No. 413P21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

REBECCA HARPER, et al.,

Plaintiffs,

v.

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

Defendants.

From Wake County

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

Plaintiffs,

v.

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

Defendants.

****

BRIEF OF BIPARTISAN FORMER GOVERNORS MICHAEL F. EASLEY, ARNOLD SCHWARZENEGGER, CHRISTINE TODD WHITMAN, AND WILLIAM WELD AS *AMICI CURIAE* SUPPORTING PLAINTIFFS[1]

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[1] Plaintiffs' and Defendants' counsel of record were provided timely notice in accordance with North Carolina Appellate Court Rule 28(i). This brief is filed in accordance with North Carolina Appellate Court Rule 28(i), *amici curiae* certify that no counsel for a party authored this brief in whole or part, and that no party or counsel other than the *amici curiae* and its counsel made a monetary contribution intended to fund preparation or submission of this brief.

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INTRODUCTION

Because the people are granted the right to govern in this democracy, it follows that they must retain the right to choose their representatives. When their representatives manipulate that right by choosing who their voters are in an imbalanced and unjust manner, it constrains democracy by entrenching power in one political party that rightfully belongs to the people.

A legislative branch that has entrenched its authority through extreme partisan gerrymandering and attempted to fabricate a permanent one-party majority over another distorts the separation of powers envisioned by the Framers. It increases the likelihood that Governors must veto legislation and that courts must adjudicate matters regarding legislation or mediate intractable conflicts between the executive and legislative branches. Rather than forming governments where laws can be passed through cooperation, gerrymandering introduces more conflict and intemperance into the legislative process, including with regard to what laws may be presented to the Governor, who is elected to represent the entire ungerrymandered state. Forming consensus, cooperating, finding common ground, and ultimately governing all become harder.

Partisan gerrymandering has the effect of manufacturing an illegitimate supermajority from a simple majority. A supermajority, at its worst, can operate as an autocratic system waning the power of the other branches of government. The fabricated supermajority may override the authority vested in coordinate branches of government and ultimately to the people.

This Court has the opportunity and duty to conduct robust judicial review to eradicate the practice of extreme partisan gerrymandering that inflicts unconstitutional and incalculable harm on democracy.

INTEREST OF *AMICI CURIAE*

Amici curiae are former Governors from both major political parties and hail from North Carolina as well as other states. Governor Michael F. Easley was the seventy-second Governor of North Carolina, serving from 2001 until 2009. He is a practicing attorney in North Carolina and previously served as both a District Attorney and Attorney General. Governor Arnold Schwarzenegger was the thirty-eighth Governor of California, serving in that role from 2003 until 2011. Governor William Weld was the sixty-eighth Governor of Massachusetts, serving from 1991 until 1997. He is a practicing attorney in Massachusetts, and previously served as a United States Attorney and as Assistant U.S. Attorney General in charge of the Criminal Division, with jurisdiction over election fraud in both offices. Governor Christie Todd Whitman was the fiftieth Governor of New Jersey, serving in that role from 1994 until 2001. As such, they have a substantial, legitimate interest in the manner in which North Carolina conducts its redistricting plan, and its effects on governance and democracy in the state.

Amici's brief demonstrates the far-reaching impacts of the new redistricting plan, which would result in damage to democracy, and is contrary to the North Carolina Constitution. Specifically, the brief highlights the practice of partisan gerrymandering in violation of the North Carolina people's fundamental rights. This Court has the authority to right this constitutional wrong.

This bipartisan group of former Governors believes that affording the citizens of North Carolina free, fair, and secure elections is one of the pillars of our democracy. They have seen the result of gerrymanders with a partisan effect on the governance process from their unique position both as the chief executives of their respective states and also as individuals elected by the entire state's population. These former Governors are compelled to work with their legislative co-equals: to come to terms on legislation, budgets, appointments, and other matters of state. They know

how legislative districts that reward partisan polarization make it more challenging to find common ground. These former Governors are filing this brief to urge the Court to halt the damage that partisan gerrymandering inflicts on our democracy.

BACKGROUND

These lawsuits arrive on the heels of a decade of litigation regarding redistricting maps in North Carolina created by the current political party in power at the General Assembly. In 2010, the decennial census necessitated new congressional and state legislative maps. Then-State Senator Robert Rucho and State Representative David Lewis chaired the two committees that were jointly responsible for preparing the new maps. To that effect, Thomas Hofeller was hired to assist in redrawing the district lines. In 2011, Hofeller utilized past election results to predict partisan voting behavior in redrawing the new districts (hereinafter the "2011 Redistricting Plans"). *See Cooper v. Harris*, 137 S. Ct. 1455, 1476 (2017). In the 2012 election, the 2011 Redistricting Plans worked as intended to entrench one political party,[2] and litigation ensued. *Id.* at 1503–04 (finding two congressional districts created in the 2010 North Carolina redistricting plan were unconstitutional racial gerrymanders).

In 2017, a North Carolina federal district court invalidated more than two dozen State House and Senate districts in the 2011 Redistricting Plans and provided the North Carolina General Assembly with an opportunity to draw new plans. *Covington v. State*, 267 F. Supp. 3d 664, 667

[2] Republicans won 64% of the seats (77 out of 120) in the North Carolina House, even though Republican candidates won only 51.6% of the statewide vote. Republicans won 66% of the seats (33 out of 50) in the North Carolina Senate, even though Republican candidates won only 51.2% of the statewide vote. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *5 (N.C. Super. Ct. Sept. 3, 2019). For the United States House of Representatives 2012 elections in North Carolina, Republicans won 69.2% of the seats (9 out of 13) even though Republican candidates won only 48.75% of the statewide vote. *2012 North Carolina House Results*, POLITICO (Nov. 29, 2012), https://www.politico.com/2012-election/results/house/north-carolina/.

(M.D.N.C. 2017). On June 5, 2017, the United States Supreme Court unanimously affirmed the decision. *North Carolina v. Covington*, 137 S. Ct. 808, 196 L.Ed.2d 594 (2017) (mem.). In light of the *Covington* decision, the congressional redistricting plans were redrawn in 2017 (hereinafter the "2017 Remedial Plans"). Thereafter, the 2017 Remedial Plans spurred further litigation based on partisan gerrymandering grounds. On September 3, 2019, after the United States Supreme Court decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) held that partisan gerrymandering challenges present political questions beyond the reach of the federal courts,[3] a three judge panel struck down the 2017 Remedial Plans as unconstitutional under the North Carolina Constitution and enjoined their use in the 2020 primary and general elections. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *135 (N.C. Super. Ct. Sept. 3, 2019). New maps were subsequently drawn and used in 2020.

Since 2011, the voters of North Carolina have been "subjected to a dizzying succession of litigation" over North Carolina's legislative and congressional districts. *Id.* at *1. Now, this Court is presented with an opportunity to act on behalf of the Constitution and the people of the State and eradicate the practice of unconstitutional gerrymandering, including gerrymandering for an unconstitutional racial or partisan result. On November 4, 2021, the North Carolina General Assembly ratified the 2021 Redistricting Plans for State House districts (SL 2021-175), Senate districts (SL 2021-173) and Congressional districts (SL 2021-174) (hereinafter the "2021

[3] Former Governor Schwarzenegger of California and Governor Larry Hogan of Maryland attended the *Rucho* oral argument before the United States Supreme Court. Speaking outside the courthouse, they decried the politically distorting effects of extreme partisan gerrymandering. Jennifer Barrios, *Hogan, Schwarzenegger urge Supreme Court to act on partisan gerrymandering*, WASHINGTON POST (Mar. 26, 2019), https://www.washingtonpost.com/local/md-politics/hogan-schwarzenegger-rail-against-gerrymandering-as-supreme-court-hears-oral-arguments/2019/03/26/2b071076-4f44-11e9-8d28-f5149e5a2fda_story.html ("Schwarzenegger said gerrymandering encourages politicians to pander to the extremes of their parties, rather than finding compromise in the middle").

Redistricting Plans"). These actions concern the constitutionality of the 2021 Redistricting Plans for the upcoming 2022 election cycle. Plaintiffs bring this action based on equal protection, free elections, freedom of speech, and right of association state constitutional claims. On December 8, 2021, and upon Plaintiffs' petition to the North Carolina Supreme Court for Discretionary Review Prior to Determination by the Court of Appeals, the Supreme Court enjoined the Defendants from conducting elections in the State in the upcoming March 2022 election. Further, the Court remanded the case to the trial court and directed it to reach a ruling on the merits of Plaintiffs' claims, encouraging the review of justiciability. On January 11, 2022, the trial court entered an order in favor of the Defendants that resolved all claims raised by the Plaintiffs.

As it relates to the partisan gerrymandering claims, in *Common Cause v. Lewis*, the three judge panel persuasively addressed the harms associated with partisan gerrymandering. "[E]lections must be conducted freely and honestly to ascertain fairly and truthfully, the will of the people," that court wrote. *Lewis*, 2019 WL 4569584, at *110. An election, fairly and truthfully ascertained, was deemed a "fundamental right of the citizens enshrined in our Constitution's Declaration of Rights, a compelling governmental interest and a cornerstone of our democratic form of government." *Id.* But, the Court warned, "[p]artisan gerrymandering operates through vote dilution – the devaluation of one citizen's vote as compared to others." *Id.* Voter dilution is done through "packing" or "cracking" voters that support the disfavored party into districts where their vote will be less effective. *Id.* In sum, this allows the majority party drawing the maps to devalue votes of the minority party. *See Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018). The three judge panel in *Common Cause* confirmed:

> [E]xtreme partisan gerrymandering – namely redistricting plans to entrench politicians in power, that evince a fundamental distrust of voters by serving the self-interest of political parties over the public good, and that dilute and devalue votes of some citizens compared to others – is contrary to the fundamental right of North

> Carolina citizens to have elections conducted freely and honestly to ascertain, fairly and truthfully, the will of the people. Extreme partisan gerrymandering does not fairly and truthfully ascertain the will of the people. Voters are not freely choosing their representatives. Rather, representatives are choosing their voters. It is not the will of the people that is fairly ascertained through extreme partisan gerrymandering. Rather, it is the will of the map drawers that prevails.

Lewis, 2019 WL 4569584, at *110. *Amici* respectfully request the Court to promote democracy, preserve the State's Constitution, and abolish this practice from the governance process.

ARGUMENT

I. THE NEED AND DUTY TO RULE ON PARTISAN GERRYMANDERING

While paying lip service to democracy, the North Carolina General Assembly continues to warp the North Carolina political process through partisan gerrymandering.

> *Partisan gerrymandering* occurs when the majority party draws districts for the purpose of increasing a party's *political* advantage in the legislature; for example, where districts are drawn to allow that party's candidates to win a supermajority (over 60%) of the seats even though their candidates in the aggregate statewide receive a bare majority of votes.

N. Carolina State Conf. of Nat'l Ass'n for Advancement of Colored People v. Moore, 273 N.C. App. 452, 455, 849 S.E.2d 87, 90 (Ct. App. 2020). Partisan gerrymandering, aided by increasingly sophisticated data tools, has made relentless advances in states across the United States, and it has become clear that those who draw district lines in this manner require neutral and independent judicial oversight. *Lewis*, 2019 WL 4569584, at *125. The practice of partisan gerrymandering is an unconstitutional act that greatly weakens the representative form of government that is the foundation of a democracy. When the legislature imposes partisan gerrymandering, the courts are duty-bound to step in to provide a meaningful remedy.

"It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution." *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253 (1997). "When a government action is challenged as unconstitutional, the courts have a duty to

determine whether that action exceeds constitutional limits." *Id.* It is the duty of the courts "to ascertain and declare the intent of the framers of the Constitution and to reject any act in conflict therewith." *Maready v. City of Winston-Salem*, 342 N.C. 708, 716, 467 S.E.2d 615, 620 (1996).

North Carolinians, through the State's Constitution, delegated the drawing of the State's legislative districts to the General Assembly. *Lewis*, 2019 WL 4569584, at *1. The delegation of this task is not unfettered. *Id.* Constitutional principles limit legislative map drawing. *Id.* More specifically, the North Carolina General Assembly must not infringe upon the people of North Carolina's fundamental rights to vote, associate, and express their political views. "The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action. . . ." *Corum v. Univ. of N.C. ex rel. Bd. of Gov'rs*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). "The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State." *Id.* (citing *State v. Manuel*, 20 N.C. 144 (1838)). The "obligation to protect the fundamental rights of individuals is as old as the State." *Id.* at 783, 413 S.E.2d at 290. Extreme partisan gerrymandering deprives the people of these fundamental rights.

When political processes breach constitutional rights, the judiciary must intervene. North Carolinians entrust the review of legislative acts to the judicial branch. *Lewis*, 2019 WL 4569584, at *1. "[W]ithin the context of . . . redistricting and reapportionment disputes, it is well within the power of the judiciary of [this] State to require valid reapportionment or to formulate a valid redistricting plan." *Stephenson v. Bartlett*, 355 N.C. 354, 362, 562 S.E.2d 377, 384 (2002). "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by th[e United States Supreme] Court but . . . has

been specifically encouraged." *Scott v. Germano*, 381 U.S. 407, 409 (1965). "It is not the province of the Court to pick political winners or losers. It is, however, most certainly the province of the Court to ensure that 'future elections' in the 'courts of public opinion' are ones that freely and truthfully express the will of the People." *Lewis*, 2019 WL 4569584, at *3.

This Court can and should take the necessary measures to address the unconstitutionality of extreme partisan gerrymandering. As this Court is aware, there is an irresistible temptation for any political majority – regardless of party affiliation – to engage in partisan gerrymandering. It is scarcely surprising that a political majority would attempt to increase political power by any means at their disposal. THE FEDERALIST NO. 51 (James Madison).

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

Id.

Unchecked partisan gerrymandering only gets worse.[4] "[L]egislators elected under one partisan gerrymander will enact new gerrymanders after each decennial census, entrenching themselves in power anew decade after decade." *Lewis*, 2019 WL 4569584, at *125. Thus, James Madison's insight on how human nature would manifest itself through the democratic process was prescient. A mere two years after a three-judge panel in Wake County Superior Court instructed the General Assembly to redraw state legislative and congressional districts, the General Assembly

[4] Gerrymandering furthers the concept of "gerrylaundering," which Professor Robert Yablon has conceptualized as a method in which mapmakers use prior unchecked gerrymandered maps to keep the field tilted in their favor. Robert Yablon, *Gerrylaundering* (August 23, 2021), 97 NEW YORK UNI. L. REV. (forthcoming 2022) Univ. of Wisconsin Legal Studies Research Paper No. 1708, available at https://ssrn.com/abstract=3910061 (articulating "gerrylaundering" as a concept "to capture instances in which mapmakers seek to perpetuate their favorable position by carrying forward key elements of the existing map.").

– consisting of some of the same legislative leadership and many of the same legislators – has produced the 2021 Redistricting Plans in remarkably similar form to that which was rejected at the time. The effect of the 2021 Redistricting Plans calls on the Court to exercise its constitutionally required duty to vindicate the rights of the people where a branch of government attempts to act unconstitutionally. By producing a plan so similar to the judicially rejected plan in its reach and effect, the General Assembly challenges our Constitution and judiciary to respond. Courts remain the arbiter of what the law is, and indeed what state actions are lawful. *Bayard v. Singleton*, 1 N.C. 5 (1787); *Marbury v. Madison*, 1 Cranch 137, 177, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Serious constitutional challenges to laws that touch upon our representative form of government, as here, deserve appropriate judicial review.

The Framers were also concerned with the risk that one branch alone would try to rule, dictate, or administer government. After identifying the need for checks and balances among the branches of government, Madison was clear to note in particular, "the legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." THE FEDERALIST NO. 48 (James Madison). Madison's concern no doubt rested in part on a belief that the legislative process unchecked was a means by which majority rule could most easily veer into tyranny. The Constitution creates three separate branches of government. When one branch sets in motion a process that interferes with the ability of the other branches to exercise checks and balances, or even overwhelms them, then the system is no longer functioning to protect the sovereignty of the people. *State v. Berger*, 368 N.C. 633, 645, 781 S.E.2d 248, 256 (2016).

In this instance, the Court has the authority and duty to intervene and protect the people of North Carolina from unconstitutional partisan gerrymandering. This concern is far from

theoretical: in 2018, a similarly gerrymandered North Carolina General Assembly sought to maximize its control of government while hobbling the other branches, seeking to unilaterally place sweeping constitutional amendments on the ballot that would increase the General Assembly's control over the judiciary and limit the Governor's authority. At that time, a bipartisan group of former North Carolina Governors – including Gov. Easley, an *amicus* in this matter – stepped in to say "enough." *Cooper v. Berger*, No. 18 CVS 9805, 2018 WL 4764150 (N.C. Super. Ct. Aug. 21, 2018). *See also* Brief of the Honorable James G. Martin, the Honorable James B. Hunt, Jr., The Honorable Michael F. Easley, The Honorable Beverly E. Perdue, and the Honorable Patrick McCrory as *Amici Curiae* Supporting Plaintiff, 2018-CVS-9805, N.C. Super. Ct. Aug. 18, 2018. Moreover, the courts enjoined those amendments as drafted and gave the people an opportunity to vote – and reject – the limitations proposed by the General Assembly. *Statewide Referenda Results*, N.C. BOARD OF ELECTIONS, (Nov. 6, 2018), https://er.ncsbe.gov/?election_dt=11/06/2018&county_id =0 &office=REF &contest=0.

II. THE CONSTITUTIONAL STRUCTURE INTENDS FAIR GOVERNANCE

The North Carolina Constitution enshrines three well-established principles of democracy – popular sovereignty, representative government, and separation of powers. When implemented together, these principles ensure a robust and functioning democracy. As set forth below, partisan gerrymandering undermines these principles, and therefore, poses a risk to our democracy.

The North Carolina Constitution empowers the citizens of North Carolina to govern themselves through their elected representatives. The North Carolina Constitution guarantees that "[a]ll political power is vested and derived from the people." N.C. Const. art. I, § 2. It intends the power to remain with the people and be exercised through the General Assembly, which functions

as the representative arm of the electorate. *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (citing *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891–92 (1961)).

Finally, the North Carolina Constitution mandates separation of powers among the branches of government, declaring that "[t]he legislative, executive, and supreme judicial powers of the State's government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. The separation of powers principle is fundamental to North Carolina's form of government, appearing in each version of North Carolina's Constitution. *Berger*, 368 N.C. at 645, 781 S.E.2d at 255–56. "When one branch interferes with another branch's performance of its constitutional duties, it attempts to exercise a power reserved for the other branch." *Id.* at 661, 781 S.E.2d at 266.

As former Governors, *amici* are familiar with "the good of the whole," N.C. Const. art. I, § 2, that flows from these three principles and with the benefits of working together with the other branches of government. And *amici* respect the institutional design for separation of powers among the three branches of government that was created out of a fear of concentrated power. Separation of powers provides a check on concentrated governmental power and empowers the three branches of government to work together to promote democracy and safeguard the rights of citizens.

Extreme partisan gerrymandering takes direct aim at these three principles and thus creates an intolerable strain on our democracy. Redistricting is critical to representative government because it provides the basis for all citizens of North Carolina to elect their representatives and thereafter hold them accountable. As such, districting should aspire to give voice to all the people of the state, and not just a portion. In North Carolina, where the legislature is entrusted with the power of redistricting in the absence of a gubernatorial veto, the legislature's constitutional duty

to draw district lines that maximizes the participation of citizens is especially important. This objective is consistent with the Framers' assessment of what criteria would be necessary for representative government and reflects their awareness of how the English monarchy had distorted the votes of political opponents in an effort to entrench their own control of the United Kingdom and its colonies. *Common Cause v. Lewis,* No. 18 CVS 014001, 2019 WL 4569584, at *111 (N.C. Super. Ct. Sept. 3, 2019) (citing John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. REV. 1759, 1797–98 (1992), J.R. Jones, THE REVOLUTION OF 1688 IN ENGLAND, 148 (1972), Grey S. De Krey, RESTORATION AND REVOLUTION IN BRITAIN: A POLITICAL HISTORY OF THE ERA OF CHARLES II AND THE GLORIOUS REVOLUTION, 241, 247-48, 250 (2007)).

Extreme partisan gerrymandering assaults the core principles of democracy including popular sovereignty, representative government and separation of powers. As such, it creates the very ill that the North Carolina Constitution is crafted to prevent.

III. PARTISAN GERRYMANDERING UNDERMINES THE CONSTITUTIONAL STRUCTURE

Partisan gerrymandering blocks the sovereign people of North Carolina from exercising their constitutional rights. Our representative democracy guarantees each person is provided with an equal say in the election of representatives. Partisan gerrymandering deprives North Carolinians of their right to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2509 (2019) (J. Kagan, dissent); *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion) ("[U]nconstitutional discrimination" occurs "when the electoral system is arranged in a manner that will consistently degrade [a voter's] influence on the political process[.]"). In doing so, democracy is debased by "turning upside-down the core American idea

that all governmental power derives from the people." *Id.*; *see also Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015).

Partisan gerrymandering violates the North Carolina Constitution's guarantee to participate in free elections. *See* N.C. Const. art. 1, § 10 ("All elections shall be free."). The Free Elections Clause ensures "that all elections must be conducted freely and honestly to ascertain, fairly and truthfully, the will of the People and this is a fundamental right of North Carolina citizens, a compelling governmental interest, and a cornerstone of our democratic form of government." *Lewis*, 2019 WL 4569584, at *2. The Free Elections Clause "shapes" the application of the Equal Protection Clause, N.C. Const. art. I, § 19, the Freedom of Speech Clause, *id.* at art. I, § 12, and the Freedom of Assembly Clause, *id.* at art. I, § 14, to partisan gerrymandering. *Lewis*, 2019 WL 4569584, at *3. "[T]hese clauses provide significant constraints against governmental conduct that disfavors certain groups of voters or creates barriers to the free ascertainment and expression of the will of the People." *Id.*; *see also Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that equal protection requires "that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.").

Partisan gerrymandering violates the North Carolina Constitution's guarantee of the right to association. N.C. Const. art. I, § 12. This right to association is a fundamental right and also speaks to the importance of free and fair elections. This exhortation is a command and not a mere admonition. *See N. Carolina Bar v. DuMont*, 304 N.C. 627, 639, 286 S.E.2d 89, 97 (1982). North Carolina courts have held that the State has a legitimate and compelling "interest in promoting fair and honest elections." *State v. Petersilie*, 334 N.C. 169, 182, 432 S.E.2d 832, 840 (1993). The North Carolina Supreme Court has enforced the Free Elections Clause to strike down laws that "interfere with voters' ability to freely choose their representatives." *Lewis*, 2019 WL 4569584,

at *112; *see Clark v. Meyland*, 261 N.C. 140, 142–43, 134 S.E.2d 168, 170 (1964) (striking down a law that required voters seeking to change their party affiliation to take an oath supporting the party's nominees).

The North Carolina "government is founded on the will of the people. Their will is expressed by the ballot." *People ex rel. Van Bakkelen v. Canaday*, 73 N.C. 198, 220, 1875 WL 2808, at *14 (1875). "The danger of partisan gerrymandering is that it has the potential to violate 'the core principle of republican government . . . that the voters should choose their representatives, not the other way around.'" *Lewis*, 2019 WL 4569584, at *110 (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015)). Partisan gerrymandering fundamentally imperils voters' ability to associate in support of political candidates of their choice because the construction of districts stifles the voters' ability to elect a candidate who shares their views or viewpoints.

Partisan gerrymandering denies voters the constitutional guarantee of equal protection. The United States Supreme Court has recognized that "[f]ull and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of his state legislature." *Reynolds*, 377 U.S. at 565; *see also Gray v. Sanders*, 372 U.S. 368, 379–80 (1963) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among [all]."). "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race." *Id.* at 566; *see also Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) ("A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed to minimize or cancel out the voting strength of racial or political elements of the

voting population."). Partisan gerrymanders further violate the Fourteenth Amendment's guarantee of "fair and effective representation" and the First Amendment by burdening citizens' fundamental voting right on the basis of their expressed ideological beliefs. *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring in judgment).

The evidence presented here has shown that a "satisfactory and manageable" standard exists to determine whether a partisan gerrymander was impermissible based on state constitutional grounds. *Lewis*, 2019 WL 4569584, at *127. The standard is based on the history of the Free Elections Clause, "as well as the commonsense insight that elections are not 'free' where the partisan will of the mapmaker predominates over the ascertainment of the fair and truthful will of the voters." *Id.* *Amici* respectfully request this Court to analyze the redistricting maps under this satisfactory and manageable standard to eradicate extreme partisan gerrymandering.

IV. PARTISAN GERRYMANDERING PERPETRATES HARMS THAT THE COURT SHOULD NOT IGNORE

Partisan gerrymandering curdles the democratic political processes. Unchecked, the then-party in power is permitted to wield the decennial redistricting process to bias and distort future elections in a way that muffles the voice of the electorate. Partisan gerrymandering allows representatives to select their voters, and not the voters to select their representatives. Partisan gerrymandering allows representatives to retrench their authority at the expense of the other branches of government who are also elected by the people.

Partisan gerrymandering degrades the most elemental principles on which the United States and the State of North Carolina were founded. As the Declaration of Independence expressly set forth, the rights of men are protected by governments "deriving their just powers from the consent of the governed[.]" Declaration of Independence (July 4, 1776). The unquestioned intent was to

instill a "government of the people, by the people, for the people." A. Lincoln, Gettysburg Address (1863). "The government of the Union is a government of the people; it emanates from them; its powers are granted by them; and are able to be exercised directly on them, and for their benefit." *McCulloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819).

Partisan gerrymandering thwarts popular sovereignty by removing the rights of the people to vote for their representatives and placing this power in the hands of the legislature. The legislature should not be permitted to manipulate the electoral process to control the outcome. Disenfranchising voters to perpetuate the power of the majority party comes at the expense of the whole. *See* DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, vol. 2, 257 (J. Elliott ed. 1876) (Alexander Hamilton) ("[T]he true principle of a republic is, that the people should choose whom they please to govern them.").

Partisan gerrymandering promotes factionalism. A robust democracy eschews factions and does not sanction a portion of the electorate to govern based upon solely the majority's own interests. THE FEDERALIST NO. 10 (James Madison) ("Complaints are everywhere heard from our most considerate and virtuous party . . . that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interest and overbearing majority."). Factionalism allows a select group of citizens, united by party lines, to aggregate their interests at the expense of other citizens. "A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party." *Id.* In contrast, our representative democracy pursues regional interests through local and state governments to aggregate the interests of the whole. Partisan gerrymandering conflicts with regional interests by drawing lines to perpetuate power to the majority party. It exemplifies "an

abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good." *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 456 (2006) (Stevens, J., concurring in part and dissenting in part) (quotations and citation omitted). It is damaging to democracy when a representative is inclined to "feel more beholden to the cartographers who drew [their] district than to the constituents who live there." *Id.* at 470.

Amici include former Governors who have seen how legislatures attempt to craft, through gerrymandering, a supermajority that effectively eliminates the Governor's use of a veto. *Amici* have observed how candidates for congressional and legislative districts are compelled to protect themselves from primary challenges. Where Governors seek to have the policy priorities they campaigned on enacted for the good of the entire State, a legislature that is comprised by design to maximize partisan advantage is less likely to share those goals. In this way, *amici* have observed as former Governors that a legislature drawn to ensure partisan advantage can block a Governor elected by the people statewide from enacting a mandate.

Instead of providing a balance on the executive, a legislative supermajority wrought by partisan gerrymandering sequesters the executive branch. When a gerrymander-designed supermajority renders the people's elected Governor powerless it not only eliminates the gubernatorial ability to participate in the passage and defeat of legislation, it eliminates the power of those voters who elected the officeholder for that purpose. And if a branch of government has been shuttered by another, it is the duty of the third branch to intercede and restore balance. *See Bayard*, 1 N.C. at 6–7. This duty falls on the courts. The judiciary is the last line of defense to ensure the General Assembly does not overstep its authority. This Court has a duty to conduct close scrutiny of the unilateral and unchecked acts of the General Assembly.

To this end, an unchecked legislative supermajority would have unrestricted power to rewrite the North Carolina Constitution. Again, this concern is not merely theoretical. In 2018, as noted above, the General Assembly, controlled by a supermajority and targeting elected members of the legislative minority political party, attempted to place misleading ballot language in front of the people. That language would have increased legislative control over the judiciary. They threatened impeachment of statewide elected officials of the opposite political party on specious grounds. It is entirely foreseeable that given the opportunity, a hyper-partisan legislative supermajority would again advance destabilizing acts like the impeachment of statewide elected officials. *See e.g.*, Nick Ochsner, *House committee approves impeachment investigation of NC Secretary of State*, WBTV (Jun. 28, 2017), https://www.wbtv.com/story/3576 3466/house-committee-approves-impeachment-investigation-of-nc-secretary-of-state/.

Intertwined with partisan gerrymandering is the entrenchment of politicians. Partisan gerrymandering enables representatives or political parties to root themselves in office, free from competition or challenge. Put simply, entrenching and preserving legislative power impairs the democratic system of government. Entrenched politicians delay effective change sought by the electorate. "[E]ntrenching a political party in power undermines the ability of voters to effect change when they see legislative actions as infringing on their rights" because "as James Madison warned, a legislature that is itself insulated by virtue of an invidious gerrymander can enact additional legislation to restrict voting rights and thereby further cement its unjustified control of the organs of both state and federal government." *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 621 (M.D.N.C.), *vacated and remanded*, 138 S. Ct. 2679, 201 L. Ed. 2d 1066 (2018) (citing James Madison, *Notes of Debates in the Federal Convention of 1787*, 424 (W. W. Norton & Co. 1987) (1787) ("[T]he inequality of the Representation in the Legislatures of particular states, would

produce like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter."); *see also LULAC*, 548 U.S. at 470–71 (2006) (Stevens, J., concurring in part and dissenting in part) (stating partisan gerrymandering creates "locked-in" legislative seats where those elected "need not worry about the possibility of shifting majorities" and "have little reason to be responsive to the political minorities within their district.").

Further, partisan gerrymandering stifles the organic electorate and creates more divisive party lines. The average percentage of House incumbents winning with supermajorities has consistently increased over the past fifty years. William A. Galston & Elaine Kamarck, *Make U.S. Politics Safe for Moderates*, BROOKINGS INSTITUTION (Feb. 23, 2021), https://www.brookings.edu /opinions/make-u-s-politics-safe-for-moderates/. However, in the previous thirty years, the ideological composition of the electorate during presidential elections has remained stable, "with liberals at roughly 20 percent, moderates at 47 percent and conservatives at 33 percent." *Id.* Based on this empirical data, moderates generally make up nearly half of the electorate.

Partisan gerrymandering encourages politicians to accommodate their primary voters and diminishes the influence of moderates in electoral cycles. Despite making up nearly half of the electorate, moderate voices are drowned out. Partisan gerrymandering shifts political parties towards opposite ends of the spectrum instead of meeting in the middle. As a result, more divisive party candidates are elected, and there is less compromise across party lines. Partisan gerrymandering allows candidates, and elected representatives, to remain in their politically-divided corners. Moreover, candidates are less likely to promote moderate policy decisions or reach across the aisle to compromise. Indeed, after the 2019 Redistricting Plan was installed, the General Assembly and the Governor were able to agree on substantive energy legislation and come

to terms on a budget, something that the previous General Assembly – one that was ruled an unconstitutional racial and partisan gerrymander – was unable to do. *See* H.B. 951, S.L. 2021-165, 2021-2022 Sess. (N.C. enacted Oct. 13, 2021), S.B. 105, S.L. 2021-180, 2021-2022 Sess. (N.C. enacted Nov. 18, 2021).

Increased technology further demonstrates the need for this Court to robustly review the latest partisan gerrymandering. Modern technology has allowed courts to review all voter data. A simple comparison of partisan voter share to how many seats won is a clear illustration of the effects of partisan gerrymandering. For example, after enactment of the 2011 Redistricting Plans, in the 2012 elections, the parties' vote shares for the North Carolina House were nearly even across the state with Democrats receiving 48.4% of the statewide vote. *Lewis*, 2019 WL 4569584, at *5. However, the Democrats only won 43 out of 120 seats (36%) and the Republicans won 77 out of 120 seats (64%). *Id.* In the North Carolina Senate, the Democrats received 48.4% of the statewide vote, but won only 17 out of 50 seats (34%). *Id.* The negative effects of partisan gerrymandering are patently obvious in the disproportionality between the statewide vote shares and the seats won by each party.[5] *See also Benisek v. Lamone*, 266 F.Supp.3d 799, 817 (D. Md. 2017) (Niemeyer, J., dissenting) (finding that the Maryland Democrats in the General Assembly "moved 360,000 persons (roughly one-half of the District's population) out of the former Sixth District . . . and

[5] *See* Arnold Schwarzenegger & David Daley, *Schwarzenegger: Too many voters live under minority rule*, WASHINGTON POST (Sep. 9, 2019), https://www.washingtonpost.com/outlook/2019/09/09/schwarzenegger-too-many-voters-live-under-minority-rule-heres-why/ ("[M]ore than 59 million [Americans] live under minority rule in a state where the party with fewer votes in the 2018 election nevertheless controls a majority of seats in the legislature. . . . [T]he maps sometimes create yawning, disproportional gaps between the percentage of the vote earned by a party and the number of seats they win. In six states — Arkansas, Kentucky, Nevada, Oklahoma, Tennessee and Wisconsin — that gap is actually greater than 15 percentage points. . . . All of this is bad for democracy. Gerrymandering insulates politicians from the voters.").

simultaneously moved 350,000 into the 'new' Sixth District . . . accomplish[ing] the single largest redistricting swing of one party to another of any congressional district in the Nation").

Modern technology has also been used to the benefit of those who practice party gerrymandering. The majority party has the technology to further analyze voter data and redraw district maps further threatening democracy. *See Lewis*, 2019 WL 4569584, at *2 (noting the General Assembly deployed extreme partisan gerrymandering with "surgical precision" to carefully craft maps in order to "dilute" voting strength).

In *Common Cause v. Lewis*, a bipartisan panel of judges concluded that judicial review was necessary to prevent an injustice from being carried out on the State's voters:

> If unconstitutional partisan gerrymandering is not checked and balanced by judicial oversight, legislators elected under one partisan gerrymander will enact new gerrymanders after each decennial census, entrenching themselves in power anew decade after decade. When the North Carolina Supreme Court first recognized the power to declare state statutes unconstitutional, it presciently noted that absent judicial review, members of the General Assembly could "render themselves the Legislators of the State for life, without any further election of the people." *Bayard v. Singleton*, 1 N.C. 5, 7 (1787). Those legislators could even "from thence transmit the dignity and authority of legislation down to their heirs male forever." *Id.* Extreme partisan gerrymandering reflects just such an effort by a legislative majority to permanently entrench themselves in power in perpetuity.

Id. at *125. This Court has a similar duty to root out attempts, like the 2021 Redistricting Plan, to preserve power at the expense of the North Carolina people. This Court should take all the steps necessary to fully evaluate the evidence and allow North Carolinians to vote in free elections in fairly drawn districts for the next decade.

CONCLUSION

Free, fair and secure elections safeguard our democracy. Partisan gerrymandering hinders the people of North Carolina's fundamental rights in the election process. *Amici* urge the Court to promote democracy and eradicate partisan gerrymandering from the political process.

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No. 413P21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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REBECCA HARPER, et al.,

Plaintiffs,

v.

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

Defendants.

From Wake County

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

Plaintiffs,

v.

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

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ***Motion for Leave to File Amici Curiae Brief and Amici Curiae Brief of Bipartisan Former Governors Michael F. Easley, Arnold Schwarzenegger, Christine Todd Whitman, and William Weld as Amici Curiae Supporting Plaintiffs*** was served upon each of the parties to this action by electronic mail at the e-mail addresses indicated below:

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