere five days to evaluate the Remedial Congressional Plan, and only two days to review Plaintiffs' comments on that plan. (R pp 4869, 4871, 4874) In this context, it is clear that the two experts in question—university professors who routinely make research data part of the public domain—were simply seeking to locate relevant public information as quickly as possible.

Third, there is no possibility that there could have been any bad faith. As the Special Masters found, the information sought was all "background information pertaining to the earlier analysis of the 2021 Redistricting Plans" performed by the experts at the liability phase of the case and was publicly available at the time. (R p 4891)

And finally, when the communications were discovered, Plaintiffs promptly disclosed all emails, and the communications ceased immediately, leaving no possibility that other communications could have occurred. (R p 4608)

All of these facts—which the Legislative Defendants fail to account for or rebut—provide ample reason for the trial court's decision.

The Legislative Defendants' core argument is a mere assertion that the brief communications between Drs. Wang and Jarvis and plaintiffs' experts about publicly available information somehow "biased the recommendations made by the Special Masters" and that the communications "materially

violated" the trial court's order. LD Br. 34. They also try to impute the purported (but in fact nonexistent) bias of the Special Masters' expert advisors to the Special Masters themselves—based not on any action by the Special Masters, but instead on the ***trial court's*** denial of the Legislative Defendants' motion to disqualify. LD Br. 36 ("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.").

But none of the Legislative Defendants' conjecture actually speaks to the basis on which they could plausibly have sought recusal, *i.e.*, that Drs. Wang and Jarvis's conduct somehow interfered with ***the Special Masters'*** ability to serve as "neutral arbiter[s]," *In re Search Warrant Issued June 13, 2019*, 942 F.3d 159, 181 & n.19 (4th Cir. 2019), or could prompt an "informed observer" to "reasonably ... question [the Special Masters'] impartiality" based on their assistants' conduct, *In re Brooks*, 383 F.3d 1036, 1046 (D.C. Cir. 2004); *see also* FED. R. CIV. P. 53(a)(2). Again, the Special Masters stated that "though the analysis provided by Drs. Wang and Jarvis was helpful and consistent with the analysis of our other expert advisors, it was not determinative of any recommendation made by the Special Masters to the court." (R p 4891) The Legislative Defendants fail to address or rebut this reasoning or to show that the trial court's acceptance of it was an abuse of discretion.

The Legislative Defendants also assert that "a substantial amount of work was completed by Drs. Wang and Jarvis contemporaneously with their communications with Plaintiffs' experts." LD Br. 37. This is irrelevant: The time entries were not before the trial court when it evaluated the motion to disqualify. Moreover, the Legislative Defendants do not explain how the entries would indicate bias in their analysis. The Legislative Defendants simply claim that 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." LD Br. 37.[5] This is incorrect. In fact, Dr. Jarvis's time entries itemize both a search for "other available NC ensemble data" and an independent check to "[e]valuate properties, quality, and suitability of this dataset for the current problem." LD Br. 37 (citing Dr. Jarvis's time entries). This argument evaporates especially quickly given that all the substantive information shared by Drs. Mattingly and Herschlag was available on their website (R p 4891) and so accessible to the Special Masters' advisors regardless—a fact the Legislative Defendants omit in their brief.

The principal case upon which the Legislative Defendants rely, *Point Intrepid, LLC v. Faley*, 215 N.C. App. 82, 714 S.E.2d 797 (2011), confirms the

[5] The Legislative Defendants make no claims about Dr. Wang's time entries, presumably because they provide no support for this unavailing argument.

weakness of their argument. In *Point Intrepid,* the Court of Appeals considered the plaintiffs' appeal of an order requiring payment of the fees for a third-party expert. The plaintiffs argued that the third-party experts' communications with counsel about the facts of the case biased him as a third-party expert. *Id.*, 215 N.C. App. at 83, 714 S.E.2d at 798. The Court of Appeals rejected the contention that ex parte communications were automatically prejudicial where they discussed facts known to all parties in the litigation; instead, a court must "examine the facts of the present case to determine whether [the special master's] neutrality was impacted by *ex parte* communications" at issue. *Id.*, 215 N.C. App. at 89, 714 S.E.2d at 802.

The *Point Intrepid* court thus explained that establishing bias turns on the substance of the ex parte communications, rather than the mere fact of their existence. *Id.*, 215 N.C. App. at 88–89, 714 S.E.2d at 802 (collecting cases); *cf. Weaver Inv. Co. v. Pressly Dev. Assocs.*, 234 N.C. App. 645, 660, 760 S.E.2d 755, 764 (2014) ("[D]efendants merely assert that there were contacts between plaintiffs and the expert; defendants present no evidence that such contacts were improper."). As discussed above, there is no indication that the substance of the communications here—which concerned only publicly available information—created or reveals any bias by Dr. Wang or Dr. Jarvis, and Legislative Defendants certainly did not show that any bias influenced the Special Masters' recommendations.

The communications at issue here were limited, focused on efficiently locating publicly available information, and had no effect at all on the recommendations ultimately adopted by the Special Masters. (R p 4891) Accordingly, the Legislative Defendants have failed to show any error in the trial court's denial of their motion, much less an abuse of discretion. *See Point Intrepid*, 215 N.C. App. at 91, 714 S.E.2d at 803 ("We find Plaintiffs' argument unconvincing and believe the trial court did not abuse its discretion in deciding this e-mail did not bias Johnson as a neutral third-party expert.").

IV. The Legislative Defendants Have Abandoned Their Elections Clause Argument.

In prior briefing before this Court concerning the 2021 Enacted Congressional Plan, the Legislative Defendants contended that the federal Constitution's Elections Clause, U.S. CONST. art. I, § 4, cl. 1, "bar[red] plaintiffs[']claims against the congressional plan." LD Response Br. 183–84, *Harper v. Hall*, No. 413PA21 (N.C. Jan. 28, 2022). This Court's opinion properly rejected that argument, both because it "was not presented at the trial court" and because it failed on the merits. *Harper*, 2022-NCSC-17, ¶ 175. At the stay stage, the Legislative Defendants again raised the Elections Clause in contesting the trial court's adoption of the Modified Remedial Congressional Plan, this time contending that by "selecting its own remedial congressional map the trial court is likely violating federal law." LD Mot. for Temp. Stay at

19, *Harper v. Hall*, No. 413PA21 (N.C. Feb. 23, 2022). Again, the argument made no headway with this Court. *See Harper*, 868 S.E.2d at 97. The Legislative Defendants have continued to press their Elections Clause arguments in the U.S. Supreme Court in a brief filed on 29 August 2022—arguing that this Court violated the Elections Clause by "nullifying" the 2021 Enacted Congressional Plan and "replac[ing]" it "with regulations of [this Court's] own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a 'fair' or 'free' election." *Moore* Pet. Br. i; *see id.* at 3–4, 49–50.

In their opening brief here, however, the Legislative Defendants strategically declined to raise any Elections Clause arguments (after this Court deferred ruling on their motion to dismiss their appeal, and after *Harper* and *NCLCV* Plaintiffs revealed the gamesmanship that the Legislative Defendants sought to achieve, *see* MTD Opp. 3–6).

That tactical choice has consequences. By choosing not to raise their Elections Clause argument in their opening brief in this appeal, the Legislative Defendants have abandoned their argument. *See* N.C. R. APP. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."); *McKinnon v. CV Indus., Inc.*, 228 N.C. App. 190, 196, 745 S.E.2d 343, 348 (2013) (applying Rule 28(a) to deem argument abandoned, even if issue is

referenced in "passing," if appellant makes "no specific argument" addressing alleged error).

More than that, as a matter of North Carolina law, the Legislative Defendants have abandoned their Elections Clause argument not only with respect to the Modified Remedial Congressional Plan at issue in this appeal, but also with respect to this Court's February 2022 interlocutory decision invalidating the 2021 Enacted Congressional Plan and remanding this case to the trial court for a remedial phase. Upon entry of final judgment in this case, all prior opinions and interlocutory orders in this case merge into that final judgment: "North Carolina, of course, takes the traditional view that interlocutory orders are subject to change and to direct attack throughout the proceedings in which entered; that unless changed or vacated [s]ua sponte or on direct party attack they are merged in any final judgment; and that they are thereafter subject to attack ***only as an incident to attack upon the final judgment***." *Yale v. Nat'l Indem. Co.*, 602 F.2d 642, 647 (4th Cir. 1979) (emphasis added) (citing *Skidmore v. Austin*, 261 N.C. 713, 136 S.E.2d 99 (1964)). By leveling no "attack upon the final judgment" under the Elections Clause, the Legislative Defendants forfeited their ability to challenge prior orders on that ground.

Given that the Legislative Defendants have continued to press their federal Elections Clause arguments in the U.S. Supreme Court, including as

to the Modified Remedial Congressional Plan ***specifically***, even after trying to tactically abandon those arguments in this Court, Plaintiffs respectfully submit that it would be appropriate for this Court to clarify that those arguments have been waived as a matter of North Carolina law.

V. If this Court Dismisses This Appeal, Its Dismissal Order Should Impose Certain Terms Clarifying the Effect of Dismissal.

Harper and *NCLCV* Plaintiffs have opposed the Legislative Defendants' motion to dismiss this appeal and continue to do so for the reasons detailed in their opposition brief. *See* MTD Opp. 1–8. They maintain that the Court should decide this case on the merits and should affirm the trial court's judgment. But in the event the Court disagrees and grants the motion to dismiss, Plaintiffs reiterate their request that the Court exercise its authority to grant dismissal only "upon such terms as … fixed by the appellate court." N.C. R. APP. P. 37(e)(2).

In particular, if the Court declines Plaintiffs' primary request to decide this appeal on the merits, Plaintiffs respectfully request that the Court impose certain "terms" aimed to avoid prejudice to Plaintiffs, and to prevent Legislative Defendants from benefiting from their gamesmanship in dismissing their appeal. *See generally* MTD Opp. 12–13.

First, applying the principles discussed above, any order dismissing the Legislative Defendants' appeal could make clear that the dismissal leaves in

effect the trial court's final order adopting the Modified Remedial Congressional Plan and renders that order a final judgment, with all "interlocutory orders … merg[ing] in [that] final judgment." *Yale*, 602 F.2d at 647 (citing *Skidmore*, 261 N.C. 713, 136 S.E.2d 99)). And this Court's dismissal order could clarify that by dismissing their appeal—and by filing an opening brief that does not even mention the federal Constitution's Elections Clause—the Legislative Defendants, as a matter of North Carolina law, have abandoned any argument that the trial court's final judgment, or any prior orders in this case, violate the Elections Clause. *See* N.C. R. APP. P. 28(a); *McKinnon*, 228 N.C. App. at 196, 745 S.E.2d at 348.

Second, any dismissal order could also memorialize that, as a matter of North Carolina law, the trial court's final judgment both (1) collaterally estops the Legislative Defendants from "relitigat[ing] … issues actually litigated and necessary to the outcome" of the judgment and (2) is *res judicata* as to "all matters, either fact or law, that were or should have been adjudicated" in connection with the final judgment. *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 428–29, 349 S.E.2d 552, 556–57 (1986).

In particular, the Court could make clear that, under North Carolina law, these doctrines preclude relitigation of the Legislative Defendants' argument that the federal Constitution's Elections Clause barred the invalidation of the 2021 Enacted Congressional Plan or the implementation of

the Modified Remedial Congressional Plan. *See King v. Grindstaff*, 284 N.C. 348, 360, 200 S.E.2d 799, 808 (1973) (*res judicata* and collateral estoppel apply between state and federal courts). These doctrines apply even if the Legislative Defendants attempt to relitigate the Elections Clause issue within this same litigation. *See Save Our Rivers, Inc. v. Town of Highlands*, 341 N.C. 635, 638, 461 S.E.2d 333, 335 (1995) (according *res judicata* effect to an unappealed "holding of the Court of Appeals in this case").

With respect to the Elections Clause issue, the trial court's order meets all requirements for collateral estoppel and *res judicata*. For collateral estoppel, dismissal of the appeal will render the trial court's remedial order "a final judgment on the merits." *Thomas M. McInnis*, 318 N.C. at 428–29, 349 S.E.2d at 557. The Elections Clause issue was "actually litigated and necessary to" the final judgment, having been raised by the Legislative Defendants for the first time in the appeal from the trial court's initial order denying Plaintiffs' challenge to the 2021 Enacted Congressional Plan, LD Response Br. 183–84, *Harper v. Hall*, No. 413PA21 (N.C. Jan. 28, 2022); again in contesting the trial court's entry of the Modified Remedial Congressional Plan (R p 4640); and again in seeking an emergency stay of the trial court's remedial order, LD Mot. for Temp. Stay at 19, *Harper v. Hall*, No. 413PA21 (N.C. Feb. 23, 2022). The argument was rejected at all three stages prior to the trial court's entry of final judgment against the Legislative Defendants.

The Legislative Defendants are therefore estopped from relitigating their Elections Clause argument in any pending or future litigation involving these same parties or their privies. *See Thomas M. McInnis*, 318 N.C. at 428–29, 349 S.E.2d at 557.

The trial court's final judgment is likewise subject to *res judicata* effect: If the appeal is dismissed, the trial court's order will be a "final judgment on the merits," and the Legislative Defendants' Elections Clause argument was one of the "matters, either fact or law, that were or should have been adjudicated" leading up to the final judgment. *Id.*, 318 N.C. at 428, 349 S.E.2d at 557. The Legislative Defendants are therefore barred from relitigating their Elections Clause argument in any pending or future case where Plaintiffs or their privies assert the same cause of action. *See id.*; 19 STRONG'S NORTH CAROLINA INDEX § 164, Westlaw (4th ed. Database updated Aug. 2022).

CONCLUSION

For the foregoing reasons, *NCLCV* Plaintiffs, *Harper* Plaintiffs, and Plaintiff-Intervenor Common Cause respectfully request that this Court affirm the trial court's order and judgment rejecting the Remedial Congressional Plan and adopting the Modified Remedial Congressional Plan.

Respectfully submitted this 6th day of September, 2022.

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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 6th day of September, 2022.

Electronically Submitted
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