NO. COA 24-1109 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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BEVERLY BARD, RICHARD LEVY, SUSAN KING COPE, ALLEN WELLONS, LINDA MINOR, THOMAS W. ROSS, SR., MARIE GORDON, SARAH KATHERINE SCHULTZ, JOSEPH J. COCCIA, TIMOTHY S. EMRY, and JAMES G. ROWE,

Plaintiffs-Appellants,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, JEFF CARMON III in his official capacity as Secretary of the North Carolina State Board of Elections, STACY "FOUR" EGGERS in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O'DUFFY MILLEN in her official capacity as a member of the North Carolina State Board of Elections, KEVIN N. LEWIS in his official capacity as a Member of the North Carolina State Board of Elections, PHILLIP E. BERGER in his official capacity as President Pro Tem of the North Carolina Senate, and TIMOTHY K. MOORE in his official capacity as Speaker of the North Carolina House of Representatives.

Defendants-Appellees.

From Wake County

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PLAINTIFFS-APPELLANTS' BRIEF

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PLAINTIFFS-APPELLANTS' BRIEF

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ISSUE PRESENTED

I. Did the trial court err in granting the Legislative Defendants' Motion to Dismiss under Rule 12(b)(6) in that the Complaint states a claim for violation of Plaintiffs' constitutionally protected, justiciable right to fair elections free from government manipulation of the election process and is not a political question?

STATEMENT OF THE CASE

On 31 January 2024, Plaintiffs-Appellants (hereinafter "Plaintiffs") filed a Complaint in Wake County Superior Court asserting claims under the North Carolina Constitution of impermissible state government intervention in discrete North Carolina voting districts. (R pp 3–55). The named Defendants in the Complaint are the North Carolina State Board of Elections ("BOE") and North Carolina Legislative Leadership ("Legislative Defendants"). Details of the claims and arguments are set forth more fully below.

In response to the asserted North Carolina Constitutional claims and in accordance with N.C.G.S. § 1-267.1, the Honorable Chief Justice Paul Newby designated a three-judge panel for the case: the Honorable Jeffery Foster, the Honorable Angela B. Puckett, and the Honorable C. Ashley Gore (the "Superior Court Panel"). (R p 1). On or about 6 March 2024, Legislative Defendants filed a Motion to Dismiss pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6). (R pp 56–58). On or about 12 March 2024, the BOE filed its Answer. (R pp 59–83).

After briefing, the Superior Court Panel (the "Panel") heard arguments in a special session of Wake County Superior Court on or about 13 June 2024. (R p 140). The Panel took the matter under advisement and issued an order on 28 June 2024 dismissing the case as to Legislative Defendants; and on 22

July 2024, the Panel dismissed the claims as to the remaining BOE Defendants. (R pp 141–46; 151–52). Plaintiffs timely appealed both Orders. (R pp 147,153). On 20 August 2024, Legislative Defendants filed a Notice of Cross-Appeal on the issue of attorney's fees as to the 26 June 2024 order. (R p 157).

The parties settled the Printed Record on Appeal on 23 December 2024. This Honorable Court granted one extension for the parties to file their opening briefs, now due 21 February 2025.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

The orders entered 27 June 2024 and 22 July 2024 by Superior Court Judges Foster, Puckett and Gore dismissing Plaintiffs' claims for relief pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1) and 12(b)(6) as to all Defendants are final judgments, and appeal therefore lies to this Court pursuant to N.C.G.S. § 7A-27(b)(1).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about election integrity. It is not a case about partisan gerrymandering, challenging the aggregate maps and seeking court-imposed proportionality of seats. Here, Plaintiffs seek to preserve their fundamental constitutional right for elections to be free from governmental efforts to manipulate election results. This issue is justiciable and is not a political

question. The Superior Court Panel's erroneous determination that it is a political question should be reversed.

If a private citizen or a political organization attempted to manipulate election results by subverting election laws dealing with voting integrity, there could potentially be grounds for a criminal prosecution. Here, it is the North Carolina Constitution that protects our citizens from an overreaching government and guarantees that elections are conducted fairly and impartially without governmental manipulation of the election. As our Supreme Court has mandated, "[t]he people are entitled to have their elections conducted honestly and in accordance with the requirements of the law. To require less would result in a mockery of the democratic processes for nominating and electing public officials." *Ponder v. Joslin*, 262 N.C. 496, 500, 138 S.E.2d 143, 147 (1964).

Plaintiffs, who are voters in the challenged districts or were voters in the previous election districts, have the right under the North Carolina Constitution to have the election process, including who gets to vote for a specific office, free from the government's purposeful action to influence or pre-determine the outcome of those discrete elections. The allegations of the Complaint more than adequately allege that the North Carolina General Assembly, in aggregating voters in Congressional elections in districts denominated as Number 6, Number 13, and Number 14; and in State House

District Number 105 and Senate District Number 7 (the "Challenged Districts"), purposefully and impermissibly aggregated voting blocks based upon voting patterns, history of election results, political registration, demographics, and other politically revealing data which virtually guaranteed the government's preferred party would prevail in those elections. (R pp 13–26). In fact, the 2024 election results in the Challenged Districts confirm the very allegations made in this Complaint.

The Plaintiffs, as registered voters in the Challenged Districts, have the right under the North Carolina Constitution to exercise their right to vote and to elect officials, without government interference purposefully taken to influence and predetermine the outcome of those elections. Defendants, through their governmental efforts to dilute the value of Plaintiffs' votes, intended to preclude voters, no matter their voting registration from having a fair election process, free from unconstitutional government interference.

While the North Carolina Constitution does not include a specific provision labeled as "Fair Elections", the right and concept of fair elections is imbedded in our state's history and in the rhetoric of citizens of all political persuasions. As stated in a recent petition filed with this Court 14 January 2025 in *Kivett v. North Carolina State Board of Elections*, COA P25-30, signed by opposing counsel herein, Phillip J. Strach, who represents the *Kivett* plaintiffs, including the Republican National Committee and the North

Carolina Republican Party: "Plaintiffs—especially individual Plaintiffs—explained how they are facing ongoing violations of *both their rights to vote in free and fair elections and their rights to equal protection.*" (emphasis added). *Kivett* Pet. 4. Thus, it seems uncontroverted that there is clearly a belief from all political sides that citizens of North Carolina have a constitutional right to free and fair elections.

Article I, Section 36 of the North Carolina Constitution, titled "Other rights of the people," states "The enumeration of rights in this Article shall not be construed to impair or deny others retained by the people." N.C. Const. art. I, § 36. Plaintiffs contend that all citizens of the state have the fundamental right to participate in elections as voters, that are free from governmental interference and manipulation of the election process by the government. This right to "fair elections" must be a fundamental right, albeit unenumerated. This right can be further guaranteed through Article I, Section 10, "Free elections" and, through Article I, Section 19, "Law of the land; equal protection of the laws" clause as explained more fully below. N.C. Const. art. I, §§ 10, 19.

As articulated above, Plaintiffs' rights were violated when the General Assembly impermissibly aggregated voters using sophisticated data and computer technology replete with political data and other partisan information to determine which voters would be selected to vote in specific

districts. In doing so, Defendants used a secretive process to create election districts for particular elections which virtually guaranteed the result of the elections.

The question presented to the Court is whether the citizens of North Carolina have a constitutionally protected justiciable right to fair elections, free from government manipulation of the election process. Here, Plaintiffs' constitutional rights were violated when the government intervened in the election process by manipulating the voter pool eligible in the Challenged Districts to preordain the outcome of the elections. This violation of Plaintiffs' constitutional rights is a justiciable issue and is not barred by the political question doctrine. Specifically, Plaintiffs' allegations show (1) the election process is not textually committed to another branch of government; (2) the determination of whether the Plaintiffs' rights were violated can be resolved in this case and others by a judicially discoverable and manageable standard; and (3) Plaintiffs' rights are not policy questions but judicially determinable legal questions

This case presents a straightforward question of interpretation and application of a basic state fundamental right: can the government—in this case the General Assembly—"rig" an election result by manipulating individual voter data during the process of forming election districts—in an effort to guarantee which party's candidate will win the election? While the

Superior Court panel below struggled with what was "fair" (R p 146), that question does not fully present to the Court the scope of the issue. Rather, the question is whether the government, in attempting to "preordain" the outcome of a specific election and "rig" the results, violates the constitutional rights of the voters? It does.

STATEMENT OF FACTS

Since this case is before the Court on the granting of Legislative Defendants' Motion to Dismiss, no evidence has been presented. The only facts are those alleged in the Complaint. (R pp 3–55). "The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted." *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (citations omitted). The summary below, therefore, consists of facts alleged in the Complaint.

In October of 2023, the General Assembly adopted legislation determining for each of the 14 congressional districts in the state, the residents to be placed in each district and who could potentially participate as voters in that district. In separate legislation, they did the same for each of

the 120 State House of Representative Districts in the state, and for each of the 50 State Senate Districts. (See SB 757 Congressional Districts 2023; SB 758 Realign NC Senate Districts 2023; and HB 898 House Redistricting Plan 2023(R pp 36–55)). Instead, this case concerns the election process for three discrete congressional offices, one State House of Representatives office and one office for State Senate. This appeal seeks to preserve the rights of voters in these districts to be protected from governmental efforts to "rig" the outcome of those elections.

Different configurations and pools of residents for each of these individual districts were in place for the 2022 election cycle. However, the General Assembly was judicially authorized, but not mandated, to create new configurations of each election district for upcoming elections. Having chosen to create new individual districts, the General Assembly set about to distribute the voters in the state into election districts for each set of offices - congressional, State House and State Senate.

The issue is not how the government crafted the geographical layout of the maps. The case is about the General Assembly impermissibly aggregating the various precincts and census block tracts in a manipulative way using political data in order to create districts favorable to one political party. Based on that aggregation of voters, the district election lines for that office

were calculated and created; ultimately, all the districts were compiled into maps.

In first aggregating voters into individual election districts and then compiling those districts into plans or maps, the General Assembly utilized written criteria which stated in part: "Political Considerations. Politics and political considerations are inseparable from districting and apportionment. (Citation omitted). The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions . . . *but it must do so in conformity with the State Constitution*." (R pp 10–11).

Legislative Defendants, in fact, considered partisan advantage and incumbency protection in the revisions to the Challenged Districts, as well as a host of other political data in order to know to a statistical certainty the likelihood of how each district would vote in upcoming elections. It is further alleged that the House Redistricting Committee never adopted any criteria in 2023, unlike in past redistricting efforts. Instead, in August of 2023, the Redistricting Chair instructed their taxpayer-funded expert to aggregate voters in a secret proceeding, using "guidelines." (See Complaint Exhibit C (R p 35)). No one saw these guidelines or the resulting map until after it was introduced and passed in October of 2023.

In complying with the required aggregation of citizens to various districts, the governmental entities performing this function in the 21st century have access to extraordinary technological and data resources to assist in apportioning those citizens into discrete districts for discrete elections. This technology and data provide governmental entities with the ability to pick and choose which pools of voters, usually defined by precincts or by census blocks, are placed together into each distinct district. Each pool of voters has substantial information associated with it including, in part, party registration, race, ethnicity, and prior election results for that precinct or census block. This information provides those governmental entities information to create districts, with a reasonable degree of statistical certainty as to how each voting block will vote in the newly apportioned district. By aggregating these voting blocks, Legislative Defendants created a pool of voters to put together in an election district and reliably predict how the district would vote in subsequent elections.

In the adoption of the three challenged legislative bills, the members of the General Assembly controlled the process and used technology and data to allocate voters to create a demonstrable advantage for their political party in the ensuing elections in those districts and to thus attempt to "preordain" the outcome of future elections.

The process utilized by the Legislative Defendants to allocate citizens into these electoral districts in 2023 was void of transparency and created in secret. Neither the public nor representatives of the minority party leadership were allowed to participate in or observe the process determining which citizens in which precincts or census blocks would be aggregated together to form electoral districts and the data used for creating them.

Most clearly as to the Challenged Districts, the Legislative Defendants and their allies and agents intended to take substantial numbers of voters likely to support their party's candidates and (1) move them into these districts; (2) take certain voters likely to oppose their party's candidates out of their district and move them into districts where their votes would be negated or minimized in deciding the outcome of the election; and (3) distribute voters in the Challenged Districts in such a way as to turn the districts from competitive to new districts favoring their political party's candidates. In essence, the government action was taken in order to unconstitutionally influence the election outcome.

The Complaint alleged: the previous voting history for each of the Challenged Districts; partisan vote totals in those districts for selected past races; and the professional analysis of how the district leaned from a partisan perspective based on the 2022 district makeup and the newly created district make up. This Court can take judicial notice of the public record from the

2024 General Election which proves the analysis in the Challenged Districts was remarkably accurate in predicting the election outcome.

ARGUMENT

I. Standard of review

The standard of review of an appeal of an order granting a motion to dismiss pursuant to Rule 12(b)(6) is *de novo*, requiring the Court of Appeals to "review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Products, Inc.*, 157 N.C. App. 396, 400 (2003), *aff'd,* 357 N.C. 567 (2003);*Taylor v. Bank of Am., N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022)

II. The Superior Court panel erred in dismissing Plaintiffs' claims pursuant to N.C. Rules of Civil Procedure 12(b)(6) because Plaintiffs stated a justiciable claim that was not a political question.

A. Plaintiffs have a Constitutional Right to Fair Elections.

1. Plaintiffs and all citizens of North Carolina have an unenumerated constitutional right under Article I, Section 36, to participate as voters in fair elections for constitutional offices in which the government does not manipulate the election process attempting to predetermine the winners of those elections.

As the majority in *Harper v. Hall*, 384 N.C. 292, 297, 886 S.E.2d 393, 399 (2023) (hereinafter "*Harper III*") stated, "[t]he constitution is interpreted

based on its plain language. The people used that plain language to express their intended meaning of the text when they adopted it. The historical context of our constitution confirms this plain meaning. As the courts apply the constitutional text, judicial interpretations of that text should consistently reflect what the people agreed the text meant when they adopted it." Other rights of the people. "The enumeration of rights in this Article shall not be construed to impair or deny others retained by the people." N.C. Const. art. I, § 36. The textual, plain language of this provision is clear: unenumerated rights are retained by the people and shall not be impaired or denied in their application to challenged governmental action.

In the treatise *The North Carolina State Constitution*, the authors John V. Orth and Paul Martin Newby, state:

> Although the people of North Carolina have expressly declared many rights in Article I, they have not attempted a complete enumeration. . . *Section 36 reminds us that the whole declaration of rights, despite its great importance, is no more than that: a selection only, not a complete catalog.*

John V. Orth & Paul Martin Newby, The North Carolina State Constitution 46 (2d ed. 2013) (hereinafter the "State Constitution") (emphasis added). This point is further emphasized in the *Harper III* majority: "The Declaration of Rights is an expressive *yet non-exhaustive list of protections* afforded to citizens against government intrusion, along with 'the ideological premises

that underlie the structure of government.'" *Harper III*, 384 N.C. at 321, 886 S.E.2d at 413.

In *State v. William*, 61 S.E. 61, 62–63 (N.C. 1908) the Court emphasized, "to the end that their Government should not by construction, implication, or otherwise deprive them of unenumerated, but 'inalienable rights' declared: 'This enumeration of rights shall not be construed to impair or deny others retained by the people and all powers not herein delegated remain with the people." *Id.* (quoting N.C. Const. art. I, § 37 (now N.C. Const. art. I, § 36)).

Therefore, it is clear the citizens of North Carolina have reserved, unenumerated fundamental rights pursuant to Article I, Section 36 which cannot be impaired or denied to them. And it is the judiciary's responsibility to protect those rights from impermissible encroachment by the General Assembly. *Id.* "It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992).

From the very inception of independence from Great Britain, the people of North Carolina by the adoption of the original state constitution created a system of government setting out the basic structure of governing for the new State of North Carolina. Critical to this new structure of government and the

declaration of powers that the new government would have was the election by the people of the representatives who would control the government and exercise the powers granted. Over the years, The North Carolina Constitution has set forth the eligibility of citizens to vote and the constitutional requirement for officeholders to be elected by those eligible citizens. The North Carolina Constitution includes two enumerated rights relating to elections in Article I, Section 9 providing for "Frequent elections" and Section 10 providing for "Free elections." In addition to those rights dealing specifically with elections, the State has enacted numerous laws regulating the conduct of elections for public offices and empowering the BOE to protect the sanctity of those election laws. "The [BOE] shall investigate when necessary or advisable, the administration of election laws, frauds and irregularities in elections in any county and municipality and special district and shall report violations of the election laws to the State Bureau of Investigation for further investigation and prosecution." N.C.G.S. § 163-22(d).

The concept or right to "fair" elections can be traced back to the Founding Fathers and arguably even before them. In framing the initial constitution for the newly independent State of North Carolina, the drafters turned to leaders around the thirteen colonies. One of those leaders was John Adams of Massachusetts. In his pamphlet "Thoughts on Government" published in April of 1776 by John Dunlap in Philadelphia, Adams wrote:

> The principal difficulty lies, and the greatest care should be employed in constituting this Representative Assembly. It should be in miniature, an exact portrait of the people at large. . . *Great care should be taken to effect this, and to prevent unfair, partial, and corrupt elections*.

John Adams, Thoughts on Government (Apr. 1776) (emphasis added).

In his inaugural address delivered on March 4, 1797, newly elected President John Adams stated,

> In the midst of these pleasing ideas, we should be unfaithful to ourselves, if we should ever lose sight of the danger to our liberties, *if anything partial or extraneous should infect the purity of our free, fair, virtuous, and independent elections*. If an election is to be determined by a majority of a single vote, and that can be procured by a party, through artifice or corruption, the Government may be the choice of a party, for its own ends, not of the nation for the national good.

Annals of Congress, vol. 6, 1581–86 (Mar. 4, 1797).

In 2001, a constitutional redistricting challenge was brought on behalf of a group of plaintiffs, including the Chairman of the North Carolina Republican Party, to legislation passed by the Democratic controlled General Assembly in 2001 apportioning voters and creating state House and Senate Districts. See *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002). This challenge was focused on the state legislative districts and sought the Court's interpretation and application of the N.C. Constitution's "whole county provision." *Id.* at 358, 562 S.E.2d at 381; N.C. Const. art. II, §§ 3(3), 5(3).

In the plaintiff-appellees' brief in *Stephenson*, filed 28 March 2002, their attorneys Thomas A. Farr, James C. Dever III, Terence D. Friedman and Phillip J. Strach argued:

> Defendants are fighting to preserve plans that – by design – give the voters no choice in the majority of Senate and House elections. Further, their plans apparently give voters a true chance to select representatives in only 3 out of 170 races. No wonder one political commentator has likened North Carolina to a third-world country – with the proviso that voters in most third-world countries have more options than the people of North Carolina when it comes to electing candidates of their choice to the Senate or House.

Stephenson Pls' Br. 39.

While the *Stephenson* case focused on the "whole county provision" in the North Carolina Constitution and not specifically on the right of citizens to fair elections, the sentiment expressed in the brief argues beyond presumption the concept of fair elections and the expectations of the Republican Plaintiff-Appellees' in *Stephenson*. Indeed, they further asserted:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.

Stephenson Pls' Br. 86 (citations omitted).

Plaintiffs here contend that Article I, Section 36, "Other rights of the people" must include the fundamental right, albeit it unenumerated, that

citizens have a right to vote for elective office, free from government's intervention in the process by purposefully stacking the electoral pool of voters in order to preordain the outcome. (R p 5). Rather, citizens have the right to a fair election process. This fundamental right is manifested throughout the North Carolina Constitution in multiple ways as set forth below. Furthermore, "the right to fair elections" is not the question presented to the Court for adjudication. The right to fair elections is a given. The question presented is whether the facts alleged, if proven at trial, constitute governmental conduct in violation of that fundamental right.

2. Plaintiffs' have a fundamental right to vote for elective office, free from government's intervention in the process by purposefully stacking the election pool of voters in order to preordain the outcome of the elections. Such governmental action violates a fundamental right which can be enforced through other enumerated rights in the North Carolina Constitution including the Law of the Land clause.

Over the years, the North Carolina Supreme Court has recognized fundamental unenumerated rights of the people not specifically set out in the North Carolina Constitution. In recognizing these fundamental rights, the Court did not address them in the specific context of "unenumerated" rights under Article I, Section 36. Instead, the Court has referred to them as "fundamental rights" and implemented and protected those rights through other provisions of the North Carolina Constitution.

In *Eller v. Board of Education*, 242 N.C. 584, 89 S.E.2d 144 (1955), Justice Bobbitt states: "When private property is taken for public use, just compensation must be paid. This principle is deeply imbedded in our constitutional law. It was incorporated in the Bill of Rights of the Federal Constitution. U.S. Const. Amend. V. *While the principle is not stated in express terms in the North Carolina Constitution, it is regarded as an integral part of the 'law of the land' within the meaning of [N.C. Const. art.] I, sec. 17.*" (Now N.C. Const. art. I, § 19). *Id.* at 586, 89 S.E.2d at 146 (emphasis added) (citations omitted).

Some 27 years later in *Long v. City of Charlotte*, 306 N.C. 187, 195–96, 293 S.E.2d 101, 107 (1982) the North Carolina Supreme Court recognized, "[w]hile North Carolina does not have an express constitutional provision against the 'taking' or 'damaging' of private property for public use without payment of just compensation, this Court has allowed recovery for a taking on constitutional as well as common law principles. *We recognize the fundamental right to just compensation as so grounded in natural law and justice that it is part of the fundamental law of this State.*" *Id.* (emphasis added) (citations omitted).

In the case of *State v. Dobbins*, 277 N.C. 484, 497, 178 S.E.2d 449, 463 (1971), the North Carolina Supreme Court acknowledged the right to travel – a right not enumerated in the North Carolina Constitution but implemented

through the Law of the Land clause, "the right to travel upon the public streets of a city is a part of every individual's liberty, protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution and by the Law of the Land Clause, Article I, [Section] 17, of the Constitution of North Carolina." (Now N.C. Const. art I, § 19). See also, *State v. Sullivan*, 201 N.C. App. 540, 687 S.E.2d 504 (2009).

While these "rights" have been acknowledged as fundamental and inherent to the rights of the people, they are not enumerated in the North Carolina Constitution. Instead, they are implemented through other provisions primarily the Law of the Land clause in Article I, Section 19. If the right sought to be protected in this case is not considered as one arising under Article I, Section 36, then it must find purchase under an enumerated right such as the Law of the Land clause.

3. Plaintiffs' have a fundamental right to vote for elective office, free from government's intervention in the process by purposefully stacking the election pool of voters in order to preordain the outcome and that fundamental right can be enforced through the "Free Election" clause in Article I, Section 10 of the North Carolina Constitution.

While case law over the years has rarely dealt with the constitutional implications and meaning of Article I, Section 9, the Frequent election clause, and Article I, Section 10, the Free election clause, *Harper III* did quote from

one North Carolina Supreme Court opinion discussing the Free elections clause. In *Harper III*, the majority quotes from *State ex rel. Swaringen v. Poplin*, 191 S.E. 746, 747 (N.C. 1937), a case involving a *quo warranto* action alleging election fraud. "In the present case fraud is alleged. The courts are open to decide this issue in the present action. In [Article] I, [Section] 10, of the Constitution of North Carolina, we find it written: 'All elections ought to be free.' Our government is founded on the consent of the governed. A free ballot *and a fair count must be held inviolable to preserve our democracy*." *Harper III*, 384 N.C. at 363, 886 S.E.2d at 439 (quoting *Swaringen*, 191 S.E. at 747) (emphasis added). "In some countries the bullet settles disputes, in our country the ballot." *Id.* If a "fair count" is "inviolable to preserve our democracy" – a fair count – being only one small part of the overall election framework, then the concept of a fair election generally must be considered "inviolable to preserve our democracy". *Id.*

Harper III involved a challenge, in part, under Article I, Section 10 "Free elections." N.C. Const. art. I, § 10. However, the arguments presented and the court's holding, in no way address or concludes anything about the question presented in this case. The *Harper III* majority determined the "Free elections" clause had a specific meaning in the context of the plaintiffs' challenge to system wide political gerrymandering and the remedial claim for proportionality. Nothing in the decision references whether the plaintiffs in

that case or the citizens of North Carolina generally have a constitutional right to fair elections.

The right to fair elections is fundamental. Fair elections are the foundation upon which representative government rests. Without fair elections, the individuals elected to public office and authorized to exercise the constitutional powers granted them as office holders have no legitimate authority. They might hold office and exercise the powers of that office, but their legitimacy to be the voice of the people will have been without constitutional validation.

As then Justice Newby stated in his dissent in *Libertarian Party of North Carolina v. State*, 365 N.C. 41, 55, 707 S.E.2d 199, 208–09 (2011): "At our nation's inception, the founders warned that unduly restricting ballot access could make illusory the right to vote". Justice Newby continued, "This Court has consistently interpreted the North Carolina Constitution to provide the utmost protection for the foundational democratic freedoms of association, speech, and voting." *Id.* Those foundational democratic freedoms are exercised by our citizens through the process of elections. If government can manipulate the outcome of elections – or even simply tries to manipulate the outcome of elections – then those foundational rights have not only been violated but lead to the critical undermining of the freedoms upon which this government was based.

The Plaintiffs and all citizens of North Carolina have a right under the North Carolina Constitution to fair elections and that right can be articulated through the Free Elections clause if the court so chooses, rather than through the Law of the Land clause or as an unenumerated right. As Justice Barringer said in her concurring opinion in *Griffin v. State Board of Elections*, No. 320P24, 910 S.E.2d 348 (Mem) (N.C. Ct. App. Jan. 22, 2025) (Barringer, J., concurring), "[h]ere, that is the right of every North Carolinian to an election 'free' from *the outcome-determinative influence* of ineligible votes. N.C. Const. art. I, Sec. 10." (emphasis added). What is important about this quote is that here, the manipulation of voting data to create a politically favorable electorate by the General Assembly is far more impactful as an "outcome-determinative influence" than that of "ineligible votes" (based on incorrect voter registration data as alleged in *Griffin*). *Id.*

Additionally, in the same Order cited above, Chief Justice Newby states in his concurring opinion, "The election protest preserves the fundamental right to vote in free elections. See N.C. Const. art. I, Sec. 10. 'It is well settled in this State that 'this fundamental right includes 'the right to vote on equal terms' and 'to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." (Citations omitted). "Further, the inclusion of even one unlawful ballot in a vote total dilutes the lawful votes and 'effectively 'disenfranchises' lawful voters."

(Citations omitted). If the inclusion of "even one unlawful ballot" dilutes the lawful vote, then the government's impermissible "stacking the electoral deck" to influence an election outcome dilutes the lawful votes of all voters regardless of political registration and effectively disenfranchises those lawful voters.

In the *Harper III* majority opinion, the Court states, "[t]hus, we hold that the meaning of the free elections clause, based on its plain language, historical context, and this Court's precedent, is that voters are free to vote according to their consciences without interference or intimidation." *Harper III*, 384 N.C. at 363–64, 886 S.E.2d at 439. As the authors of State Constitution note, the Free Election clause doesn't just mean free from "intimidation." Orth & Newby, State Constitution 56. It also means being free from "interference." Black's Law Dictionary states interference is an "act of meddling in another's affairs . . . an obstruction or hinderance." Interference, Black's Law Dictionary (7th ed. 1999). Can there be any question that government purposefully interfering in the election process by manipulating the voting pool for specific offices through the aggregation of voters sympathetic to the government's political perspective, constitutes "hindering" or "meddling" in what has been described as "fundamental political processes – elections"? *Bouvier v. Porter*, 386 N.C. 1, 3, 900 S.E.2d 842, 844 (2024).

The definition of "fair" as applied in the context of this case is simple and straightforward: "just, unbiased, equitable; in accordance with the rules." Fair, Oxford English Dictionary (9th ed. 1995). In the context of the allegations at bar, the government, specifically the General Assembly, has the constitutional obligation to provide for a system of elections for the offices set forth in the North Carolina Constitution. How impartially that system – from beginning to end – operates for the benefit of the people, is entirely dependent on the imposition of a standard of fairness. In other words, as the definition above implies, the system created by the government must be free from self-interest, injustice or favoritism. The foundational step in an election is the determination as to what group of people are entitled to vote for a specific office. In the case at hand, the voters in the Challenged Districts are entitled to have the determination as to what group of people - the electorate - can vote in these elections for those specific offices, without the government's favoritism in treating one group more favorably than another. The North Carolina Constitution, which serves as a limitation on the powers of government, imposes this limitation on the General Assembly through the unenumerated, fundamental right to fair elections or through its application of that right in enumerated rights such as the Law of the Land clause and the Free elections clause.

As the landmark *Corum* decision states about the Declaration of Rights in our constitution:

> The fundamental purpose for its adoption was to provide citizens with protection from the State's encroachment upon these rights. Encroachment by the State, is, of course, accomplished by the acts of individuals who are clothed with the authority of the State. 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. at 782–83, 413 S.E.2d at 290.

B. *Harper III* does not control the question of whether this case raises a non-justiciable political question.

1. This case does not involve a political question and is justiciable.

First, the issue presented in this case is fundamentally different from the issue presented to the U.S. Supreme Court in *Rucho v. Common Cause*, 588 U.S. 684 (2019), and in the North Carolina Supreme Court decision in *Harper III* which relied on *Rucho*. *Rucho* and *Harper III* challenged the maps in totality as "partisan gerrymandering." As the Court said in *Rucho*:

> Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. . . . Partisan gerrymandering claims invariably sound in a desire for *proportional representation*.

Id. at 704 (emphasis added) (citations omitted).

This case before the Court is based on the "fair" elections theory, grounded in the constitutional rights of citizens to be free from improper governmental interference in the election process. This case also alleges violations in limited, discrete election districts for individual elective office. The theory of this case is different, and the applicable facts of this case are different. In addition, this case seeks an entirely different remedy. This case is about the rights of all citizens regardless of political affiliation or potential election results. It does not seek as a remedy any preconceived idea of which party should prevail in any particular election either individually or collectively. Rather, this case is solely about the right of citizens to be free of an election process that mirrors those seen in totalitarian states like Russia.

Although *Gill v. Whitford*, 585 U.S. 48 (2018) was a decision by the U.S. Supreme Court decided on the issue of standing, the articulation of the unanimous court decision written by Chief Justice Roberts is still applicable here. *Gill* challenged the redistricting maps in Wisconsin based on partisan gerrymandering claims. The Court, however, addressed the threshold question of standing to decide the case.

Gill presaged the Supreme Court's decision in *Rucho* by less than a year where the Court ultimately held "partisan gerrymandering" was a political question. However, as previously argued, *Rucho* is an entirely different case and legal theory than here. As pointed out in *Gill*, the

challenge here is by individual voters in individual districts seeking to enforce their constitutional right to participate in elections free from the government's purposeful efforts to influence the election results. Plaintiffs here do not challenge the maps, do not seek a proportional distribution of elective offices, or seek any partisan advantage.

In *Baker v. Carr*, 369 U.S. 186, 211 (1962), the U.S. Supreme Court said,

> In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. *The doctrine of which we treat is one of 'political questions,' not one of 'political cases.'* The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority. The cases we have reviewed show the necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing.

Id. at 198, 217.

The Court in *Harper III* analyzed the political question issue by relying on the U.S. Supreme Court's decision in *Rucho* and its standard for deciding whether issues presented constituted a non-justiciable political question as discussed below.

(a) The textual commitment of redistricting to the General Assembly does not, under the claims presented in this case, constitute a non-justiciable political question.

First, was there a "textually demonstrable constitutional commitment of the issue to a coordinate political department?" *Harper III*, 384 N.C. at 327, 886 S.E.2d at 416. The state constitutional authority granted to the General Assembly is to "revise" the Senate and House districts and "the apportionment" of those legislative offices among the districts, subject to certain limitations set out in the North Carolina Constitution. *See* N.C. Const. art. II, §§ 3, 5.

In *Harper III*, the Court discussed the "textual commitment" standard in the context of the General Assembly's authority to "redistrict" or "reapportion" but noted "it does not leave the General Assembly completely unrestrained. The constitution expressly requires that any redistricting plan conform to its explicit criteria." *Harper III*, 384 N.C. at 327, 330, 886 S.E.2d at 416, 418–19. In the analysis of the claims in *Harper III*, the Court noted neither the Executive nor Judicial branch is given any role in the "redistricting" or "reapportionment" responsibilities of the General Assembly. *Id.* However, in this case, there is no claim the Court should in any way intervene or usurp that authority of the General Assembly. Instead, the issues in this case turn on the long-standing constitutional duty of the Courts

to determine if an act of the General Assembly violates the constitutional rights of the citizens of this state. *See Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). The challenge here is to parts of the legislative acts which Plaintiffs allege violate their constitutional right to be free from governmental interference in a fair and impartial election process.

The fact the legislative acts challenged in part, were done pursuant to a constitutional duty, does not insulate the legislative actions from judicial review. That review determines whether that duty was performed within constitutional limitations and not in violation of the constitutional rights of the people. While the General Assembly is tasked under the North Carolina Constitution with redistricting, its authority in the context of legislation impacting elections is no different from any other subject matter about which the General Assembly can legislate.

Therefore, the textual commitment of redistricting to the General Assembly does not create a non-justiciable political question which precludes the lower court's review of the asserted violation of Plaintiffs' discrete rights raised in the Complaint. Plaintiffs ask the Court to apply the constitutional rights articulated to the evidence to be presented to the fact finder at trial in support of determining a viable claim. The Executive Branch executes the election laws of the state, and the Judicial Branch interprets and applies the law and North Carolina Constitution if called upon.

(b) A judicially discoverable and manageable standard for a Court to review a claim under the rights claimed in this case is available and straightforward in its application.

The second factor the *Harper III* majority discussed as part of their evaluation of the question of a non-justiciable political question is the need for "judicially discoverable and manageable standards". *Harper III*, 384 N.C. at 337, 886 S.E.2d at 422. In addressing the claims of the partisan gerrymandering raised in *Harper III* (and by extension *Rucho*), the Court focused its discussion on the plaintiffs' allegation that proportionality of districts was mandated by the constitutional provisions at issue. *Harper III* quotes *Rucho* and says:

> Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, *a districting map* is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. . . Partisan gerrymandering claims invariably sound in a desire for proportional representation.

Harper III, 384 N.C. at 339, 886 S.E.2d at 424 (quoting *Rucho*, 588 U.S. at 704) (emphasis added).

Here, Plaintiffs are not making this claim. Rather, this case involves an individual citizens' right to fair elections in discrete election districts, regardless of their political affiliation or voting intentions. Plaintiffs do not claim that a Democrat or a Republican should win. They simply claim that in

a democracy based on a constitutional republic, the government cannot "stack the deck" in an election to try and preordain the outcome.

The foundational step in an election is a determination as to what group of people are entitled to vote for a specific office. In the case at hand, the voters in the Challenged Districts are entitled to have the decision as to the electorate entitled to vote in these elections determined without self-interest, injustice, or favoritism being utilized by the governmental body making the decision.

The test in this case as a clear, manageable, and politically neutral standard is easily determined by evidence presented and is judicially capable of being applied across the board in a non-political manner. In addition, the claims presented are politically neutral in that the test for a violation of the right to a fair election, free from governmental efforts to "rig" the election is applicable to all registered voters regardless of political affiliation or unaffiliated status. The trier of fact must find whether Legislative-Defendants and their agents, as alleged in the Complaint, aggregated voters in the districts challenged with the purpose of creating districts which reflected their self-interest and favoritism toward their political interests by using extensive political data about the voters in those districts and their political leanings to help win the election.

Such a test does not require the desired election results to be successful for a violation, but evidence of governmental intent to impact the election results. This evidence can be meaningfully ascertained through statistical analysis which is regularly conducted by various political and apolitical groups. The issue is whether upon the evidence meeting the standard of proof, the trier of fact is convinced the General Assembly purposefully shifted voters around to influence the outcome of an election in each of the Challenged Districts. The election results may not end up the way intended by the government but attempting to do so is beyond the constitutional authority of government.

Any election can be won by a single vote. Thus, any action on the part of government to improperly and unconstitutionally manipulate the aggregation of voters in a district to influence the outcome would constitute a violation of the right to a fair election. It makes no difference whether the General Assembly "puts its thumb on the scale" or "sits on the scale" – the result is still the same – an unfair election.

(c) The issue of whether the citizens of the state have a constitutional right to fair elections is not a policy question and courts reviewing such issues do not have to make any policy choices.

Finally, the *Harper III* majority discussed "Policy Decisions" which is the third part of their test for justiciability. *Id.* at 345–46, 886 S.E.2d at 428.

The decision criticizes the prior *Harper* rulings[1] by stating they "involve a host of 'policy determination[s] of a kind clearly for nonjudicial discretion.'" *Id.* (citing *Baker*, 369 U.S. at 217). The majority emphasis is on the *Harper III* Plaintiffs' choice "to insert into our constitution a requirement for some type of statewide proportionality based on their view of political 'fairness.' The Court then noted the North Carolina Constitution, "[l]ike the Federal Constitution, . . . does not contain a proportionality requirement." *Id.*

There is no "policy question" as to what rights the North Carolina Constitution guarantees its citizens. Either the citizens have such a right to fair elections free from governmental interference – or they do not have such a right. If they do, then it is a question for the trier of fact to determine whether particular legislation passed by the General Assembly violated the constitutional rights at issue. Ultimately, it is for the judicial branch to resolve the constitutionality of an act, just as the court did in *Bayard* over 225 years ago. As the North Carolina Supreme Court said in *Bayard*:

> That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality

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[1] *Harper v. Hall*, 380 N.C. 317, 868 S.E.2d 499 (2022), *aff'd sub. nom.*, *Moore v. Harper*, 500 U.S. 1 (2023), and *Harper v. Hall*, 383 N.C. 89, 881 S.E.2d 156 (2022), withdrawn and superseded by *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023).

> of any trial at all: *that if the members of the General Assembly could do this, they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.*

Id. at 7 (emphasis added). The concept of judicial review cannot be set aside by spurious arguments of policy in this case.

C. The Complaint states a claim for relief that meets the standards of pleading and justiciability.

Applying the standard test for evaluating a Motion to Dismiss, the Legislative Defendants have failed to show Plaintiffs' Complaint should be dismissed. Taking the alleged facts as true, the Complaint shows the General Assembly in the exercise of its authority to create districts for specific elective offices, utilized political data in a secretive process which allowed them to create and populate the Challenged Districts in question in such a way as to virtually guarantee a decided electoral advantage to the favored political party. In essence, the General Assembly attempted to "stuff the ballot box" to ensure election success in selected districts by virtue of their reapportionment actions in the Challenged Districts.

Taking those allegations as true and applying the constitutional rights as argued here, the Plaintiffs' constitutional rights have been violated. The Plaintiffs, having such rights as argued in this case and the governmental

action complained in their Complaint, state a claim that violates those rights and is justiciable.

CONCLUSION

Plaintiffs, respectfully contend Legislative Defendants' Motion to Dismiss should have been denied by the court below, and this Honorable Court should reverse that decision and remand the case back for discovery and trial on the merits of the claims alleged.

Respectfully submitted the 21st day of February 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Plaintiffs-Appellants certifies that the foregoing brief, which was prepared using 13-point proportionally spaced font with Century Schoolbook, is less than 8,750 words (excluding covers, captions, indexes, table of authorities, counsel's signature block, certificates of service, this certificate of compliance and any appendixes) as reported by the word-processing software/word count.

This the 21st day of February, 2025.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document has been served by e-mail on the following:

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