No.413PA21-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

REBECCA HARPER; et. al.,

Plaintiffs,

vs.

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

Defendants,

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

Plaintiffs,

vs.

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

Defendants.

From Wake County
(includes Plaintiff-Intervenors Common Cause)

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LEGISLATIVE DEFENDANTS' SUPPLEMENTAL BRIEF ON REHEARING

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INTRODUCTION

Redistricting in North Carolina is, and always has been, political. Recognizing that it is impossible—and, we submit, a mistake to wish otherwise[1]—to "take politics out" of policymaking, the North Carolina Constitution vests the inherently political task of redistricting with the branch of government most accountable to the people and properly disposed to make political choices: "the General Assembly." N.C. Const. art. II, §§ 3 and 5. That power is subject to textually explicit limitations, including that electoral districts be of substantially equal population and that county lines not be crossed except where necessary to achieve that voting equality. *Id.* art. II, § 3(1) and (3); *id.* art. II, § 5(1) and (3). Because "redistricting is quintessentially a political process[,]" *Shapiro v. McManus*, 203 F. Supp. 3d 579, 590 (D. Md. 2016), these provisions can only be read to delegate the many political choices inherent in redistricting to the General Assembly, not to the North Carolina courts.

In *Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, 868 S.E.2d 499 ("*Harper I*"), *cert. granted in part*, *Moore v. Harper*, 142 S. Ct. 2901 (2022)[2], this Court "retain[ed] for itself the ultimate redistricting authority," *Harper v. Hall*, ___ N.C. ___, 2022-NCSC-121, 881 S.E.2d 156, ¶ 116[3] ("*Harper II*") (Newby, C.J., dissenting), and in its

[1] "Policymaking in a democracy must be political—that is, legitimized by popular support rather than by technical analyses. And American democracy, in particular, was designed to be messy and frustrating." Alan Blinder, *Is Government Too Political?*, 76 Foreign Affairs 115, 116 (1997).

[2] *Moore v. Harper* only addresses the congressional map enjoined by *Harper I*, not the legislative maps. *See* 142 S. Ct. 2901 (2022).

[3] Counsel has used universal citation to refer to this Court's prior opinions in this matter because those opinions were issued during the use of universal citation, which ended with this Court's 13 January 2023 order.

wake reached unprecedented conclusions about constitutional order, separation of powers, and the rule of law. While North Carolina appellate courts have inserted themselves into the redistricting process in the past, they had always done so using objective, measurable, and plainly textually-grounded standards, such as maintaining the integrity of county lines or avoiding race discrimination. However, in *Harper I*, a majority of the Court held for the first time that partisan redistricting "violate[s] every individual voter's fundamental right to vote on equal terms." *Harper I*, 2022-NCSC-17, ¶ 142. And it did not identify judicially manageable standards for determining how much partisanship is too much in this inherently political process. Instead, it promised that "bright-line standards" would follow in "future cases," and was content to identify some tests—based on what it called "reliable" political-science metrics—that it deemed "entirely workable." *Id.* ¶¶ 163, 165, 167–68.

The experiment failed. Today, the 2020 decennial redistricting in this State is not yet complete. After *Harper I*, the General Assembly enacted remedial House (S.L. 2022-4), Senate (S.L. 2022-2), and congressional (S.L. 2022-3) plans (respectively, the "RHP," "RSP," and "RCP") in an effort to comply with what *Harper I* called "entirely workable" standards. But, in *Harper II*, the Court reaffirmed the erroneous legal premises set forth in *Harper I.* Instead of creating a bright-line rule based on the guidance offered to the General Assembly in February of 2022, a bare majority of the Court went back on that promise, now stating 10 months later that no bright-line test would ever come to measure partisanship of districts. *Compare Harper I*, 2022-NCSC-17, ¶¶ 163, 165, 167–68 *with Harper II*, 2022-NCSC-121, ¶ 76. The Court then

gutted the tests it illuminated in *Harper I* and invalidated the RSP in the process. It then affirmed the court-drawn Modified RCP and the RHP, even though the RCP and RSP were both within the Court's original guidance from *Harper I*. *Harper II*, 2022-NCSC-121, ¶¶ 76, 110, 112–14.

The *Harper* project traded judicial review for judicial power. It endorsed an expansion of the judicial role into the redistricting process that knows no limit in scope or time. This, the *Harper* Court freely admits, is the "beating heart" of this case. *Harper I*, 2022-NCSC-17, ¶ 9 ("The only way that partisan gerrymandering can be addressed is through the courts[.]"). But, as the United States Supreme Court recognized just a few years ago, "in the absence of a constitutional directive or legal standards to guide [the Court] in the exercise of such authority," we respectfully submit, sometimes saying what the law is means saying "this is not law." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2508 (2019). This Court should use this rehearing proceeding to return the judiciary to its proper role of interpreting and enforcing constitutional directives as written. Nothing in the North Carolina Constitution empowers courts to determine what purely political considerations in the drawing of district lines are unlawful, the constitutional text and structure foreclose that inquiry, and this Court should return to its well-established modes of constitutional interpretation. It should withdraw its *Harper II* opinion, overrule *Harper I*, and remand with instructions to dismiss with prejudice. It should also declare that the General Assembly is now able to exercise its redistricting power to enact new state

House, Senate, and Congressional redistricting plans unencumbered by the remedial dictates of the *Harper* cases.

STATEMENT OF FACTS

Before the *Harper* litigation, this Court consistently recognized that policing the politics of redistricting was not the judiciary's constitutional role, holding that "[t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions," so long as it does "so in conformity with the State Constitution." *Stephenson v. Bartlett*, 355 N.C. 354, 371, 562 S.E.2d 377, 390 (2002) ("*Stephenson I*"). The State Constitution provides "objective restraints" on legislative redistricting, mandating that State House and Senate districts be of substantially equal population, be contiguous and compact, and not unnecessarily cross county lines. *Id.* at 362–72, 383–84, 562 S.E.2d at 384–90, 396–98. This Court has had many occasions to interpret the "whole county rule", which places "an objective limitation upon the authority of incumbent legislators to redistrict and reapportion in a manner inconsistent with the importance that North Carolinians traditionally have placed upon their respective county units." *Id.* at 385, 562 S.E.2d at 398; *see* N.C. Const. art II, §§ 3(3) and 5(3). In both *Stephenson I* and *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 404 (2015), *judgment vacated on other grounds*, 137 S. Ct. 2186 (2017), this Court has held that so-called "political" or "partisan" gerrymandering claims are "not based upon a justiciable standard." 368 N.C. at 534, 781 S.E.2d at 440.

This redistricting cycle, two sets of Plaintiffs filed suit in November 2021 alleging that the Session Law 2021-175 (House), Session Law 2021-173 (Senate), and Session Law 2021-174 (Congressional) (collectively, the "2021 Enacted Plans") violated the North Carolina Constitution by establishing severe partisan gerrymanders in violation of the Free Elections Clause, Art. I, § 10, the Equal Protection Clause, Art. I, § 19, and the Freedom of Speech and Assembly Clauses, Art. I, §§ 12, 14. (R pp 30-122; 128-176; 897-964).

On 3 December 2021, the *NCLCV* and *Harper* cases were consolidated and a three-judge superior court panel held a hearing on Plaintiffs' Motions for Preliminary Injunction. (R pp 867-870, 883). The same day, after considering the extensive briefing and oral arguments on the motion, the panel denied both motions, having found that "Plaintiffs' claims [were] not likely to succeed because they are not justiciable" and even if partisan gerrymandering claims were justiciable, the preliminary injunction record "suggest[ed] a lack of [discriminatory] intent." (R pp 871-884). Both sets of Plaintiffs immediately filed a notice of appeal with the North Carolina Court of Appeals, which denied a requested temporary stay *en banc* on 6 December 2021. (R pp 885-890).

This Court then took a bypass petition and granted a preliminary injunction on 8 December 2021 and temporarily stayed the candidate filing period "until such time as a final judgment on the merits of Plaintiffs' claims, including any appeals, is entered and remedy, if any is required, has been ordered." (R p 893). This order violated the rule that a preliminary-injunction order must "set forth the reasons for

its issuance," N.C. Gen. Stat. 1A-1, Rule 65(d); *see, e.g.*, *Wilson v. N.C. Dep't of Com.*, 239 N.C. App. 456, 462 ,768 S.E.2d 360, 364–65 (2015), and a remedial redistricting statute requiring that "[e]very order . . . declaring unconstitutional or otherwise invalid" a redistricting law "identify every defect found by the court, both as to the plan as a whole and as to individual districts," N.C. Gen. Stat. § 120-2.3. The Court also moved election primary timelines from 8 March 2022 to 17 May 2022, consequently resetting dozens of related election deadlines, none of which were its prerogative to set. *See Harper I*, 2022-NCSC-17, ¶ 22; R pp 893-94.

The Order also directed the superior court panel to hold hearings on the merits on Plaintiffs' claims and issue a ruling by 11 January 2022. (*Id.).* Common Cause then intervened as a Plaintiff in this action. (R pp 965-1068, 1232-39). After an expedited two-and-a-half week discovery period, the superior court panel conducted a bench trial from 3 January to 6 January, 2022.[4] (R pp 1069-78).

The superior court panel issued its opinion on 11 January 2022 and denied all of Plaintiffs' claims. (R pp 3512-3771). Specifically, the court held that partisan gerrymandering claims were neither justiciable nor cognizable under the North Carolina Constitution. (R p 3753 at COL ¶134, 3756 at COL ¶144). The superior court concluded that such claims were political questions and, therefore, did not present a justiciable controversy for two independent reasons. First, "satisfactory and manageable criteria or standards do not exist for judicial determination of" how much

[4] The superior court panel observed that prior redistricting cases (including a 2019 case alleging political gerrymandering) had required months of discovery, weeks of trial, lengthy findings of fact and conclusions of law, and involved remedial phases. (*See* R pp 1069-78).

partisanship is too much in our politics. (R p 3756 at COL¶144). Such standards are necessary because "[w]ith uncertain limits" the court "would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." (R p 3755 at COL ¶ 140 (quoting *Rucho v. Common Cause,* 139 S.Ct. 2484, 2498 (2019)). The superior court panel recognized that this Court previously rejected prior attempts to "apportion political power as a matter of fairness," when it held that the state Constitution's "Good of the Whole" provision provides no justiciable standard upon which to strike down maps duly enacted by the legislature. (R p 3756 at COL ¶143 (citing *Dickson v. Rucho*, 367 N.C. 542, 575, 766 S.E.2d 238, 260 (2014), *vacated on other grounds* 135 S. Ct. 1843 (2015)). And, as the panel observed, none of Plaintiff's' experts could "inform the Court of how far the [2021] Enacted Maps are from what is permissible partisan advantage" and therefore could not provide any indication of what is or is not actually permissible. (R p 3697 at FOF ¶ 567).

Second, the superior court panel recognized that the North Carolina "Constitution commits [the] issue" of redistricting to the legislature. (R p 3754 at COL ¶¶136-137). The North Carolina Constitution and democratic processes have "left redistricting solely in the province of the legislature subject to only four objective restraints," none of which the 2021 Enacted Plans violate, "and accountability through frequent elections." (R p 3758 at COL ¶ 149). Further "[r]edistricting is a political process that has serious political consequences. It is one of the purest political questions which the legislature alone is allowed to answer." (R p 3578 at COL ¶ 153). Because the court rightly recognized that it was not permitted to "usurp[]

the political power and prerogatives of an equal branch of government[,]" it concluded that Plaintiffs' claims were not justiciable. (*Id.*).

The superior court panel also concluded that none of Plaintiffs' proffered Constitutional hooks—the Free Elections Clause, the Equal Protection Clause, and the Free Speech and Right of Assembly Clauses—prohibit illegal partisan gerrymandering. (R p 3753 at COL ¶¶133-34). Given the absence of any historical evidence that the Free Elections Clause has ever been viewed as operating as a restraint on the General Assembly's ability to consider political factors in redistricting, the superior court panel concluded that Plaintiffs' claims under that clause were not cognizable. (R pp 3736–46 at COL ¶¶ 70–107). The panel also concluded that the North Carolina Equal Protection Clause could not provide Plaintiffs' proposed relief because no voter is "entitled to be included in a district that is more likely to elect a candidate from their own party," and ultimately Plaintiffs were neither "denied the right to vote, nor were they in a district where they have less voting power than those in other districts." (R p 3750 at COL ¶ 120-21).

Lastly, the superior court panel concluded that neither the Free Speech, nor Right of Assembly Clauses of the North Carolina Constitution could provide relief because the 2021 Enacted Plans in no way served to restrict "speech, association, or any other First Amendment activities." (R pp 3751-52 at COL ¶¶ 127–31). The panel further rejected NCLCV and Common Cause Plaintiffs' racial vote dilution claims for various reasons, as well as NCLCV Plaintiffs' Whole County Provision claim. (R pp

3698-3704 at FOF ¶¶570-598; R pp 3764–66 at COL ¶ 172, 177-78). All Plaintiffs appealed the Panel's order. (R pp 3772-3783).

A. *Harper I*

In *Harper I*, the Supreme Court abruptly changed course from prior precedent, holding that political gerrymandering "violate[s] every individual voter's fundamental right to vote on equal terms and the fundamental right to substantially equal voting power," 2022-NCSC-17, ¶ 142, and thus contravenes the North Carolina constitutional guarantees of free elections, free speech and assembly, and equal protection, *id.* ¶¶ 121–174. In its 4 February 2022 order and 14 February 2022 opinion and judgment, *Harper I* invalidated all three 2021 Enacted Plans as unconstitutional partisan gerrymanders. *Harper I*, 2022-NCSC-17, ¶ 178. The fact that *these* consolidated cases were used as a vehicle for an abrupt change in constitutional jurisprudence, is especially puzzling given that the General Assembly in 2021 adopted criteria that excluded the use of political data in line-drawing, no partisan data was loaded into the redistricting software, two members of the General Assembly testified that partisan considerations did not in fact enter the line-drawing, and the trial record contains no contrary direct evidence of partisan intent.

Despite this lack of direct evidence of partisan intent, central to the *Harper I* holding was the Court's belief that the 2021 plans were "the product of intentional, pro-Republican partisan redistricting." *Id.* ¶ 184; *see also id.* ¶¶ 27, 37, 39, 63, 64, 68, 69, 140, 141, 150, 157, 193, 197, 201, 203, 211. But with no direct evidence to support that finding, *Harper I* relied on "circumstantial evidence of partisan intent," which

consisted of "computer simulation programming techniques" designed to infer partisan intent from supposedly neutral baselines. *Id.* ¶ 30 (quoting the superior court); *see also id.* ¶¶ 30–71.[5]

The *Harper I* majority declined to "identify an exhaustive set of metrics or precise mathematical thresholds" to measure either partisan intent or effect in gerrymandering cases. *Id.* ¶ 163. As precedent for that approach, it cited the U.S. Supreme Court's early one-person, one-vote decisions, which initially announced a principle of voting equality and "arriv[ed] at detailed constitutional requirements" in later decisions. *Harper I*, 2022-NCSC-17, ¶ 163 (quoting *Reynolds v. Sims*, 377 U.S. 533, 578 (1964)). *Harper I* predicted that similar rules would emerge in the gerrymandering context, twice using the phrase "bright-line standards" to describe what was forthcoming. *Id.* ¶¶ 164–65. For the interim, *Harper I* identified specific standards that it deemed "entirely workable," including (1) setting a "seven percent efficiency gap threshold as a presumption of constitutionality," or (2) establishing "that any plan with a mean-median difference of 1% or less . . . is presumptively constitutional." *Id.* ¶ 166.

[5] Since then, however, the *Harper* Plaintiffs' lawyer, representing different clients, told the U.S. Supreme Court that there is a "fundamental flaw" in "overly relying on these simulations" in attempting to infer improper intent, because they are not "an objective . . . benchmark." *Merrill v. Milligan*, Transcript of Oral Argument at 80:23–81:10. She said they are not a "gold standard" because "[t]hey are the result of a host of very subjective decisions going into the process about which considerations to take into account and how to quantify them." *Id.* at 81:12–15. That was the same argument Legislative Defendants' counsel made to this Court in *Harper I*. Legislative Defendants-Appellees' Br. at 97, *Harper v. Hall*, 913PA21 (Jan. 28, 2022) ("these sorts of simulations analyses are inherently problematic and untrustworthy"); *see also id.* at 101–13.

B. The Remedial Process

While Legislative Defendants were ordered to go back to the drawing board, and to run mathematical tests that allegedly measured the permissible partisanship of the districts, the North Carolina Supreme Court still failed to address the seminal question of "how much partisanship is too much?" Legislative Defendants engaged in a herculean effort to comply with *Harper I*. That effort was made more difficult by the unprecedented level of judicial management of legislative affairs mandated by the *Harper I* judgment.

Four days after this Court's 4 February Order that began the remedial phase, on 8 February 2022, the superior court panel entered an order stating that it would employ "a Special Master." (R p 3837-38). The parties gave their submissions and objections, but ultimately the superior court appointed its own special masters, three retired jurists, none of whom were suggested by the parties, and allowed them to "hire research and technical assistants and advisors reasonably necessary to facilitate their work[.]" (R pp 4176-82). The Special Masters did so, ultimately hiring four advisors. (R pp 4870–71).

One of the special masters "publicly participated in advertisements for a Democratic candidate in a statewide senatorial campaign and for a Democratic congressional candidate in a district he created during this remedial process." *Harper II*, 2022-NCSC-121, ¶ 152 n.4 (Newby, C.J., dissenting). One of the advisors filed an amicus brief "in support of plaintiff Common Cause in previous litigation surrounding redistricting in North Carolina," and he also "came under investigation . . . for

allegedly manipulating data in favor of Democrats in his role as a redistricting expert in another state." Id. ¶ 142 (Newby, C.J., dissenting). Two of the assistants engaged in improper *ex parte* communications with Plaintiffs' experts (*see* R pp 4655-73), and one had publicly criticized one of Legislative Defendants' experts on Twitter during the liability phase.[6] "None of the advisors were recommended by Legislative Defendants." *Harper II*, 2022-NCSC-121, ¶ 142 (Newby, C.J., dissenting). Each assistant utilized different election sets and different partisan-fairness measures and showed different scores for the RSP, RHP, and RCP. *See, e.g., id.* ¶¶ 186, 199. None of them examined the plans by reference to the metrics and dataset the General Assembly chose; none contended that the General Assembly's non-partisan staff members inaccurately calculated the scores under General Assembly's chosen set (that of Plaintiffs' Expert Dr. Mattingly).

As the General Assembly and Plaintiffs were drawing their proposed remedial plans, this Court entered its 14 February 2022 opinion and ordered an immediate issuance of the mandate. (R pp 3953-4169, 4170-75). This opinion was issued less than four days before remedial plans were due to the superior court panel. Despite these challenges, the General Assembly passed Session Laws 2022-2 (Senate), 2022-3 (Congressional), and 2022-4 (House) (collectively, the "Remedial Plans") and submitted them to the superior court panel, along with statistics and data compiled by non-partisan central staff that the General Assembly used in preparing the plans.

[6] *See* Sam Wang (@SamWangPhD), Twitter (Jan. 3, 2022, 9:32 p.m.), https://twitter.com/SamWangPhD/status/1478192492432535558 (stating "[i]n today's North Carolina gerrymandering trial, the defense witness is pwned [sic] by [an] opposing mathematician/redistricting expert. . .").

(R pp 4185–4374; 9d R pp 11640–43 (Affidavit of Raleigh Myers), 15415–18 (Affidavit of R. Erika Churchill)). But *Harper I* compelled the General Assembly to modify its criteria. Whereas the 2021 criteria forbade the use of political data, the General Assembly in 2022 regarded itself as obligated to use political data to ensure the creation of enough Democratic-leaning seats to satisfy this Court's apparent demand for additional Democratic Party representation. (*See* 9d R pp 216-18 (2021 criteria, 14752:1–14752:10); *Harper II*, 2022-NCSC-121, ¶ 144 (Newby, C.J., dissenting). The legislative record indicates that this concern at times predominated over traditional redistricting criteria. (*See, e.g.*, 9d R pp 14742:19–14743:5).

In effort to comply with the supposedly "entirely workable" metrics set forth in *Harper I*, the General Assembly used the same twelve elections examined by the Harper Plaintiffs' expert, Dr. Mattingly, during the *Harper I* proceedings that was credited by the three-judge panel. (9d R pp 14752:1-14753:15) The resulting remedial Senate, House, and congressional plans satisfied the working standards of *Harper I*. Specifically, the Remedial Plans scored as follows:

***Harper I* Test**	**RHP**	**RSP**	**RCP**
Mean-Median	0.71%	0.63%	0.61%
Efficiency Gap	0.84%	3.98%	5.30%

(9(d) R pp 15420–37).

On 23 February 2022, the three-judge panel issued an order approving the RHP and RSP determining that they met all requirements set forth in *Harper I*. (R

pp 4866-89). Bizarrely, the panel rejected the RCP even though its efficiency gap and mean-median scores were comparable to the RSP and RHP. (R pp 4876, 4885-88).[7] Instead, the panel adopted a congressional plan prepared by an assistant to the Special Masters. (*Id.*). The panel also acknowledged that the General Assembly was directed to use partisan election data by the Supreme Court's Remedial Order. (R pp 4885-88).

The superior court panel acknowledged the *Harper I* directives that a "mean-median difference of 1% or less" and an "efficiency gap of 7% or less" are presumptively constitutional. (R pp 4876 at ¶34, 4879 at ¶42, 4882 at ¶55, 4885). Applying those directives, it deemed the RHP and RSP compliant with *Harper I*. (R pp 4879 at ¶42, 4882 at ¶ 55). But, "based upon the analysis performed by the Special Masters and their advisors," it held that the RCP "is not satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion." (R p 4876 at ¶ 34). The panel did not identify what it determined to be the accurate metrics for measuring the RCP and did not explain how "the General Assembly's use of partisan data" could have "comported with the Supreme Court's Remedial Order," (R p 4873 at ¶ 15), while also deficient under that order at the same time, (R p 4876 at ¶ 34). The panel made no finding that the General Assembly engaged in "intentional, pro-Republican partisan redistricting," *Harper I*, 2022-NCSC-17, ¶ 184. Having disapproved of the RCP, the superior court panel adopted a version fashioned by its special masters and assistants. (R p 4888).

[7] Ironically, the RCP had the best Mean-Median score of the three Remedial Plans.

C. The Remedial Appeal

Legislative Defendants appealed the three-judge panel's rejection of the RCP.[8] (R pp 5143–44). All Plaintiffs appealed the panel's order insofar as it approved the RSP, and Common Cause also appealed the panel's approval of the RHP. (R pp 5147-57, 5166-68). The parties petitioned this Court to stay the panel's ruling, which the Court denied the same day, allowing the RSP, RHP, and the Special Masters' remedial Congressional plan to be used in the 2022 election. *See Harper v. Hall*, 868 S.E.2d (2022) (Mem.); *Harper v. Hall*, 868 S.E.2d 90 (2022) (Mem.); *Harper v. Hall*, 868 S.E.2d 95 (2022) (Mem).

In late July 2022, the Court expedited the consideration of the remedial legislative appeal and set oral argument for October. *Harper v. Hall,* 382 N.C. 314, 315–16, 874 S.E.2d 902, 904 (2022) (Mem.). By that point, the redistricting plans governing the 2022 elections were set, there was no possibility for meaningful relief effective in 2022, and there was no need for expedited relief in advance of the 2024 elections. Three Justices dissented from this order, asserting that it "appears to reflect deeper partisan biases that have no place in a judiciary dedicated to the impartial administration of justice and the rule of law." *Id.* at 317–24, 874 S.E.2d at 904–09 (Barringer, J., dissenting) ("[D]espite the lack of any credible argument or reason supporting this decision, the majority inexplicably has allowed the motion to expedite the legislative maps appeal. . . . The majority's decision . . . lacks any

[8] Legislative Defendants also appealed the superior court's denial of a motion it filed for the recusal of two of the special masters' assistants. That order is not at issue on rehearing. (R pp 5143-44).

jurisprudential support. It reeks of judicial activism and should deeply trouble every citizen of this state."). Oral argument was held on 4 October 2022.

D. *Harper II*

On 16 December 2022, a divided Court affirmed the superior court panel's remedial order in part and reversed in part. *Harper II*, 2022-NCSC-121, ¶¶ 1–115.

The majority began by "tak[ing] this opportunity to clarify and reaffirm the constitutional standard recognized by this Court in" *Harper I*. *Id.* ¶ 74. It announced that "[c]onstitutional compliance is not grounded in narrow statistical measures," that "individual datapoints are vulnerable to manipulation," and that the inquiry turns on "a broader constellation of principles that a court may consider in reaching its ultimate constitutional determination." *Id.* ¶¶ 3, 75, 78. It therefore concluded that "a trial court may not simply find that a districting plan meets certain factual, statistical measures and therefore dispositively, legally conclude *based on those measures alone* that the plan is constitutionally compliant." *Id.* ¶ 76. Applying that standard, *Harper II* inexplicably faulted the superior court for having "leaned very heavily upon its factual findings regarding two datapoints, mean-median difference and efficiency gap." *Id.* ¶ 79.

Turning to the remedial plans, *Harper II* affirmed the superior court panel's disapproval of the RCP and approval of the RHP, but reversed its approval of the RSP. *Id.* ¶¶ 80–109. As to the RCP, *Harper II* found the panel's findings "supported by competent evidence," *id.* ¶ 83, including that "the RCP was passed on a strict party-line vote" and that several advisors found the RCP to have "an efficiency gap

above 7% and a mean-median difference of greater than 1%," *id.* ¶ 82 (quotation marks omitted). It did not address the General Assembly's method of calculating these metrics or the panel's finding "that the General Assembly's use of partisan data . . . comported with the Supreme Court's Remedial Order." (R p 4873 at ¶15).

As to the RHP, it found the superior court panel's approval "supported by competent evidence," *Harper II* ¶ 93, including that it "ultimately passed the House and Senate with sweeping bipartisan approval" and that "the RHP yields" an acceptable "average" score on several partisan-fairness metrics," *id.* ¶¶ 92–93. The Court did not explain why it looked to averages in analyzing the RHP, but not the RCP. *Id.* ¶ 215 (Newby, C.J., dissenting).

As to the RSP, the Court reversed the superior court panel, holding that its finding "are unsupported by competent evidence." *Id.* ¶ 98. It was not sufficient that "the Special Masters conclude[d] under the metrics identified by the North Carolina Supreme Court that the RSP meets the test of presumptive constitutionality." *Id.* ¶ 46 (bracket marks omitted). The *Harper II* majority found it sufficient for reversal "that the RSP passed both chambers of the General Assembly on strict party-line votes," "that suggested Senate plans drawn by Democrats were rejected," *id.* ¶ 97, and that some metrics showed "a pro-Republican" bias, *id.* ¶ 99.

Legislative Defendants filed a timely petition for rehearing on 20 January 2023. The Petition asked the Court to (1) withdraw the *Harper II* ruling, (2) overrule *Harper I* and hold that political-gerrymandering claims are non-justiciable and non-cognizable, and (3) permit the General Assembly to redistrict the state legislative and

congressional districts free from unfounded judicial interference. [*See* Legislative Defendants' Petition p 25.] Common Cause attempted to file an improper response to Legislative Defendants' Petition styled as a "Motion" on 30 January 2023. On 3 February 2023, Legislative Defendants filed a response to Common Cause's "motion." That same day, this Court granted Legislative Defendants' petition and ordered supplemental briefing and oral argument on the issues discussed herein. *Harper v. Hall*, No. 413PA21, 2023 WL 1516190 (N.C. Feb. 3, 2023). The Court directed the parties, "[i]n addition to the issues raised in the petition for rehearing," to address "[w]hether congressional and legislative maps utilized for the 2022 election . . . are effective for future elections," "[w]hat impact, if any," Article II Sections (3)(4) and (5)(4) "have on our analysis," and "[w]hat remedies, if any, may be appropriate." *Id.* at *2.

STANDARD OF REVIEW

Rule 31 authorizes this Court to rehear a civil action if it "has overlooked or misapprehended" any "points of fact or law." N.C. R. App. P. 31(a). "That [rule] is the appropriate method of obtaining redress from errors committed by this Court." *Nowell v. Neal*, 249 N.C. 516, 521, 107 S.E.2d 107, 111 (1959). On rehearing, this Court "treat[s] the case before [it] as a hearing *de novo* on the issue raised." *Alford v. Shaw*, 320 N.C. 465, 467, 358 S.E.2d 323, 324 (1987).

ARGUMENT

In granting the rehearing petition, this Court directed supplemental briefing on the following:

(a) "issues raised in the petition for rehearing,"
(b) "[w]hether congressional and legislative maps utilized for the 2022 election . . . are effective for future elections,"
(c) "[w]hat impact, if any," Article II Sections (3)(4) and (5)(4) of the North Carolina Constitution "have on our analysis," and
(d) "[w]hat remedies, if any, may be appropriate." *Harper*, 2023 WL 1516190, at *2.

Legislative Defendants' supplemental briefing on these issues follows.

(a) Supplemental briefing on "issues raised in the petition for rehearing"

I. The Court Should Withdraw Its Opinion in *Harper II* and Hold That the Remedial Phase Was Unwarranted.

The superior court's remedial ruling was founded on legal error. This Court had ordered it to "approve or adopt compliant congressional and state legislative districting plans," *Harper*, 380 N.C. at 307, 867 S.E.2d at 558, by which it meant compliant with *Harper I*. But *Harper I* left judicially manageable standards for "future cases." 2022-NCSC-17, ¶ 168. That cast the superior court into a stormy political sea in a rudderless boat. It was justified in seeking guidance about the tentative standards *Harper I* called "entirely workable." *Id.* ¶ 167. When *Harper II* deemed that approach erroneous, it claimed the bright-line standards promised in *Harper I* would never come, and declared that the inquiry would turn on an unknown and unknowable "constellation of principles that a court *may* consider" (or not), 2022-NCSC-121, ¶¶ 3, 75, 78, *Harper II* announced in effect that *Harper I* was wrongly

decided. As a result, the superior court panel's rulings were infected by legal error. This Court must correct them and those of *Harper II*.

A. *Harper II* Confirms That *Harper I* Was Wrongly Decided.

Harper II failed to fulfill the promise of *Harper I* that "bright-line standards" would emerge in "future cases," 2022-NCSC-17, ¶¶ 165, 168, and instead determined that gerrymandering claims must be governed by a "broad[] constellation of principles," 2022-NCSC-121, ¶ 3, which are vague and unascertainable.

Harper II purported to take the "opportunity to clarify and reaffirm the constitutional standard recognized" in *Harper I*. 2022-NCSC-121, ¶ 74. But it actually revised its entire approach to gerrymandering cases. *Harper I* did not in fact adopt a standard. It declined to "identify an exhaustive set of metrics or precise mathematical thresholds." *Id.* ¶ 163. Citing the U.S. Supreme Court's early apportionment cases, the majority predicted that a rule like one person, one vote would emerge in the gerrymandering context, twice using the phrase "bright-line standards" to describe what was forthcoming. *Id.* ¶¶ 164–65. In addition, *Harper I* identified specific standards that it already deemed "entirely workable," including (1) setting a "seven percent efficiency gap threshold as a presumption of constitutionality," or (2) establishing "that any plan with a mean-median difference of 1% or less . . . is presumptively constitutional." *Id.* ¶ 166.

The *Harper II* Court should not have been surprised when the superior court panel, on remand, three times identified "the statistical ranges set forth in the Supreme Court's full opinion" as governing its remedial task. (R pp 4876 at ¶34, 4879

at ¶42, 4882 at ¶55). After all, in its 4 February 2022 order, the court referenced how sufficiently good scores on "some combination of [partisan fairness] metrics" makes a plan "presumptively constitutional" and ordered the General Assembly to submit a written report to the trial court with its "proposed remedial maps" to document "what data they relied on to determine that their redistricting plan is constitutional, including what methods they employed in evaluating the partisan fairness of the plan." *Harper,* 380 N.C. at 306, 867 S.E.2d at 558.

Yet *Harper II* faulted the panel for having "leaned very heavily upon" these "two data points." 2022-NCSC-121, ¶ 79. *Harper II* held that what it now called a legal error was cured only because "the trial court also expressly adopted into its factual findings the findings within the Special Masters' Report," which "in turn, considered within its determination not just these two datapoints." *Id.* But the special masters and their assistants also read *Harper I* to approve 7% efficiency gap and 1% mean-median thresholds. *See id.* ¶¶ 45–48 (summarizing and quoting their repeated references to "an efficiency gap above 7% and a mean-median difference of greater than 1%" and the like).[9]

More fundamentally, *Harper II* concluded that these standards were suddenly no longer "entirely workable" and "reliable" as *Harper I* held, 2022-NCSC-17, ¶¶ 163, 168, but "vulnerable to manipulation," *Harper I*, 2022-NCSC-121, ¶ 77. Similarly, whereas *Harper I* stated that the identification of specific "metrics" in

[9] Recently, Special Master Orr gave an interview indicating that even though all of the Special Masters were highly qualified former jurists, they "struggled" to understand the instructions mandated by *Harper I*. *See* https://mailchi.mp/wfae/congressional-map-maker-bob-orr-speaks-no-one-had-the-ability-to-cook-the-books?e=8d8f3d55b5

"future cases" is "*precisely* the kind of reasoned elaboration of increasingly precise standards the United States Supreme Court utilized in the one-person, one-vote context," 2022-NCSC-17, ¶ 168 (emphasis added), *Harper II* rejected that approach as unduly dependent on "narrow statistical calculations," *Harper II*, 2022-NCSC-121, ¶ 78. All of that may be true, but it undermines *Harper I*, which could deem gerrymandering claims justiciable only by finding "satisfactory and manageable criteria or standards" to apply. *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004) (internal citation omitted); *see Harper I*, 2022-NCSC-17, ¶ 100. *Harper I* handled this problem by taking out a manageable-standards loan to be repaid in future decisions. Even if that were appropriate in principle, that strategy would succeed only upon repayment of the loan. By announcing default, *Harper II* exposed *Harper I* as erroneously decided. *See* 2022-NCSC-121, ¶ 123 (Newby, C.J., dissenting) ("The majority has effectively overturned its own decision in *Harper I*.").

B. The Standards of Harper II Are Unmanageable and Unconstitutional.

With the promise of "reasoned elaboration of increasingly precise standards" repudiated, *Harper I*, 2022-NCSC-17, ¶ 168, *Harper II* failed to identify any substitute source of "satisfactory and manageable criteria," *Hoke Cnty.*, 358 N.C. at 639, 599 S.E.2d at 391.

1. *Harper II* Erroneously Abandoned the Presumption of Constitutionality.

Harper II reveals how divorced the *Harper I* experiment is from this State's ordinary modes of constitutional interpretation. North Carolina courts seeking

manageable standards have always begun with the bedrock principles "that a statute enacted by the General Assembly is presumed to be constitutional[;]" that "[a]ll doubts must be resolved in favor of the Act[;]" and that "the wisdom and expediency of the enactment is a legislative, not a judicial, decision." *Wayne Cnty. Citizens Ass'n for Better Tax Control v. Wayne Cnty. Bd. of Comm'rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 314–15 (1991) (quoting *In re Housing Bonds*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982)). While *Harper I* at least mentioned these principles, *see* 2022-NCSC-17, ¶ 7, *Harper II* ignored them and did not even purport to apply them. This was the first decision of its kind in North Carolina history. *See Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6 (1787) (taking "every reasonable endeavor . . . for avoiding a disagreeable difference between the Legislature and the Judicial powers of the State").

As the *Harper II* dissent explained, the only plausible way to begin addressing whether a redistricting plan is "fair"—assuming that could ever be judicially determined—is "to exercise the presumption that the General Assembly's policy choices are constitutional." 2022-NCSC-121, ¶ 178 (Newby, C.J., dissenting). The General Assembly did everything it could have done to facilitate that analysis. It adopted measures *Harper I* approved, used a set of elections chosen by one of the leading plaintiff-side experts in *Harper I*, directed non-partisan staff to run those metrics using Maptitude, the nation's leading redistricting software, and passed three plans that complied with these numbers. The superior court held "that the General Assembly's use of partisan data in this manner comported with the Supreme Court's Remedial Order." (R p 4873 at ¶¶ 14–15). But the Court promptly disregarded

the General Assembly's findings and set a standard requiring the General Assembly to prove that its plan were not unconstitutional.

Doubling down on its burden flipping, the Court improperly deferred, not to the legislative branch, but to the conflicting determinations of special masters and their advisors. *Harper II,* 2022-NCSC-121 ¶ 180 (Newby, C.J. dissenting). The *Harper* rulings "effectively amended the state constitution to establish a redistricting commission composed of judges and political science experts," *Harper II*, 2022-NCSC-121, ¶ 117 (Newby, C.J., dissenting), even though *Harper I* admitted that "[t]he constitution vests the responsibility for apportionment of legislative districts in the General Assembly." 2022-NCSC-17, ¶ 113.

2. *Harper II* Erroneously Failed to Demand Proof of Discriminatory Intent.

Harper II compounded these errors by failing to demand proof of "intentional, purposeful discrimination," as settled precedent requires in cases alleging violations equal-protection and free-speech and -assembly guarantees. *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 662, 178 S.E.2d 382, 386 (1971); *Holmes v. Moore*, 270 N.C. App. 7, 16, 840 S.E.2d 244, 254 (2020). *Harper I* purported to apply that doctrine. It held that gerrymandering violates the Free Elections Clause because gerrymandering "denies to certain voters . . . substantially equal voting power . . . on the basis of voters' partisan affiliation," *Harper I*, 2022-NCSC-17, ¶ 140; the Equal Protection Clause, because gerrymandering "[c]lassif[ies] voters on the basis of partisan affiliation so as to dilute their votes," *id.* ¶ 150; and the Free Speech and Free Assembly Clauses because, by engaging in gerrymandering, the legislature "intentionally engages in a

form of viewpoint discrimination and retaliation that triggers strict scrutiny," *id.* ¶ 157. The outcome in *Harper I* was driven—said the majority—because of the superior court panel's finding that the challenged plans were "the product of intentional, pro-Republican partisan redistricting." *Harper I*, 2022-NCSC-17, ¶ 184; *see also id.* ¶¶ 27, 37, 39, 63, 64, 68, 69, 140, 141, 150, 157, 193, 197, 201, 203, 211.

By the time *Harper II* came down, this element became a nuisance to Court's majority, who in crafting *Harper II,* simply ignored the intent question, thereby authoring transformative case law showing that intent does not matter in constitutional litigation. This cannot stand.

3. *Harper II*'s Application of its Novel Disparate-Impact Approach Confirms That It Is Subjective, Unmanageable, and Unconstitutional.

Harper I's standard also proved unmanageable in application. As an initial matter, the remedial phase demonstrates partisan-fairness metrics to be of little use, as different methods and data inputs analyzing the same plan, yield disparate results, including efficiency gaps of 2.2% and 4.8% and mean-median differences of .77% and 2.2%, *Harper II*, 2022-NCSC-121, ¶ 186 (Newby, C.J., dissenting). So *Harper II* was correct that the standards *Harper I* identified are vulnerable to manipulation. It erred in failing to conclude from this that *Harper I* was erroneous, root and branch.

The *Harper II* majority's "constellation" approach only confirmed its admission that no manageable standards are on the horizon. The test in application was as erratic as should have been expected. For example, *Harper II* found significance in a

metric referenced in the special masters' report called "declination," 2022-NCSC-121, ¶ 79, and relied on it in affirming the disapproval of the RCP, *id.* ¶ 82, and approval of the RHP, *id.* ¶ 82. But the Court ignored it in analyzing the RSP. *Id.* ¶¶ 95–103. By contrast, the special masters' report "considered . . . the declination metrics" in concluding that the RSP "meets the test of presumptive constitutionality." *Id.* ¶ 46 (quoting the special master's report); *see also id.* ¶ 184 (Newby, C.J., dissenting). That should have supplied the substantial evidence to compel affirmance on the RSP, but *Harper II* felt licensed to ignore that data point on a selective basis. As another example, *Harper II* found it relevant "that the RSP kept many of the same county groupings as the unconstitutional 2021 Senate plan," *id.* ¶ 97, but did not examine whether the RHP maintained "many of the same" prior groupings (as, in fact, it did), *see id.* ¶¶ 90–97.[10] *Harper II* did not explain why that inquiry is sometimes relevant and sometimes not.

Harper II was equally unpredictable in reviewing the superior court panel's "keystone" determination that the RSP "is satisfactorily within the statistical ranges set forth in" *Harper I*. *Id.* ¶ 98. Inexplicably, it did not address the efficiency gap, *id.* ¶ 99, even though it relied on that metric in examining the RHP, *id.* ¶¶ 92–93, and the RCP, *id.* ¶ 88. The RSP's efficiency gap was considerably below the 7% mark referenced in *Harper I* in every calculation. *See id.* ¶ 198 (Newby, C.J., dissenting). *Harper II* did not say why a metric trumpeted in *Harper I* and elsewhere in *Harper II* had suddenly become so irrelevant as to not be worth a mention.

[10] The RSP did in fact alter county groupings based on criticisms in *Harper I*. (9d R p 14695:5–20).

Harper II next declared that "the average of all four advisors' mean-median difference calculation is also above 1%," *id.* ¶ 99, but none of the advisors recommended averaging these scores, there was no evidence that this approach is a sound use of these metrics, and the *Harper II* majority did not examine averages when analyzing the RCP. This selectivity tainted the majority's analysis of that plan: "If it had [run averages] it would see that both scores for the RCP are within the 'presumptively constitutional ranges' identified in *Harper I*." *Id.* ¶ 215 (Newby, C.J., dissenting); *see id.* ¶ 199 (average RCP mean-median under 1%). In short, *Harper II*'s standard enables judges to "meaningfully engage with these principles," 2022-NCSC-121, ¶ 78, only if meaningful engagement means picking from an array of possible considerations "to ensure a predetermined outcome," *id.* ¶ 170 (Newby, C.J., dissenting).

4. *Harper II*'s Test Turns on Impermissible Political Considerations That Violate Separation of Powers Principles.

Ultimately, the only difference of any significance between the RHP (which *Harper II* upheld) and the RSP and RCP (which it invalidated) is that "the RCP was passed on a strict party-line vote," *id.* ¶ 82, as was the RSP, *id.* ¶ 97, whereas the RHP "passed the House and Senate with sweeping bipartisan approval," *id.* ¶ 92. *Harper II* was not shy in relying on this difference: these were its *first* findings in reviewing each respective plan. *See id.*¶¶ 82, 92, 97. The functional effect of this doctrine is to amend a mechanism into the North Carolina Constitution by which a minority legislative group with an incentive to aid a litigation strategy and a willing

judiciary can veto redistricting legislation. A group of legislators lacking the votes to pass or block legislation can vote against it, that vote becomes overriding evidence that the legislation is unfair, and the remaining "datapoints"—vulnerable to manipulation as they are—can be molded to round out an adverse constitutional finding.

But "[t]he courts have no veto power," *State v. Williams*, 146 N.C. 618, 61 S.E. 61, 67 (1908), and it is unconstitutional for a court to amend one into the Constitution, *see Long v. Watts*, 183 N.C. 99, 110 S.E. 765, 767–68 (1922). The judicial power cannot extend so far as to "prevent another branch from performing its core functions." *State v. Berger*, 368 N.C. 633, 636, 781 S.E.2d 248, 250 (2016).

C. *Harper II* Confirms That the Promise of *Harper I* Could Never Be Delivered.

Harper II failed in these ways because *Harper I* set this Court up to fail. *See Harper II*, 2022-NCSSC-121, ¶¶ 116–125 (Newby, J., dissenting). *Harper I* believed it possible for courts to determine, in a reliable way, when a plan "creates a level playing field for all voters" on a partisan basis. *Harper I*, 2022-NCSC-17, ¶ 164. But confronted with that question in *Harper II*, the Court found no reliable method for deciding this, resorted to an indeterminate approach dependent on no particular point of fact or law, and ultimately looked principally to the political choices of legislators in drawing legal distinctions.

The underlying problem that both *Harper I* and *Harper II* overlooked is political geography, and no branch of government can fix it. Supporters of political parties are not evenly dispersed in any jurisdiction, and it is therefore not to be

expected that any given set of districts will provide "the voters of all political parties substantially equal opportunity to translate votes into seats across the plan." *Harper I*, 2022-NCSC-17, ¶ 163. At a minimum, it takes a concerted effort to attempt to achieve this, and it is unclear even then whether such an effort delivers results. *Johnson v. Wisconsin Elections Comm'n,* 967 N.W.2d 469, 484 (Wis. 2021). Furthermore, "[e]xperience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time." *Harper I*, 2022-NCSC-17, ¶ 241 (Newby, C.J., dissenting); *accord Rucho*, 139 S. Ct. at 2503–04 (describing instances where "predictions of durability" in partisan gerrymandering cases "proved to be dramatically wrong")). It was and remains impossible for the General Assembly to know how it should draw districts in order to satisfy the constantly moving target adopted by the *Harper* majority, and *Harper II* holds that this will never change.

Harper I admitted that the judiciary has no constitutional license to "seek . . . proportional representation for members of any political party" or "to guarantee representation to any particular group." *Harper I*, 2022-NCSC-17, ¶ 10. But "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation," *Rucho*, 139 S. Ct. at 2499, and "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." *Davis v. Bandemer*, 478 U.S. 109, 159 (1986) (O'Connor, J., concurring in the judgment).

The *Harper I* majority attempted to overcome this problem by substituting "symmetry" for "proportionality", proposing that supporters of a major party "are entitled to have substantially the same opportunity to electing a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised [the same] percent of the statewide vote share in that same election." 2022-NCSC-17, ¶¶ 167, 169. But that is not something any redistricting authority can reliably promise or deliver, at least without aiming for proportional representation. Because there is no dependable way to know who will vote for candidates of what party in legislative races, and because parties' constituents are not evenly distributed in any jurisdiction, symmetry is not a realistic expectation of a redistricting plan. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 420 (2006) (rejecting this test because "[t]he existence or degree of asymmetry may in large part depend on conjecture about where possible vote-switchers will reside"). It is predictable that "courts will respond by moving away from the nebulous standard" *Harper I* suggested "and toward some form of rough proportional representation for all political groups." *Bandemer*, 478 U.S. at 145 (O'Connor, J., concurring in the judgment). "The consequences of this shift will be as immense as they are unfortunate." *Id.*

II. This Court Should Overrule *Harper I.*

Because it is neither sufficient nor possible for this Court to correct the errors of *Harper II* in isolation, the Court must also overrule *Harper I*. This Court retains

the prerogative to overrule its own precedent, and this petition presents the optimal vehicle.

Harper I "does not call the rule of stare decisis in its true sense into play," because "no series of decisions exists" finding gerrymandering claims justiciable, and this "single case . . . is much weakened as an authoritative precedent by a dissenting opinion 'of acknowledged power and force of reason.'" *State v. Ballance*, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949) (citation omitted). Further, *stare decisis* has "no application" where "there are conflicting decisions," *State v. Mobley*, 240 N.C. 476, 487, 83 S.E.2d 100, 108 (1954), which is the case here, *see Dickson v. Rucho*, 368 N.C. 481, 534, 781 S.E.2d 404, 440 (2015); *Howell v. Howell*, 151 NC 575, 66 S.E. 571, 573 (N.C. 1911). In any event, because "[n]othing is settled under the doctrine of stare decisis until it is settled right." *State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997), "the doctrine of stare decisis should never be applied to perpetuate palpable error," *id.*; *see, e.g.*, *Bulova Watch Co. v. Brand Distributors of N. Wilkesboro, Inc.*, 285 N.C. 467, 473, 206 S.E.2d 141, 145 (1974) ("[A] decision of this Court, subsequently concluded to have been erroneous, may properly be overruled when such action will not disturb property rights previously vested in reliance upon the earlier decision."); *Rabon v. Rowan Mem'l Hosp., Inc.*, 269 N.C. 1, 15, 152 S.E.2d 485, 495 (1967). The error here is palpable. *Harper I* was such a sharp departure from the state's ordinary modes of constitutional interpretation that it lacks any fair and substantial basis in North Carolina law.

A. Political Gerrymandering Claims Are Non-Justiciable.

Harper I fails as a matter of justiciability doctrine, which "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to" the political branches of government. *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001) (internal citation omitted). A question is non-justiciable "when either of the following circumstances are evident: (1) when the Constitution commits an issue, as here, to one branch of government; or (2) when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue." *Hoke Cnty.* 358 N.C. at 639, 599 S.E.2d at 391. *Harper I* went egregiously wrong in rendering value judgments that the State Constitution assigns solely to the General Assembly and that "[t]he Judiciary is particularly ill-suited to make." *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (quotation marks omitted).

1. Discretionary Political Choices Are Textually Committed to the General Assembly's Discretion.

The Constitution of North Carolina empowers the General Assembly to make political choices in redistricting, and it does not empower the State judiciary to review those choices *as* political choices or make the political choices in the General Assembly's stead. This is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (citation omitted). "The reality is that districting inevitably has and is intended to have substantial political consequences." *Bandemer*, 478 U.S. at 129 (plurality opinion). The justiciability question, then, is what body of government is vested with

power to make these political determinations, and the textual answer is clear: "The General Assembly." N.C. Const. art. II, § 3; *see* N.C. Const. art. II, § 5. Thus, this Court was correct to hold partisan-gerrymandering claims non-justiciable in *Dickson*. *See* 367 N.C. at 574–75, 766 S.E.2d at 260; *see also Pender Cnty. v. Bartlett*, 361 N.C. 491, 506, 649 S.E.2d 364, 373 (2007), *aff'd sub nom. Bartlett v. Strickland*, 556 U.S. 1 (2009) ("We do not believe the political process is enhanced if the power of the courts is consistently invoked to second-guess the General Assembly's redistricting decisions.").

Those holdings belong to a much older line of cases holding that a constitutional delegation of power to draw political boundaries established a "plenary" and unreviewable "authority." *Town of Boone v. State*, 369 N.C. 126, 136, 794 S.E.2d 710, 718 (2016); *see also id.* at 152, 794 S.E.2d at 728 (Ervin, J., concurring). Indeed, this Court rejected a partisan gerrymandering claim in *Howell*, which involved a claim that lines of a special-tax school district "were so run as to exclude certain parties opposed to the tax and include others favorable to it." 66 S.E. at 572. The Court (1) found that an "attempt to gerrymander" the district "was successfully made," (2) could not "refrain from condemning" that as a matter of policy, and (3) concluded that the body that adopted the lines acted erroneously in ignorance and without full knowledge that the private party that proposed the plan had intended to gerrymander the district. *Id.* at 574. And yet the Court still held that "the courts [are] powerless to interfere and aid the Plaintiffs-Appellants." *Id.* "There is no principle better established than that the courts will not interfere to control the

exercise of discretion on the part of any officer to whom has been legally delegated the right and duty to exercise that discretion." *Id.* at 573.

Similar decisions fill the North Carolina reports. *See, e.g.*, *Norfolk & S.R. Co. v. Washington Cnty.*, 154 N.C. 333, 70 S.E. 634, 635 (1911) (holding the General Assembly's authority to "declare and establish" the "true boundary between . . . counties . . . is a political question, and the power to so declare is vested in the General Assembly."); *see also Carolina-Virginia Coastal Highway v. Coastal Tpk. Auth.*, 237 N.C. 52, 62, 74 S.E.2d 310, 317 (1953) ("[T]he power to create or establish municipal corporations…is a political function which rests solely in the legislative branch of the government."); *State ex rel. Tillett v. Mustian*, 243 N.C. 564, 569, 91 S.E.2d 696, 699 (1956) ("The power to create and dissolve municipal corporations, being political in character, is exclusively a legislative function."); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 7, 269 S.E.2d 142, 147 (1980) ("Annexation by a municipal corporation is a political question which is within the power of the state legislature to regulate."); *Raleigh & G.R. Co. v. Davis*, 19 N.C. 451, 465 (1837) ("The necessity for the road between different points is a political question, and not a legal controversy; and it belongs to the legislature. So, also, does the particular line or route of the road . . . ."). *Leonard v. Maxwell,* 216 N.C. 89, 3 S.E.2d 316, 324 (1939) (claim alleging an act of the General Assembly was invalid because of legislative redistricting issue was "a political one, and there is nothing the courts can do about it."). These cases are all the more relevant given that, for much of North Carolina history, legislative district boundaries *were* county boundaries and hence

beyond the judiciary's control. *Harper I*, 2022-NCSC-17, ¶ 264.(Newby, C.J., dissenting).

Harper I did not address this precedent, and it failed to explain how a grant of discretionary authority to the General Assembly could be read as a grant of discretionary authority to the courts. Instead, the majority argued that to find gerrymandering claims non-justiciable would "turn back the clock to the time before courts entered the political thicket to review districting claims in *Baker v. Carr*." 2022-NSCS-17, ¶ 113. That is not true. No state justiciability determination could override federal-law doctrines, and this logic erroneously treats justiciability as an all-or-nothing proposition, such that any expansive category of claims—here, "reapportionment" claims—must either be justiciable or non-justiciable. 2022-NCSC-17, ¶ 113. This Court has always taken care in distinguishing *aspects* of governmental power that are and are not reviewable. *See, e.g.*, *Hoke*, 358 N.C. at 639–40, 599 S.E.2d at 391; *Cooper v. Berger,* 370 N.C. 392, 408-09, 809 S.E.2d 98, 107-08 (2018); *City of Charlotte v. McNeely*, 281 N.C. 684, 690, 190 S.E.2d 179, 184 (1972); *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195–96 (2012). The U.S. Supreme Court had little trouble rejecting the argument "that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims." *See Rucho*, 139 S. Ct. at 2501. The same is true here.

Harper I also erroneously relied on the fact that the redistricting power is "subject" to specific, enumerated "requirements"—but then read in a political-fairness requirement and overstepped separation of powers principles. *Compare*

Cooper v. Berger, 371 N.C. 799, 810-11, 822 S.E.2d 286, 296 (2018) ("All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution" (citation omitted)), *with Harper I*, 2022-NCSC-17, ¶ 113.

2. There Are No Judicially Manageable Standards to Govern Political Gerrymandering Claims.

Gerrymandering claims are independently non-justiciable because "satisfactory and manageable criteria or standards do not exist for judicial determination of the issue." *Hoke Cnty.*, 358 N.C. at 639, 599 S.E.2d at 391. *Harper I* erred from the outset in declining to identify a standard in the hope that one might emerge in "future cases." 2022-NCSC-17, ¶ 168. That is no way to ensure the public and the branches of government that the judges doing the analysis "see[] only with judicial eyes." *Bacon*, 353 N.C. at 713, 549 S.E.2d at 852 (citation omitted).

Another deficiency is that *Harper I* and *Harper II* could not adjudicate gerrymandering claims "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962). There are different manners in which the supposed problem of partisan gerrymandering may be addressed, resulting in different redistricting processes. For example, a redistricting authority may be forbidden from considering political data or drawing lines for partisan reasons, as Florida's constitution mandates. Fla. Const. Art. III, §§ 20-21 (prohibiting districts from being drawn with "the intent to favor or disfavor a political party or an incumbent"). By contrast, in certain circumstances, a redistricting

authority may be required to achieve partisan fairness, as Ohio's constitution states. Ohio Const. Article XI, Section 6(B). As shown above, *Harper I* and *Harper II* are in tension on this point.

Yet another set of problems is which elections and other data points are used to evaluate whether a gerrymander is durable or even exists. *See e.g., Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (plurality opinion). "There is no statewide vote in this country for the House of Representatives or the state legislature. Rather, there are separate elections between separate candidates in separate districts, and that is all there is." *Id.* at 289 (quoting Lowenstein & Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, 33 UCLA L. Rev. 1, 59–60 (1985)). Yet, both *Harper I* and *Harper II* looked to statewide election to show that legislative and congressional seats are gerrymanders. The State Constitution says nothing on this topic; how to construct the analysis is a policy choice.

3. The Errors of *Harper I* Are Sufficiently Grave to Justify Overruling It.

Harper I was not only wrong, but amounted to "palpable error." *Mobley*, 240 N.C. at 487, 83 S.E.2d at 108. There is, then, no basis to stand by the decision, regardless of the status the Court affords it under the doctrine of *stare decisis*.

First, the reasoning of *Harper I* contains no limiting principle and represents "an unrestricted license to amend our constitution." *Harper I*, 2022-NCSC-17, ¶ 244 (Newby, C.J. dissenting). As shown, the Court reasoned that, because some redistricting claims are justiciable, all redistricting claims are justiciable. To apply that rationale broadly would subsume all governmental powers into "a super

legislature." *State v. Bryant*, 359 N.C. 554, 565, 614 S.E.2d 479, 486 (2005) (quotation marks omitted). All government actors are subject to judicial review in some of what they do. If some review implies all review, there is no decision in government beyond the judiciary's power to claim for itself.

Second, the *Harper I* majority more or less declared that the Court's powers are just that broad, basing the judicial arrogation of redistricting power on the proposition that "the people . . . are represented by legislators who are able to entrench themselves by manipulating the very democratic process from which they derive their constitutional authority." 2022-NCSC-17, ¶ 4. Until *Harper I*, this Court always understood its responsibility to be to "interpret our constitution," *Silver v. Halifax Cnty. Bd. of Commissioners*, 371 N.C. 855, 862, 821 S.E.2d 755, 760 (2018), rather than to correct it. This Court has always understood its "duty" to be "to ascertain and declare the intent of the framers of the Constitution." *Maready v. City of Winston-Salem*, 342 N.C. 708, 716, 467 S.E.2d 615, 620 (1996).

Third, *Harper I* was unduly dismissive of the United States Supreme Court's resolution of the justiciability doctrine, where this Court's precedent had previously looked to federal justiciability standards for guidance. *See, e.g.*, *Hoke Cnty.*, 358 N.C. at 639, 599 S.E.2d at 391; *Cooper*, 370 N.C. at 408, 809 S.E.2d at 107; *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854. It is one thing to recognize that Supreme Court justiciability precedents do not bind this Court, *Harper I*, 2022-NCSC-17, ¶ 110, but quite another to take the opposite approach from the Supreme Court, in knee-jerk fashion. This Court ordinarily finds "guidance" from United States Supreme Court

decisions addressing a topic on which federal and state principles are similar. *E.g.*, *N.C. Dep't of Correction v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983).

Harper I's reasons for parting with federal justiciability doctrine do not hold water. It represented that "our state constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens," 2022-NCSC-17, ¶ 110 (citation and quotation marks omitted), but that is not so in any respect relevant here. The United States Supreme Court could not fashion standards on that subject because "there is no 'Fair Districts Amendment' to the Federal Constitution," as there is in the Florida Constitution. *Rucho* 139 S. Ct. at 2507. The same is true of the North Carolina Constitution. *Harper* also reasoned that "state law provides more specific neutral criteria against which to evaluate alleged partisan gerrymanders." 2022-NCSC-17, ¶ 110. But, as shown, that cuts *against* the result in *Harper I* because it did not apply the specific neutral criteria of the State Constitution. *Harper I* then argued that "[t]he role of state courts in our constitutional system differs in important respects from the role of federal courts." 2022-NCSC-17, ¶ 110. But it is as true in North Carolina as anywhere that "courts are not the judges of the wisdom or impolicy of a law," *D & W, Inc. v. City of Charlotte*, 268 N.C. 577, 591, 151 S.E.2d 241, 251, *supplemented*, 268 N.C. 720, 152 S.E.2d 199 (1966), and the State Constitution is more protective of the separation of powers than is the federal Constitution, *see* N.C. Const. art. I, § 6; *Jernigan v. State*, 279 N.C. 556, 563, 184 S.E.2d 259, 265 (1971).

Fourth, *Harper I* did not speak to the harms of entertaining gerrymandering claims. It did not explain how the doctrines it announced can fairly be fashioned to

avoid granting "members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests" the ability "to bring similar claims." *Bandemer*, 478 U.S. at 147 (O'Connor, J., concurring in the judgment). It failed to recognize "that the losing party or the losing group of legislators in every reapportionment will now be invited to fight the battle anew in . . . court." *Id.* It either did not see the harms of "pervasive and unwarranted judicial superintendence of the legislative task of apportionment," *id.*, or else it erroneously viewed them as virtues. And it did not consider the harms to the judiciary itself from what can only become unlimited immersion in partisan politics. "Nothing in" this Court's "precedents compel[ed]" it "to take this step, and there [was] every reason not to do so." *Id.* at 144. Today, there is every reason to overrule *Harper I*.

B. Politics in Redistricting Do Not Violate the State Constitution.

Justiciability doctrine aside, *Harper I* fails as a matter of basic constitutional interpretation. The provisions of the Declaration of Rights the *Harper I* majority cited "protect only 'individual and personal rights' rather than a group's right to have a party's preferred candidate placed in office." *Harper I*, 2022-NCSC-17, ¶ 267 (Newby, C.J. dissenting). By attempting to administer the Constitution's individual-rights guarantees to competing partisan groups, and use these individual rights to override the structural design of the Constitution and power allocations among the branches, the *Harper I* majority palpably erred.

1. The Free Elections Clause.

Harper I first relied on the Free Elections Clause, which requires that "[a]ll elections shall be free." N.C. Const. art. I, § 10. *Harper I*, 2022-NCSC-17, ¶¶ 133–41. But nothing in that guarantee of individual voting rights promises partisan groups an equal opportunity to elect their preferred candidates *as* members of those groups. "The meaning [of North Carolina's Free Elections Clause] is plain: free from interference or intimidation." John Orth & Paul Newby, *The North Carolina State Constitution* 56 (2d ed. 2013) (hereinafter "Orth"). "Based upon this Court's precedent with respect to the free elections clause, a voter is deprived of a 'free' election if (1) the election is subject to a fraudulent vote count, or (2) a law prevents a voter from voting according to one's judgment." *Harper I*, 2022-NCSC-17, ¶ 288 (Newby, C.J., dissenting) (first citing *Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746, 747 (1937); and then citing *Clark v. Meyland*, 261 N.C. 140, 143, 134 S.E.2d 168, 170 (1964)).

Nothing like that is implicated in political-gerrymandering cases. Every voter may cast a vote based on the voter's conscience, every vote has equal weight, and every vote is counted equally. The *Harper I* majority did not dispute these basic facts. Instead, it spilled out several paragraphs of lofty verbiage about "the principle[s] of the Glorious Revolution that those in power shall not attain 'electoral advantage' through the dilution of votes," "that representative bodies . . . must be 'free and lawful,'" and that the constitutional framers must have intended "that all attempts to manipulate the electoral process . . . would be prohibited under this Clause." *Harper I*, 2022-NCSC-17, ¶¶ 135–39. But it failed to link any of these ideas to the

rules it imposed on the State, such as "that the magnitude of the winner's bonus should be approximately the same for both parties." *Id.* ¶ 167 (citation omitted). "To believe that the framers of this provision in 1776 or the people who ultimately adopted it in subsequent constitutions had even a vague notion that the clause had this unbounded meaning is absurd." *Harper I*, 2022-NCSC-17, ¶ 287 (Newby, C.J., dissenting).

The historical argument never had legs and never could have. The principles of the Glorious Revolution (1688) and the English Bill of Rights (1689) did not even eliminate "the 'rotten boroughs' in England," *Harper I*, 2022-NCSC-17, ¶ 138, which were not addressed for nearly another 150 years through the Reform Act of 1832. *See* UK National Archives, *What caused the 1832 Great Reform Act?*[11] ("As [a] result, 57 'rotten and pocket boroughs' were removed . . . , although constituencies were still of uneven size."). Equal population did not become a requirement for North Carolina congressional and legislative districts until the 1960s. *See* Robert G. Dixon, Jr. *Democratic Representation: Reapportionment in Law and Politics* 617 (1968) (showing that, as of 1962, North Carolina's congressional plan had a total population deviation of more than 249%); *see Drum v. Seawell*, 250 F. Supp. 922, 923 (M.D.N.C.1966).

But set that aside. Neither *Harper I* nor *Harper II* addressed rotten boroughs or anything like them. They instead proposed a "right to have a 'fair shot' at winning"

[11] https://www.nationalarchives.gov.uk/education/resources/what-caused-the-1832-great-reform-act/#:~:text=In%201832%2C%20Parliament%20passed%20a,men%2C%20leaving%20working%20men%20disappointed.

elections on a partisan basis, *New York State Bd. of Elections v. Torres*, 552 U.S. 196, 197 (2008), and there is no plausible historical argument for *that* idea—not in the Glorious Revolution, not at the framing of the North Carolina Constitution, and not since. The only arguable analogue in United States history is the 1982 amendment to the Voting Rights Act, which forbids election systems that leave "members of racial and language minority groups" with "less opportunity than other members of the electorate . . . *to elect representatives of their choice*." 52 U.S.C. § 10301(a) (emphasis added). *Harper I* effectively proposed that, all along, the North Carolina Constitution guaranteed Republicans and Democrats an equal opportunity to win, even though federal law did not guarantee that for members of discrete and insular minorities except by statutory act in 1982.

Ultimately, *Harper I* set history aside, even criticized Legislative Defendants for presenting historical evidence, and announced that their plain-text reading of the Clause is "inconsistent with hundreds of years of constitutional development." 2022-NCSC-17, ¶ 138. Setting aside that this Court previously understood its "duty" to be "to ascertain and declare the intent of the framers of the Constitution," *Maready*, 342 N.C. at 716, 467 S.E.2d at 620, *Harper I* failed to identify any "constitutional development" supporting its theory. Even if one believes the meaning of the Constitution is "changing," rather than "fixed," *see Harper I*, 2022-NCSC-17, ¶ 227 (Newby, C.J., dissenting), one presumably needs a theory as to which specific changes should and should not occur—a theory, that is, apart from the political will of a majority of the Court.

Harper I did not even pretend to have a theory of "constitutional development" and none was available to it. As painstakingly shown, the General Assembly is a political body handling a political task, redistricting, and as recently as 2015, this Court held that so-called "political" or "partisan" gerrymandering claims are "not based upon a justiciable standard." *Dickson*, 368 N.C. at 534, 781 S.E.2d at 440. The Court recognized in 2007 that "the political process is not enhanced if the power of the courts is consistently invoked to second-guess the General Assembly's redistricting decisions," *Pender County*, 361 N.C. at 506, 649 S.E.3d at 373, and in 2004 that "[t]he General Assembly consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions," *Stephenson*, 355 N.C. at 371, 562 S.E.2d at 390. In 1909, it rejected a partisan-gerrymandering claim. *Howell*, 66 S.E. at 573. Further, the superior court panel documented numerous recent efforts to amend the State Constitution to address gerrymandering, which it correctly viewed as compelling evidence that the populace recognizes this is a problem requiring amendment, not interpretation. (R p 3543 at ¶¶ 98–102). *Harper I* cited nothing against that overwhelming trend of development. The decision was nothing but rupture.

2. The Equal Protection Clause.

Harper I also relied on the Equal Protection Clause, which provides that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. art. I, § 19. Nothing in this State's ordinary interpretative

methods supports the notion that the equal protection of laws includes the right of a partisan group to elect its preferred candidates. The equal-protection principle "requires that all persons similarly situated be treated alike," *Richardson v. N.C. Dep't of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996), and a redistricting plan composed of equally populated districts does just that.

Harper I failed to make a threshold showing that a redistricting plan of equally populated districts does not treat similarly situated persons "alike." *Id.* It did not identify any distinction drawn on the basis of a suspect classification. *See Badham v. Eu*, 694 F. Supp. 664, 673 (N.D. Cal.), *sum aff'd* 488 U.S. 1024 (1989) ("[E]ven the bounds of normal political exaggeration are exceeded when the Republicans of California attempt to suggest that their political role can even be spoken of in the same breath as that of the *Blacks of Burke County, Georgia and Mobile, Alabama*."). It quoted at some length decisions addressing "the fundamental right of each North Carolinian to substantially equal voting power," 2022-NCSC-17, ¶ 145 (quoting *Stephenson*, 355 N.C. at 379, 562 S.E.2d 377), but did not show that individuals with equal voting power have been differentiated in a manner relevant to equal-protection principles. Its theory circularly referenced its novel doctrine that "results" must "fairly reflect the will of the people," including "in aggregate" terms, 2022-NCSC-17, ¶ 149, which would be plausible only if the right to vote entailed the right of political parties to place their preferred candidates into office. Because the premise fails, so does the conclusion. *See Town of Beech Mountain v. Cnty. of Watauga*, 324 NC 414, 378 S.E.2d 780, 783 (1989) (applying rational basis, not strict, scrutiny when

restrictions "impinge[d] to some limited extent on" the exercise of a fundamental right).

Harper I devoted much space to the view "that the equal protection clause in article I, section 19 applies in circumstances where the federal Equal Protection Clause is silent." 2022-NCSC-17, ¶ 147. Setting aside that North Carolina courts "use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal protection analysis," *Richardson*, 345 N.C. at 134, 478 S.E.2d at 505, the line of reasoning falls short of the mark. Generalities about the breadth of state provisions as compared to federal provisions do very little analytical heavy lifting. The U.S. Supreme Court has rejected challenges to many distinctions drawn by state actors, such as distinctions between ophthalmologists and opticians. *See Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 486–91 (1955). It has never been the doctrine of this Court that, once the U.S. Supreme Court rejects a claim, this Court should *recognize* it simply because it can afford State provisions a broader scope than federal provisions. *Cf. In re N. Carolina Pesticide Bd. File Nos. IR94-128, IR94-151, IR94-155*, 349 N.C. 656, 673, 509 S.E.2d 165, 176 (1998) (following *Williamson*). Thus, generic assertions about the breadth of state provisions do practically nothing to identify why any given cause of action, rejected at the federal level, should be recognized in North Carolina.

Harper I also analogized "partisan gerrymandering claims" to *Stephenson*'s recognition of a right to "substantially equal voting power and substantially equal legislative representation[.]" 2022-NCSC-17, ¶ 148 (quoting *Stephenson I,* 355 N.C.

at 378, 562 S.E.2d 377). But *Stephenson* was discussing variations on the principle of one person, one vote, which is not implicated in "partisan gerrymandering claims." To be precise, *Stephenson* held that a redistricting plan may not place some voters in single-member districts and others in multi-member districts. 355 N.C. at 377, 562 S.E.2d at 393. That is a straightforward application of the *individual* right to vote, *see Harper I*, 2022-NCSC-17, ¶ 258 (Newby, C.J., dissenting), and does not in any way support the *Harper I* majority's proposed right to "the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials." 2022-NCSC-17, ¶ 148. "[I]t is not enough to cite precedent: [the Court] should examine it for possible limits." *Bandemer*, 478 U.S. at 146 (O'Connor, J., concurring)

3. Free Speech and Assembly.

Harper I relied on the Free Speech and Freedom of Assembly Clauses, 2022-NCSC-17, ¶¶ 151–74, which provide, respectively, that "[f]reedom of speech and of the press . . . shall never be restrained," N.C. Const. art. I, § 14, and that "[t]he people have a right to assembly together to consult for their common good," *id.* art. I, § 12. Nothing in the *Harper I* analysis explains how gerrymandering of any type *restrains* speech or denies anyone's right *to consult*. "The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district." *Rucho*, 139 S. Ct. at 2504. Because no redistricting plan involves "restrictions . . . on the espousal of a particular viewpoint," *State v. Petersilie*, 334 N.C. 169, 183, 432 S.E.2d 832, 840 (1993), none of the *Harper I* discourse on free speech as the "great bulwark of liberty" and so forth, 2022-NCSC-17, ¶ 153 (citation omitted), has any application.

Harper I focused its analysis on the analogy to free-speech "retaliation." *Id.* ¶¶ 154, 157. But a political gerrymandering claim does not state a plausible cause of action for retaliation because "a person of ordinary firmness would not refrain from expressing a political view out of fear that the General Assembly will place his residence in a district that will likely elect a member of the opposing party." *Harper I*, 2022-NCSC-17, ¶¶ 298–99 (Newby, C.J., dissenting). Given that North Carolina districts have historically been "gerrymandered to a degree inviting widespread contempt and ridicule," *Stephenson*, 355 N.C. at 375, 562 S.E.2d at 392, evidence of that chilling effect would be plentiful if the *Harper I* free-speech theory had any modicum of accuracy. But the Court cited none. And there is no analogy between politics in redistricting and speech-based conditions on public employment. *See Harper I*, 2022-NCSC-17, ¶ 153 (discussing *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 766, 413 S.E.2d 276, 280 (1992)).

In truth, Plaintiffs do not desire merely to speak and associate. They "desire districts drawn in a manner ensuring their political speech will find a receptive audience." *Johnson*, 967 N.W.2d at 487. But "[a]ssociational rights guarantee the freedom to participate in the political process; they do not guarantee a favorable outcome." *Id.* The U.S. Supreme Court decades ago rejected the notion that free-speech doctrine contains "an entitlement to a government audience for [citizens'] views." *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 282 (1984). Whether or not the State Constitution's free-speech doctrine is to be "construed . . . more expansively than" the First Amendment, *Harper I,* 2022-NCSC-

17, ¶ 154, it surely cannot be broad enough "to impose any affirmative obligation on the government to listen, to respond or . . . to recognize [each] association" and facilitate its speech, *Knight*, 465 U.S. at 286 (quoting *Smith v. Ark. State Highway Emp., Loc. 1315*, 441 U.S. 463, 464–65 (1979)).

4. *Harper I* is Contrary to the U.S. Constitution's Elections Clause.

Harper I's decision invalidating the congressional map enacted by the General Assembly also conflicts with the U.S. Constitution's Elections Clause. *See* U.S. Const. art. I, § 4, cl. 1. The provisions of the North Carolina constitution invoked by *Harper I* to invalidate the congressional map are either inapplicable or insufficiently definite to justify striking down the General Assembly's regulation of congressional elections, and their application to the General Assembly's congressional map violates the Elections Clause. *Harper I* was wrong to hold otherwise. The U.S. Supreme Court has granted certiorari and held oral argument in December 2022 on that aspect of *Harper I* in a case that may definitively resolve the Elections Clause issue by the end of the Court's Term in June. *See Moore v. Harper*, No. 21-1271 (U.S.). This Court, if it decides to grant this Petition, should consider the impact and timing of *Moore* in any decision it renders in this case.

(b) "Whether congressional and legislative maps utilized for the 2022 election . . . are effective for future elections."

1. The Congressional and Legislative Maps Used In The 2022 Election Were Established By This Court, Not the General Assembly, and the General Assembly Is Free To Redraw Wholly New Maps for Future Elections.

The Remedial Plans adopted by the General Assembly in 2022 were enacted by the General Assembly solely to comply with this Court's erroneous order in *Harper I*. That usurped the discretion of the General Assembly and demanded a pre-determined outcome.

As a reaction to what was an unconstitutional usurpation of legislative authority exercised by this Court in *Harper I*, the General Assembly expressly stated that the Remedial Plans would take effect only upon approval of those plans by the superior court panel. *See* N.C. Session Laws 2022-2 (Senate), 2022-3 (Congressional) and 2022-4 (House). The intent and purpose of this legislative qualification was to conclusively establish that the 2022 plans would not exist but for the erroneous ruling and mandate in *Harper I*. Because the 2022 plans are nothing more than court-approved interim plans enacted under the duress of *Harper I*, the General Assembly is free to enact entirely new plans during its 2023 session.

2. The Court-Ordered Remedial Process Violated Separation of Powers.

None of the plans used in the 2022 election or drawn by the General Assembly under erroneous standards espoused by this Court in *Harper I* or *Harper II* are effective in any future elections. The General Assembly created the 2022 plan under a court-invented redistricting regime to remedy a constitutional violation that did not

exist. And it made the 2022 plans contingent on court approval in a remedial process that violated the separation of powers.

But the remedial proceeding is only as valid as the need for a remedy. In this case, that need is only as valid as the need for plans "compliant" with *Harper I*. *See Harper II*, 2022-NCSC-121, ¶ 11. This "limited opportunity to correct plans" afforded in this proceeding entailed judicial supervision and, ultimately, judicial approval or disapproval. But here, with *Harper I* overruled, the remedial proceeding itself was unlawful and unwarranted given that *Harper I* was wrongly decided to begin with. Central to the limited remedial opportunity is the judiciary's reserved role to determine whether any plan so adopted actually *remedies* the deficiencies and either to approve or disapprove of remedy plans on that basis. *See Stephenson*, 358 N.C. 219. 225, 595 S.E.2d 112, 116 (2004) (recounting that "the trial court determined" the General Assembly's remedial plans "failed to meet the requirements" of precedent and that "interim plans for use in the 2002 legislative elections only"); *Pender County*, 361 N.C. at 510, 649 S.E.2d at 376.

Recognizing this legal backdrop, the General Assembly expressly stated that the Remedial Plans would take effect only upon approval of those plans by the superior court panel. *See* N.C. Session Laws 2022-2 (Senate), 2022-3 (Congressional) and 2022-4 (House). For that reason alone, they will not be effective for future elections. This case is in all material respects like *Hunt v. Cromartie*, 526 U.S. 541 (1999), where the U.S. Supreme Court interpreted language in 1998 remedial plans enacted by the North Carolina General Assembly, which provided "that the State will

revert to the 1997 districting plan [invalidated] upon a favorable decision of this Court." *Id.* at 545 n.1. The Court held that this legislative text had the force of law and rendered the appeal concerning the 1997 plans live and not moot. *Id.* In this case, although the text of the 2022 plans is different, the concept is the same: the 2022 plans by their own terms take effect only upon court approval. When the proceeding from which that approval might be obtained is dismissed as non-justiciable—as this proceeding should be—the plans by their own terms lack the force of law and therefore are not effective. They simply are not law at all, and cannot be when the legislation itself says this.

The same conclusion follows from background remedial principles, which render the effectiveness of a remedial plan contingent on court approval. At every stage of the *Harper* proceeding, this approval function was recognized by all parties concerned. This Court in *Harper I* established a process by which the General Assembly would submit proposed plans for the superior court's consideration and ordered the superior court to "approve or adopt compliant congressional and state legislative districting plans" by 23 February 2022. (R p 4869). The superior court panel likewise viewed its role as to either "approve or adopt" compliant plans. (R pp 4879, 4885-86). The *Harper II* majority viewed its role as determining whether the "approval" and disapproval decisions of the trial court, respectively, were erroneous, 2022-NCSC-121, ¶ 6, and recognized that only after a court "order approving" a plan does it become "established" under the mid-decade redistricting rule, *id.* ¶ 94. The dissenting opinion too understood that approval was essential to the plans' validity.

See 2022-NCSC-121, ¶¶ 169, 170, 234 (Newby, C.J., dissenting). And the parties agreed on these principles. Legislative Defendants-Appellants' Br. at 15, *Harper II*, 413PA21 (Aug. 1, 2022). ("The remedial congressional redistricting plan set out in 2022 N.C. Sess. Law 3 is an act of the General Assembly, which would have been effective *only upon court approval*." (emphasis added)); *see also NCLCV* Plaintiffs-Appellants' Reply Br. at 2–3, *Harper II,* 413PA21 (Aug. 15, 2022); Common Cause Plaintiff-Appellant Br. at 3–4, *Harper II,* 413PA21 (June 27, 2022); *Harper* Plaintiffs-Appellants Br. at 3–4, *Harper II*, 413PA21 (June 27, 2022). Because there is no jurisdiction to "approve" any plan, and because such an approval would be an advisory opinion, the 2022 plans lack effect in future elections.

3. Court-Ordered Plans Are No Different Than Interim Plans.

Decisions by a superior court panel approving remedial plans establish such plans as "court ordered" plans that are no different than the interim plans adopted by the superior court and used during the 2002 general elections. *Stephenson v. Bartlett*, 358 N.C. 219, 238, 595 S.E.2d 112, 119 (2004) ("*Stephenson III*"). Thus, even if the 2022 plans were court-approved interim plans enacted solely in an attempt to meet this Court's usurpation of legislative authority as reflected by *Harper I*, they lack effect in future elections, just as the 2002 court ordered plans could not be used in 2004.

(c) "What impact, if any, does Article II Sections (3)(4) and (5)(4) of the North Carolina Constitution have on this Court's analysis."

Under Article II, Sections 3 and 5, the General Assembly—and not the judiciary—is granted the constitutional authority to apportion state Senate and

House districts. Article II, Sections 3(4) and 5(4) state that once districts are "established" by the General Assembly, such district lines may not be altered until the next decennial census. N.C. Const. art. II, § 3(4); *see also id.* art. II, § 5(4). No redistricting plans qualify as established in this case. The ban on mid-decade is inapplicable here because (1) the 2022 plans were established by courts, not the General Assembly; (2) the 2021 plans are not established because they were enjoined before they were ever used; (3) applicable precedent holds that when constitutional infirmities infect a whole districting plan, the General Assembly must be given an opportunity to draw an entirely new plan; and (4) Article II, Sections 3(4) and 5(4) do not apply to congressional plans.

1. The 2022 Plans.

The mid-decade rule only applies to plans that are established by the General Assembly. *See* N.C. Const. art. II, §§ 3(4), 5(4). As previously stated, the plans used in the 2022 general election were established by the superior court panel and this Court, not the General Assembly. This fact is conclusively demonstrated by the way the majority opinions in *Harper I* and *Harper II* changed the rules from one case to the other. The majority in *Harper I* and *Harper II* transformed itself from a judicial body into a super legislature with the self-appointed authority to move the goal posts for compliance by the General Assembly.[12] The only explanation for the sleight of

[12] For example, *Harper I* relied upon a finding that the record established "intentional and purposeful discrimination" by the General Assembly when it enacted the original 2021 plans. But in *Harper II*, the Court failed to address or even mention any alleged showing of intentional discrimination by the General Assembly related to the enactment of the Remedial Plans. [Legislative Defendants' Petition for Rehearing pp 4-12.]

hand played by the Court in *Harper I* and *Harper II* is the obvious opinion of the Justices in the majority that, regardless of the text of the state constitution, they had broad authority to approve or disapprove redistricting plans based upon their subjective and political opinions about how many seats each of the two major political parties should be won. It would be a gross miscarriage of justice, not to mention a violation of North Carolina law, for plans mandated by standards that have been shown to change from case to case to be deemed plans "established" by the General Assembly. Because these plans were established by this Court and not the legislature, the General Assembly is not constrained from enacting new legislative plans by the restrictions stated in Article II, Sections 3(4) and 5(4).

2. The 2021 Plans.

The 2021 districts also have not become "established" because this Court "enjoin[ed] the[ir] use . . . in any future elections." *Harper*, 380 N.C. at 304, 867 S.E.2d at 557. To overrule *Harper I* would not alter the Court's injunction against the 2021 plans for at least two reasons.

First, a ruling of this Court continues to "bind[] the parties" in the relief afforded, even if ultimately found to be delivered on "erroneous" grounds. *E. Carolina Lumber Co. v. West*, 247 N.C. 699, 701, 102 S.E.2d 248, 249 (1958). To overrule a decision revokes its claim of authority under the "doctrine of stare decisis," which dictates that "a principle of law . . . settled by a series of decisions . . . is binding . . . in similar cases." *Ballance*, 229 N.C. at767, 51 S.E.2d at 733. Overruling a decision announces its error and dictates that a new rule be followed "in all cases still open on

direct review and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule." *Harper v. Virginia Dep't of Tax'n*, 509 U.S. 86, 97 (1993). That the overruled decision itself was found to be issued on "erroneous" grounds does not override the relief actually afforded in *that* case. *See E. Carolina Lumber*, 247 N.C. at 701, 102 S.E.2d at 249. Thus, overruling *Harper I* would announce its error and dictate that a new constitutional principle be applied in all pending cases, including this one (*Harper II*). But the Court's dictate that the 2021 plans may not be used "in any future elections" would not be vacated.

Second, the 2021 districts are not "established" for the independent reason that they lack the continuity inherent in that term, through no fault of the General Assembly's. The term "establish" means "to make firm or stable," "to place, install, or set up in a permanent or relatively enduring position," and "to bring into existence . . . as permanent." Webster's Third New International Dictionary 778 (1993); *see also* 5 Oxford English Dictionary 404 ("establish" means "[t]o set up on a secure or permanent basis," and "established" means "in permanent employ"). Accordingly, in Article II, Sections 3 and 5, the term "established" directs the use of the same plan (for each respective body) over the course of the decade in a continuous manner. That makes sense because there are many practical problems with erratic changes in redistricting plans, which may undermine legitimate state interests in "avoiding contests between incumbent Representatives," *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *see also Tennant v. Jefferson Cnty. Comm'n,* 567 U.S. 758, 762 (2012), and

"keep[ing] the constituenc[ies] intact so the officeholder is accountable for promises made or broken," *LULAC*, 548 U.S. at 441 (plurality opinion).

The Constitution's use of the word "established" is significant because it cannot logically be reduced to referencing only a bill's "passing" the General Assembly. The framers used the term "when established, not "when passed." They understood that decennial redistricting is accomplished through the passage of a "bill," because they identified that process as culminating in a "bill" in Article II. N.C. Const. art. ii., §§ 22(5)(b)–(d) (holding that a bill "revising . . . districts" is not subject to gubernatorial veto). Had the framers intended for the bar on mid-decade redistricting to trigger upon the first passage of redistricting legislation, they could have written "when passed" instead of "when established." To render "every word" of the text "operative," and none "idle," *Bd. of Educ. of Macon Cnty. v. Bd. of Comm'rs of Macon Cnty.*, 137 N.C. 310, 49 S.E. 353, 353–54 (1904) (quoting Thomas M. Cooley, *Cooley's Constitutional Limitations* 92 (7th ed. 1903)), the Court must recognize that "established" references more than that act of passage. It also connotes continuity in fact.

In this case, the 2021 plans do not satisfy that continuity element. To revert to the 2021 plans would not return to "established" plans because they were not permanent in the essential sense. Although *Harper I* was wrong as a legal matter, overruling it would not change the fact of history that the 2021 plans obtained no permanent status. They lasted only one month and four days, not even making it out of the 2021 calendar year. *See Harper I*, 2022-NCSC-17, ¶¶ 18, 22. The State did not

use them in the 2022 elections, representatives were not elected from them, and to impose them now would double-bunk numerous incumbents of both political parties, causing irreparable harm.[13] To return to these plans now would destroy the continuity purpose the Constitution seeks to create and work the very opposite of the constitutional intent and meaning. The 2021 plans were never "established" for purposes of Article II, Sections 3 and 5.

3. Precedent Supports the General Assembly Drawing Entirely New Districting Plans in Similar Situations.

This Court has repeatedly afforded the General Assembly the opportunity to adopt new redistricting plans after invalidation of a plan enacted in the same decade, which would not be proper if those plans were deemed "established" under Article II, Sections (3)(4) and (5)(4). *See Stephenson I*, 355 N.C. at 385, 562 S.E.2d at 398 ("The General Assembly optimally should be afforded the first opportunity to enact new redistricting plans for the North Carolina Senate and North Carolina House of Representatives . . . ."); *Stephenson v. Bartlett*, 357 N.C. 301, 303, 582 S.E.2d 247, 248–49 (2003)("*Stephenson II*"). If that were not so, the bar on mid-redistricting would defeat judicial review itself, and this litigation should never have been entertained.

Indeed, there is a long line of redistricting cases just in this State where remedies against plans were deemed to require redistricting large swaths, if not the entirety of, those plans. For example, in *Stephenson I*, this Court ordered that both

[13] Allowing the General Assembly the opportunity to redraw affords the General Assembly the discretion to adopt criteria to take incumbency into account in the wake of the 2022 elections. Consideration of incumbency is a traditional redistricting criterion. *See Karcher,* 462 U.S. at 740.

the House and Senate plans be completely redrawn as opposed to only revising those districts drawn in violation of the Whole County Provision ("WCP"). *Stephenson I,* 355 N.C. at 385, 562 S.E.2d at 397. Even more instructive is this Court's opinion in *Pender County,* 361 N.C. 491, 649 S.E. 2d 364. In *Pender County*, the Attorney General argued that House District 18, drawn in violation of the State's whole-county principles was nevertheless constitutional because it was drawn to comply with Section 2 of the Voting Rights Act. This Court rejected that argument because the district was not a majority-minority district and held that House District 18 violates the WCP. *Id.* at 361 N.C. at 510, 649 S.E.2d at 376. This Court then ordered "that all redistricting plans for North Carolina House of Representatives and North Carolina Senate comply with the principal holding of this case." *Id.* It held that "[a]ny legislative district designated as a Section 2 district under the current redistricting plan, and any future plans, must satisfy the numerical majority requirement defined herein, or be redrawn in compliance with the Whole County Provision." *Id.*

In 1981, following the legal standards of all prior legislative plans, the General Assembly enacted state Senate and House plans that did not divide counties into separate districts. *Id*. But later in that same year, the United States Department of Justice ("DOJ") objected to the 1981 plans pursuant to Section 5 of the Voting Rights Act. The DOJ's objection was based upon the ground that whole county, multi-member districts illegally submerged minority populations in the forty North Carolina counties that were covered by Section 5 of the Voting Rights Act. *Cavanagh v. Brock*, 577 F. Supp. 176, 178-79 (E.D.N.C. 1983),

In response, the General Assembly enacted new state House and Senate plans in 1982, both of which divided counties throughout the state including counties not covered by Section 5. Thus, the General Assembly concluded that the Section 5 objections to districts located in covered counties, gave it the constitutional authority to modify the entire Senate and House plans. *Id.* at 179. In fact, no one interpreted Article II, Sections 3(4) or 5(4) as preventing the General Assembly from changing districts "established" by the 1981 plans that were not located in counties covered by the DOJ's Section 5 objection. *Id.*

Thereafter, in *Cavanagh*, a case removed from state court, the state defendants advocated for the invalidation of the WCP. The District Court, based upon its interpretation of state law, concluded that the DOJ's objection to the WCP's enforcement in the 40 counties covered by Section 5 precluded its enforcement in non-covered counties. *Id.* at 179. Notably again, the District Court did not object to the General Assembly's decision to modify districts located in counties that were not covered by Section 5 on the ground that those districts were "established" and therefore could not be changed.

Furthermore, it is axiomatic that changing one or more districts in a redistricting plan can have a ripple effect on every other district. *Bethune-Hill v. Virginia State Bd. of Elections*, 326 F. Supp. 3d 128, 154 (E.D. Va. 2018). This is why, in 1982, the General Assembly needed to modify numerous districts located in counties impacted by the DOJ objection, even though many of those counties were not covered by Section 5. Mindful of this reality, in *Stephenson I*, this Court

remanded the case to the trial court with instructions that the General Assembly be given an opportunity to draw new plans that complied with the remedial framework adopted in *Stephenson I.* 355 N.C. at 385, 562 S.E.2d at 398. Notably, the Court did not instruct that only those counties that violated the WCP should be redrawn—it ordered that both the Senate and House plans be entirely revised. *Id.* It also authorized the superior court to adopt "temporary or interim remedial plans" for both chambers and that the General Assembly would thereafter have the right to adopt new plans to replace the court's interim plan during its 2003 session. *Id*. at n.9. The principles established in *Stephenson I* provide controlling guidance to assist the Court in determining whether the 2021 plans are effective for future elections and the impact of Article II, Sections 3(4) and 5(4).

Moreover, the ripple effect caused by the *Harper I* majority's unconstitutional criteria is present in the 2022 plans. This Court erroneously mandated that the General Assembly meet the proposed benchmarks related to partisan fairness formulas known as the efficiency gap and mean-median as established by this Court in *Harper I*. *Harper I*, 2022-NCSC-17 ¶¶ 165–68. Ironically, in a case purportedly to eliminate politics from redistricting, for the General Assembly to meet the Court's benchmarks, partisan election results became the predominant criteria imposed on the General Assembly by *Harper I*. This is because the efficiency gap and the mean-median require that political data for every proposed district be analyzed on a cumulative level to determine whether the distribution of voters throughout every district results in an acceptable efficacy gap and/or mean-median scores for the entire

plan. In many instances, in order to attempt to meet the metrics adopted in *Harper I*, the General Assembly was required to intentionally gerrymander districts to favor Democratic voters, particularly in urban counties, thereby depriving Republican voters of an equal right to vote under the same theories advocated by plaintiffs for Democrat voters. No specific number of districts can be identified that have been improperly drawn based upon the metrics adopted in *Harper I*—because in each instance the constitutional error resulting from the criteria illegally mandated by this Court infects the entire plan in question.

4. The Congressional Plans.

As to congressional plans, Article II, Sections 3(4) and 5(4) do not apply, leaving the General Assembly free to enact a new plan to replace the superior court's interim congressional plan. Under the federal Elections Clause, the General Assembly has been granted the federal right of determining the time, place, and manner of congressional elections. This authority includes the drawing of congressional districts. *See Vieth*, 541 U.S. 267. The North Carolina Constitution contains no criteria whatsoever regarding the General Assembly's obligation to redraw congressional plans following each decennial census. There is no dispute that the congressional plan used in the 2022 elections is a court-drawn interim plan, that the General Assembly must re-draw. As such, the General Assembly is completely free under the North Carolina Constitution to replace the interim court-drawn congressional plan with a plan of its choosing. *League of United Latin American Citizens*, 548 U.S. at 420-23.

(d) "What remedies, if any, may be appropriate."

The proper remedy is an order remanding this case to the superior court with instructions that it be dismissed with prejudice, combined with a declaration that the General Assembly may now exercise its constitutional authority and draw all new redistricting plans under the correct constitutional standards. *See Caswell Cnty v. Hanks*, 120 N.C. App. 489, 492, 462 S.E.2d 841, 843 (1995) ("A court empowered to hear a case de novo is vested with 'full power to determine the issues and rights of all parties involved, and to try the case as if the suit had been filed originally in that court.'").

As "the appropriate method of obtaining redress from errors committed by this Court," *Nowell*, 249 N.C. at 521, 107 S.E.2d at 111, the rehearing procedure affords this Court ample power to afford the General Assembly effective relief from a novel redistricting regime that palpably violates the State Constitution. In this posture, the Court is empowered to withdraw its *Harper II* ruling and "to reconsider" its "holdings and to redetermine the questions" presented. *Branch Banking & Tr. Co. v. Gill*, 293 N.C. 164, 177–78, 237 S.E.2d 21, 29 (1977); *Alford*, 320 N.C. at 467, 358 S.E.2d at 324; *Clary v. Alexander Cnty. Bd. of Ed.*, 286 N.C. 525, 533, 212 S.E.2d 160, 165 (1975). As shown, the Court should hold that the constitutional experiment of *Harper I* was erroneous root and branch, withdraw or entirely vacate its *Harper II* ruling applying and extending (even rewriting) *Harper I*, and replace it with a decision overruling *Harper I* and holding that partisan gerrymandering claims are non-justiciable and non-cognizable.

The relief necessary to effectuate that ruling is an order vacating the *Harper II* remedial proceeding as unwarranted and improper. It should also declare that the General Assembly may redistrict the legislative and congressional plans free from the vacated remedial proceeding. *See Pender County*, 361 N.C. at 510, 649 S.E.2d at 376.

That a fundamental and foundational constitutional error of this magnitude and scope requires that the General Assembly redraw all three plans is not unusual. For example, in cases involving claims of unequal population between districts, the courts have approved a redrawing of all of the districts within the plan in question, not just the districts that have been under or over-populated. *Whitcomb v. Chavis*, 403 U.S. 124, 161-62, (1971). Even more instructive is this Court's opinion in *Pender County*, 361 N.C. 491, 649 S.E. 2d 364 (2007). In *Pender County*, even though only House District 18 was directly in issue, this Court ordered "that all redistricting plans for North Carolina House of Representatives and North Carolina Senate comply with the principal holding of this case." *Pender County*, 361 N.C. at 510, 649 S.E.2d at 376. Even more specifically, the Court held that "[a]ny legislative district designated as a Section 2 district under the current redistricting plan, and any future plans, must satisfy the numerical majority requirement defined herein, or be redrawn in compliance with the Whole County Provision." *Id.* Similar to *Pender County*, as set forth herein, the rampant constitutional errors present in all three plans resulting from *Harper II* require that all three plans be redrawn.

CONCLUSION

The Court should withdraw its opinion in *Harper II*, overrule *Harper I*, and permit the General Assembly to exercise its constitutional duties to draw new House, Senate, and congressional redistricting plans free from the failed judicial experiment in *Harper I* and *II*.

Respectfully submitted, this the 17th day of February, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date the foregoing was served upon all counsel of record via email.

This the 17th day of February, 2023.

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