No. 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. EMERY; and JAMES G. ROWE;

Plaintiffs,

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; PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; and DESTIN HALL, in his official capacity as Speaker of the North Carolina House of Representatives,

Defendants.

From Wake County
No. 24CV003534-910

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LEGISLATIVE DEFENDANTS-APPELLEES' BRIEF

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ISSUE PRESENTED

I. DID THE SUPERIOR COURT ERR WHEN IT GRANTED LEGISLATIVE DEFENDANTS' MOTION TO DISMISS PURSUANT TO NORTH CAROLINA RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)?[1]

[1] This is similar to the issue presented by Plaintiffs-Appellants. However, Plaintiffs' presented issue indicates that the superior court dismissed Plaintiffs' claim pursuant to Rule 12(b)(6). This is incorrect. The superior court dismissed Plaintiffs' claims pursuant to both 12(b)(6) and 12(b)(1) of the North Carolina Rules of Civil Procedure. *See* R pp 141-46.

STATEMENT OF FACTS[2]

Plaintiffs-Appellants ("Plaintiffs") filed this action on 31 January 2024, against the North Carolina State Board of Elections and its members (the "NCSBE Defendants") and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Destin Hall,[3] in his official capacity as Speaker of the North Carolina House (collectively, "Legislative Defendants"). Plaintiffs' Complaint alleged that certain districts in the 2023 state House, state Senate, and Congressional Plans (collectively, the "2023 Plans") were partisan gerrymanders that violated Plaintiffs' rights to "fair elections" under the North Carolina Constitution. (R pp 3-55). That Plaintiffs brought a redistricting challenge is undisputed. Plaintiffs used synonyms for redistricting—"reapportionment," "reapportioned," and their variants—77 times throughout their 28-page Complaint. (R pp 3-30). Consistent with Plaintiffs' challenge to North Carolina's 2023 Plans, Plaintiffs' Complaint alleged that:

- The legislature redistricted in such a way as to create an unfair advantage for their political party (R p 12 at ¶29);
- The legislature took a "substantial number of voters likely to support their party's candidates" and moved them into certain districts, while taking other voters likely to not support their party's candidates out of their district, moving them into districts where "their votes would be negated or minimized so as to not be determinative in deciding the outcome of the election" (R p 13 at ¶33);

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[2] Legislative Defendants rely on the statement of the case prepared in their opening Cross-Appellants Brief filed on February 21, 2025. Legislative Defendants also refer the Court to the fulsome statement of facts in their opening brief regarding the redistricting process following the 2020 census and the history of the *Harper* litigation. In the interest of brevity, Legislative Defendants do not re-state these facts.

[3] Plaintiffs originally named former Speaker Timothy K. Moore. However, pursuant to N.C. R. Civ. P. 25(f)(1), Destin Hall is substituted for his predecessor in office.

- The legislature acted in such a way to turn competitive districts into those favoring the Republican Party (R p 13 at ¶33);

- The legislature intentionally removed or added certain precincts or census blocks to give Republican candidates a significant advantage (R pp 16, 19, 21-22 at ¶¶44, 56, 68); and

- The legislature intentionally aggregated and apportioned voters in Congressional Districts 6, 13, 14, Senate District 7, and House District 105 in a manner "that tilts the election towards one political party or candidate" (R p 27 at ¶96).

Based on these facts, Plaintiffs alleged a single claim for relief pursuant to N.C. Const. Art. I, § 36, which Plaintiffs admit "secures unenumerated rights" of North Carolinians. (R p 26 at ¶93). Plaintiffs sought a preliminary and permanent injunction preventing elections from being held in Congressional Districts 6, 13, 14, Senate District 7, and House District 105 under enacted 2023 Plans and asked the Court to take necessary action to "order the adoption of a constitutionally fair and valid reapportionment" of those districts. (R p 29).

Plaintiffs further asked the Court to reapportion the remaining unchallenged portions of the 2023 Plans. (R p 29). Thus, Plaintiffs' Complaint not only alleged claims of partisan gerrymandering for specific districts, but also asked the Court to order new redistricting plans for the entire state.

Legislative Defendants timely moved to dismiss Plaintiffs' Complaint on 6 March 2024 pursuant to North Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted (hereinafter, the "Motion"). (R pp 56-58). Pursuant to a scheduling order, the parties timely filed their briefs in opposition to and in support of the Motion

on 10 May 2024. (R pp 84-139). Legislative Defendants' brief argued that Plaintiffs' claim presented a non-justiciable political question as previously foreclosed in *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023) ("*Harper III*"). (R pp 133-35, 144). Plaintiffs' brief continued to raise arguments regarding partisan gerrymandering. For example, Plaintiffs argued that:

- The General Assembly "preordained the outcome of the election in at least three ways." Specifically, by taking voters likely to support their party's candidates and moving them into certain districts, taking certain voters likely to oppose their party's candidates and moving them into certain districts, and reapportioning voters in certain districts in such a way as to turn the districts from competitive to favoring one political party's candidates (R p 88);

- The General Assembly manipulated the apportionment of voters to influence the outcome of elections (R p 97); and

- The General Assembly apportioned voters whose voting inclinations are known and apportioned voters based on those inclinations (R p 106)[4].

On 13 June 2024, a hearing was held before the Honorables Jeffery B. Foster, Angela B. Puckett, and C. Ashley Gore, Superior Court Judges presiding (hereinafter, "the superior court"). (R pp 142-43, 146; T pp 1-2). At this hearing, counsel for Legislative Defendants argued that Plaintiffs presented a claim which has no judicially manageable standard and was barred by *Harper III*. (T pp 6:5-25:12). In response, Plaintiffs' counsel argued for "fair" elections. (T pp 25:21-57:6). The superior court repeatedly asked Plaintiffs to define a manageable standard for their claim, but Plaintiffs failed to provide one. (T pp 26:19-33:3, 41:8-47:7, 49:25-53:25).

[4] Notably, Plaintiffs in this same argument referenced the "challenged apportionment"—a clear admission that Plaintiffs' challenge is regarding redistricting, not election integrity.

In fact, Plaintiffs attempted to articulate several "standards" only to repudiate them minutes later. First, Plaintiffs argued that "fair" meant starting at 0-0, using a baseball analogy, but then immediately said that 50/50 or 0/0 was not the standard. (T pp 26:21-28:10). Next, the Court asked Plaintiffs to define "fairness." (T p 41:8-17). In response, Plaintiffs' counsel incredibly responded that he agreed with the Court that "in *Harper III* the Court's saying, well fairness doesn't work" and that they were "not taking exception to that." (T p 41:18-24). Plaintiffs then went on to attempt to define "fair" as "equality" and "impartial," but again Plaintiffs eschewed seeking "equal" as the standard for their claims, and the Court noted that the North Carolina Supreme Court had already ruled on the issue of impartiality. (T pp 41:25-43:3). In response, Plaintiffs equated their claims to stuffing a ballot box with 500 extra votes through stacking precincts with political reports, incredibly admitting that moving counties back and forth "may be a political decision." (T pp 43:4-45:23).

Pressed further on the discoverable and manageable standards Plaintiffs alleged governed their claims, they argued that the standard "is that the government legislature cannot unfairly apportion voters so as to attempt to influence the outcome of the election." (T p 50:17-24).[5] But when questioned on a number to quantify the alleged unfair apportionment, Plaintiffs again agreed it was "not 50/50." (T pp 50:25-51:1). When asked whether it was 49/51 or 60/40 the response was "there is no number" pointing out that "***this is an apportionment case, obviously***, but it's not

[5] As Legislative Defendants noted in their Memorandum below, a single vote can influence the outcome of an election. (R p 132). The idea that any district, drawn in any way could not "influence the outcome of the election" is absurd on its face and evidence that Plaintiffs can present no judicially manageable standard of fairness.

about somebody having a 55/45 or anything like that." (T p 51:2-11 (emphasis added)). In sum, Plaintiffs were unable to articulate a single way that a court could measure the degree of partisanship acceptable in apportionment.[6]

On 28 June 2024, the superior court entered an order granting Legislative Defendants' Motion, and dismissing Plaintiffs' claims as non-justiciable political questions. (R pp 141-46). In its order, the superior court specified exactly how the issues raised by Plaintiffs presented non-justiciable political questions and how the Supreme Court's decision in *Harper III* squarely foreclosed Plaintiffs claims. (R pp 144-46). For example, the superior court explained:

> In its decision, the *Harper* Court reaffirmed the exclusive role of the Legislature as the body tasked with redistricting in North Carolina. "Under the North Carolina Constitution, redistricting is explicitly and exclusively committed to the General Assembly by the text of the Constitution." [*Harper III*] at 326. "[O]ur constitution and the General Statues expressly insulate the redistricting power from intrusion by the executive and judicial branches." *Id.* at 331.
>
> In the instant case, the issues raised by Plaintiffs are clearly of a political nature. There is not a judicially discoverable or manageable standard by which to decide them, and resolution by the Panel would require us to make policy determinations that are better suited for the policymaking branch of government, namely, the General Assembly.
>
> Plaintiffs, in their arguments to the Panel, urge us to find that the holdings in *Harper* do not apply to the facts and issues present in this case, but rather to Article I, §10, Free Elections Clause claims. We do not find these arguments persuasive. This case deals with the same underlying issue that was addressed in *Harper*: the redrawing of districts from which representatives to the Legislature will be elected.

(R p 145).

[6] The same goes for the repeated statements that Legislative Defendants had "stacked the deck" or "stacked the district," which Plaintiffs' counsel could not define when asked, but insisted would become clear at trial. (T pp 28:23-29:2, 43:20-45:9, 45:24-46:3, 57:3-6).

ARGUMENT

Plaintiffs' attempt to reframe this case as an "Election Integrity" case (Pl. App. Br. p 3) belies both logic and the record before the Court. Plaintiffs offer no evidence, or even an allegation in their Complaint, of any concrete issues pertaining to the 2024 elections. Nor could they. Plaintiffs filed their Complaint over a month before the 2024 primary. Nor do Plaintiffs raise any issue with the actual conduct or integrity of the election. There are no allegations that any of the Plaintiffs were denied access to the ballot box, that any ballot box was stuffed with illegal ballots, or that ballots were cast by non-registered or fraudulent voters implicating a potential issue under N.C. Const. Art. I, § 10.[7]

Plaintiffs' efforts to re-cast their single Article I, § 36 claim is nothing more than a desperate attempt to evade the failings of their own Complaint. As shown above, Plaintiffs' Complaint, Brief in Opposition to Legislative Defendants' Motion to Dismiss, and arguments before the superior court all raise theories regarding the "apportionment" of voters based on partisanship. *See supra* at 3-7. There is no mention of denial of the right to vote, or any other election integrity issues. Put

[7] For this reason, Plaintiffs' generalized citation to *Kivett v. North Carolina State Board of Election*, COA P25-30 (N.C. Ct. App. 2025), is misplaced. In *Kivett* the claim was that ineligible persons voted in certain contests in the November 5, 2024 general election and would continue to vote in future elections unless the State Board was ordered to act. *See Kivett, et al. v. N.C. State Board of Elections*, et al., 24 CVS 041789-910, at D.E 3 (Wake Super. Ct.). An ineligible voter participating in an election is akin to a claim of illegal ballot harvesting or stuffing a ballot box, which *is* actionable pursuant to Article I, § 10's protections of an accurate vote count. *See Cmty. Success Initiative v. Moore*, 384 N.C. 194, 239, 886 S.E.2d 16, 49 (2023) ("We thus construed the Free Elections Clause to prohibit fraudulent vote counts."). In contrast to those justiciable claims under Article I, § 10, Plaintiffs' Complaint is devoid of any allegation of election fraud, illegal voters, or an inaccurate count.

plainly, Plaintiffs challenge the 2023 Plans under theories of partisan gerrymandering barred by *Harper III*. Based on the Complaint and the law, the superior court could have reached no other conclusion but dismissal. The order dismissing Plaintiffs' Complaint pursuant to N.C. R. Civ. P. 12(b)(1) and 12(b)(6) should be upheld.

I. Standard of Review.

Appellate courts review *de novo* an order granting a Rule 12(b)(1) motion to dismiss. *Marlow v. TCS Designs, Inc.*, 288 N.C. App. 567, 572, 887 S.E.2d 448, 452-53, *review denied*, 891 S.E.2d 279 (N.C. 2023). On appeal, the reviewing court considers the issue anew, independently determining whether any evidence in the record establishes that subject matter jurisdiction exists. *Id.* Similarly, the standard of review for an order granting a Rule 12(b)(6) motion to dismiss is also *de novo*, with the appellate court considering only whether the plaintiffs' allegations, taken as true, are legally sufficient to state a claim upon which relief may be granted. *Bossian v. Chica*, 910 S.E.2d 682, 688 (N.C. Ct. App. 2024). In conducting this review, the court must assess only the legal sufficiency of the pleadings while disregarding the plaintiffs' legal conclusions. *Proctor v. City of Jacksonville*, 910 S.E.2d 269, 273-74 (N.C. Ct. App. 2024) (citing *Skinner v. Reynolds*, 237 N.C. App. 150, 152, 764 S.E.2d 652, 655 (2014)). The lower court's ruling should be affirmed if "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint

discloses some fact that necessarily defeats the plaintiff's claim." *Bissette v. Harrod*, 226 N.C. App. 1, 7, 738 S.E.2d 792, 797 (2013) (citations omitted).

De novo review is also appropriate because Plaintiffs' arguments attempt to implicate a constitutional right. *Piedmont Triad Reg'l Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (citing *Ornelas v. United States*, 517 U.S. 690, 696-97, 116 S.Ct. 1657, 1661-62, 134 L.Ed.2d 911, 918-19 (1996) for the proposition that de novo review is appropriate for constitutional claims that are not "finely tuned," allowing appellate courts to clarify legal principles, establish unified precedent, and provide a defined set of rules). "In challenging the constitutionality of a statute, the burden of proof is on the challenger, and the statute must be upheld unless its unconstitutionality clearly, positively, and unmistakably appears beyond a reasonable doubt or it cannot be upheld on any reasonable ground." *State v. Sullivan*, 201 N.C. App. 540, 544, 687 S.E.2d 504, 508 (2009). In conducting this examination, the appellate court presumes that the statute is constitutional, resolving all doubts in favor of constitutionality. *Id*. Thus, while the factual allegations of the pleadings must be construed in favor of Plaintiffs, any ambiguities over the legal question of the existence of a fundamental right must be construed in favor of Defendants. *Id.*

II. The Superior Court Properly Dismissed Plaintiffs' Suit Because Plaintiffs' Claim Presents a Non-Justiciable Political Question.

The superior court properly dismissed Plaintiffs' Complaint because it presents a non-justiciable political question. *Harper III* bars Plaintiffs' claim. Full stop. But even assuming *arguendo* that *Harper III* does not apply (which it does), Plaintiffs'

single claim under Article I, Section 36 of the North Carolina Constitution presents a non-justiciable political question of its own right.

A. The superior court properly held that *Harper III* fully bars Plaintiffs' claim.

Plaintiffs' attempts to distinguish this case from *Harper III* fall flat when compared to the actual text of the Complaint. Plaintiffs contend that the state Constitution is violated when redistricting plans "give[] a specific political party or candidate a determinative advantage in the election by intentionally 'apportioning' voters favorable to that specific political party into the specific district or 'apportioning' voters unfavorable to that specific political party out of the specific district." (R p 27 at ¶95). Plaintiffs in *Harper III* also brought claims under discrete sections of the North Carolina Constitution, contending that "the General Assembly violated the state constitution by drawing legislative districts that unfairly benefited one party at the expense of another…." 384 N.C. at 299, 886 S.E.2d at 400. The substance of the claim alleged here is identical. There is simply no material difference between the "advantage" alleged here and the "unfair benefit" alleged in *Harper*. *Id.* at 326-350, 886 S.E.2d at 416-431.

Plaintiffs' Complaint here and the *Harper* complaints[8] mirror each other in several respects. Namely, both sets of complaints:

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[8] This Court may take judicial notice of the complaints in *NCLCV, et al. v. Hall, et al.* (21 CVS 15426) *and Harper, et al. v. Hall, et al.* (21 CVS 500085) as they are part of the official Printed Record on Appeal in *NCLCV, et al. v. Hall, et al.*, No. 412PA21, at R pp 30-125 (Verified Complaint of *NCLCV* Plaintiffs), 897-964 (*Harper* Plaintiffs' Amended Complaint), 1263-1346 (*Common Cause* Intervenors' Complaint), publicly available at https://www.ncappellatecourts.org/show-file.php?document_id=297834. *State v. Griffin*, 286 N.C. App. 94, 101 at n.1, 879 S.E.2d 361, 367 (2022) (taking

- Call for a three-judge panel to be convened because the action challenges the validity of reapportionment acts enacted by the General Assembly (*Compare* R p 6 *with NCLCV, et al. v. Hall, et al.*, No. 412PA21, https://www.ncappellatecourts.org/show-file.php?document_id=297834 (hereinafter, "*Harper Record*"), at pp 44, 912, 1268);

- Highlight specific districts in legislative and Congressional plans, but seek a remedy that requires reapportioning the remaining districts (*Compare* R pp 6, 13, 28-29 *with* *Harper Record* at pp 941-46);

- Complain that modern technology and data allowed the General Assembly to pick and choose which voters were apportioned into which districts based on voting tendencies and other characteristics in order to benefit the Republican Party (*Compare* R p 11 *with* *Harper Record* at pp 31, 901, 1301);

- Recite recent election results in the reconstituted challenged districts where Democrats have lost to illustrate the purported unfairness of the maps (*Compare* R pp 15-16, 18-19, 21-22 *with* *Harper Record* at pp 59, 62-64);

- Accuse the General Assembly of reapportioning "in such a way as to turn the districts from competitive to favoring one political party's candidates, in this case the Republican Party" (*Compare* R p 13 *with* *Harper Record* at pp 32, 91, 108, 1267-1268); and

- Claim their rights to a "fair" election have been violated (*Compare* R pp 2-3 *with* *Harper Record* at pp 35, 107-08, 956-57, 1276-1277).

Plaintiffs here are careful to not self-identify their claim as a partisan gerrymandering challenge. But the root of Plaintiffs' Complaint is that "members of the General Assembly controlling the apportionment process used technology and data in such a way as to reapportion voters so as to create an unfair advantage for their political party in the ensuing elections in those districts," and "it was the intent of [Legislative Defendants] to take a substantial number of voters likely to support

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judicial notice of appellate records in another case for comparison purposes). *See also West v. G. D. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981).

their party's candidates and move them into the above referenced districts; take certain voters likely to not support their party's candidates out of their district." (R pp 12-13 at ¶¶ 29, 33). This is simply a long-winded way to accuse the General Assembly of partisan gerrymandering.

B. Article I, Section 36 cannot be used to state a claim for fair elections.

Plaintiffs' legal theory that an unenumerated constitutional right to "fair" elections can be enforced through Article I, Section 36 of the North Carolina Constitution relies on an unprecedented and erroneous interpretation of the Declaration of Rights.

Plaintiffs ignore that the Declaration of Rights provides "'a statement of general abstract principles'" and that "many provisions of the Declaration of Rights do not give rise to justiciable rights." *Harper III*, 384 N.C. at 431-32, 886 S.E.2d at 431-32 (citing N.C. Const. art. I, § 6); *Dickson v. Rucho*, 367 N.C. 542, 575, 766 S.E.2d 238, 260 (2014) ("*Dickson I*"). The North Carolina Supreme Court has previously determined that similar provisions of the Declaration of Rights do not place justiciable restrictions on the General Assembly's redistricting authority. First, in *Dickson I*, the Court ruled that Article I, Section 2 (the "Good of the Whole Clause") provided no justiciable restrictions on the General Assembly's redistricting authority. 367 N.C. at 575, 766 at 260. In *Harper III*, the Court reached the same conclusion on partisanship considerations under Article I, Section 10 (the "Free Elections Clause"); Article I, Section 19 (the "Equal Protection Clause"); Article I, Section 12 (the "Right

of Assembly and Petition" Clause); and Section 14 (the "Freedom of Speech and Press" Clause). 384 N.C. at 351-370. 886 SE.2d at 431-443.

Proper interpretations of the Constitution look to the plain text of the constitution and courts may "not search for a meaning elsewhere." *State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 510 (2004); *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989). Here, there are "no hidden meanings or opaque understandings" in the plain text of Article I, Section 36. *Harper III,* 384 N.C. at 297, 886 S.E.2d at 399; *see also McKinney v. Goins*, 911 S.E.2d 1, 9-10 (N.C. 2025) (holding that the North Carolina Constitution does not contain hidden meanings, but instead was written to be clear and accessible).

Article I, Section 36 is entitled "Other rights of the people" and simply provides that "[t]he 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. This provision cannot reasonably be read to create an unenumerated vested right or a judicially manageable standard that could limit the General Assembly's exclusive redistricting authority as set forth in Article II. *See McKinney*, 911 S.E.2d at 11-12 (defining a vested constitutional right as "something more than such a mere expectancy . . . based upon an anticipated continuance of the present general law"). Moreover, generalized claims that ask the court to search the entire Constitution to help plaintiffs develop a legal theory for their case do not meet this burden, even at this initial stage. *See Blue v. Bhiro*, 381 N.C. 1, 5, 871 S.E.2d 691, 694 (2022) ("[W]hen considering a Rule 12(b)(6) motion, the trial court is limited to reviewing the allegations made in the complaint.").

C. Plaintiffs' claim is a non-justiciable political question.

Even if Plaintiffs' claim is not wholly barred by *Harper III* (which it is), and assuming *arguendo* that Article I, Section 36 is a proper avenue to bring an apportionment-related action (which it is not), Plaintiffs' claim is still a nonjusticiable political question.

Separation of powers principles are entrenched in North Carolina jurisprudence. N.C. Const. art. I, § 6 ("The legislative, executive, and judicial powers of the State governments shall be forever separate and distinct from each other."); *see Bacon v. Lee*, 353 N.C. 696, 716, 549 S.E.2d 840, 853-54 (2001) ("[T]he separation of powers doctrine is well established under North Carolina law." (citations omitted)).The political question doctrine provides that "out of respect for separation of powers, a court must refrain from adjudicating a claim when any one of the following is present: (1) a textually demonstratable commitment of the matter to another branch; (2) a lack of judicially discoverable and manageable standards; or (3) the impossibility of deciding a case without making a policy determination of a kind clearly suited for nonjudicial discretion." *Harper III*, 384 N.C. at 325, 886 S.E.2d at 415-16. All three of these factors are present in this case.

i. Redistricting is textually committed to the General Assembly.

Plaintiffs do not dispute that the North Carolina Constitution provides a textual commitment of the redistricting power to the General Assembly. *See* N.C. Const. art. II, §§ 2-5. These are the only express restrictions found in the state Constitution that limit the General Assembly's discretion to draw districts. *Harper*

III, 384 N.C. at 322-23, 886 S.E.2d at 413-14. Plaintiffs do not claim that the General Assembly violated any of these express criteria and admit that Article I, Section 36 is, at best, an implied (not express) provision. (Pl. App. Br. pp 6, 18-19).

Indeed, the Supreme Court of North Carolina has repeatedly emphasized that any limits on the legislative branch's plenary power "must be explicit in the text and demonstrated beyond a reasonable doubt."[9] *McKinney*, 911 S.E.2d at 7 (citing *Harper III*, 384 N.C. at 323, 886 S.E.2d at 414; *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 212, 886 S.E.2d 16, 32 (2023); *Holmes v. Moore*, 384 N.C. 426, 435-36, 886 S.E.2d 120, 129 (2023)). This principle is derived from the structure of the state Constitution itself, which recognizes that "[t]he people exercise their inherent political power through their elected representatives in the General Assembly." *McKinney,* 911 S.E.2d at 8 (citing *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895)). Therefore, absent an express prohibition on apportioning voters based on political ideologies in districting in the North Carolina Constitution, which *Harper III* held is nowhere to be found, the General Assembly is free to make policy decisions in reapportionment subject only to other express requirements. *Harper III*, 384 N.C. at 334, 886 S.E.2d at 421; *see also Stephenson v. Bartlett*, 355 N.C. 354, 371, 562 S.E.2d 377, 390 (2002).

[9] The 1971 amendment to Article I, § 36 confirms that the people speak through the General Assembly by eliminating the phrase "and all powers, not herein delegated, remain with the people" that concluded the original 1868 version. Newby & Orth, *The North Carolina State Constitution* 92 (Oxford Univ. Press 2d ed. 2013). Elimination of that phrase is consistent with the General Assembly having "long been recognized to possess all legislative powers not specifically denied it[.]" *Id.* Not only is there a textual commitment to the General Assembly on reapportionment, but there is also nothing else in the text that specifically denies the General Assembly of apportionment power, except the limitations in Article II, §§ 3, 5.

ii. Plaintiffs' claim lacks a judicially discoverable and manageable standard, and cannot be adjudicated without policy determinations.

Similarly, Plaintiffs' claim lacks a judicially discoverable and manageable standard. The idea that the phrase "determinative advantage" is somehow judicially manageable (R p 27 at ¶95), is absurd. Elections, by their very nature, require that one candidate achieve a "determinative advantage" in the form of more votes, even a single vote, to win. Moreover, Plaintiffs utterly failed to allege a judicially discernable definition of "fair" elections at the motion to dismiss hearing, even after the superior court asked multiple times for a precise definition of fairness. (*See supra* at 5-7; T pp 41:8-47:7, 50:2-51:5, 57:18-59:15).

Whether voters have been fairly apportioned based on political considerations cannot be adjudicated without policy determinations. For example, which elections to analyze from which years or other datapoints that could be used to determine whether a district benefits a political party "too much" do not account for individual candidates or unique election conditions. *See e.g., Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (plurality opinion). Unlike states like Florida, which expressly forbids districting being drawn with "the intent to favor or disfavor a political party or incumbent", Fla. Const. Art. III, §§ 20-21, the North Carolina Constitution permits political intent. *See Harper III*, 384 N.C. at 333-34, 337, 886 S.E.2d at 420-21, 423. Absent such an express constitutional provision, the question of how much political intent is too much is a policy determination left within the sole discretion of the General Assembly. *Id.* at 336, 886 S.E.2d at 422.

III. Plaintiffs' Arguments on the Law of the Land Clause and the Free Elections Clause Were Not Raised Below, Are Not in the Complaint, Are Not Properly Before this Court, and Fail on Their Own Merits.

Plaintiffs' remaining arguments were not raised below or properly preserved for appeal. But even if Plaintiffs' Law of the Land Clause and Free Elections Clause arguments were properly preserved, these arguments fail on their own merits.

A. Plaintiffs cannot raise new legal theories on appeal.

"[T]he law does not permit parties to swap horses between courts in order to get a better mount" on appeal. *Weil v. Herring*, 207 N.C. 6, 175 S.E. 836, 838 (1934). Indeed, North Carolina appellate courts have repeatedly emphasized that a litigant may not raise a new legal theory on appeal that was not argued before the trial court. *See State v. Sharpe*, 344 N.C. 190, 194-95, 473 S.E.2d 3, 5-6 (1996) (internal quotation marks omitted) ("[The] Court has long held that where a theory argued on appeal was not raised before the trial court the law does not permit [review]."); *State v. Gentile*, 237 N.C. App. 304, 310-11, 766 S.E.2d 349, 354 (2014) (dismissing the appellants' argument because the issue was not argued before the lower court and therefore was not preserved for appellate review). This is true even if the new theory is based on an alleged constitutional right. *See State v. Radomski*, 294 N.C. App. 108, 112, 901 S.E.2d 908, 912, *review denied*, 386 N.C. 557, 904 S.E.2d 542 (2024), *and writ denied*, 904 S.E.2d 548 (N.C. 2024) (quoting *State v. Gobal*, 186 N.C. App. 308, 320, 651 S.E.2d 279 (2007)) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error[.]"). The rule against raising new issues on appeal is aimed squarely at appellants, who carry the

burden to show error in the lower court's ruling. *State v. Hester*, 254 N.C. App. 506, 516, 803 S.E.2d 8, 16 (2017).

Here, Plaintiffs raise for the first time on appeal that the unenumerated voting right they allege exists pursuant to Article I, Section 36 of the North Carolina Constitution can be enforced *through* the "Free Elections Clause" in Article I, Section 10, or the "Law of the Land Clause" in Article I, Section 19, of the North Carolina Constitution. (Pl. App. Br. pp 19-27).[10] But as the appellants, the North Carolina Rules of Appellate Procedure and clear judicial precedent bar Plaintiff from now raising these new theories. *Weil*, 207 N.C. 6, 175 S.E. at 838; *see also* N.C. R. App. P. 10(b)–(c).[11]

Plaintiffs first attempt to introduce a theory that a fundamental right to "fair" elections pursuant to Article I, Section 36 can be adjudicated through Article I, Section 19, a clause not mentioned by Plaintiffs until appeal. (Pl. App. Br. pp 19-21). Plaintiffs next attempt to argue the right exists through Article I, Section 10. (Pl. App. Br. pp 21-27). While Plaintiffs mentioned the Free Elections Clause in passing below, (R pp 27, 85, 93, 95-96; T pp 29:21-30:6, 55:20-56:9), they never raised the

[10] Notably, Plaintiffs argued in their Memorandum in Opposition to Legislative Defendants' Motion to Dismiss that "[t]he source of [an unenumerated right to fair elections] is the common law of North Carolina and the Declaration of Rights of the North Carolina Constitution, which is a limitation of the powers of the General Assembly." (R p 86). The notion that Article I, Section 36 is a limit on the General Assembly's power is simply not correct. *See supra* p.16, n.8. (T pp 60:21-61:4).

[11] To the extent Plaintiffs argue in reply that the Rules can be suspended, courts may deviate from the general Rules of Appellate Procedure only in extreme circumstances, as suspension of the Rules is a last resort available only "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest." N.C. R. App. P. 2; *see also State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017); *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions.").

argument that a right to "fair" elections under Article I, Section 36 can be enforced *through* Section 10.[12] Indeed, the superior court understood Plaintiffs' argument to be the exact opposite, noting that *Harper III* extends to the types of partisan gerrymandering claims brought by Plaintiff, not just those initiated under the same constitutional provisions as *Harper* (including §§ 10 and 19). (R p 145).

Plaintiffs may argue that their newly minted theories under Sections 10 and 19 fall within the "scope of the issue" as presented in their arguments below for enforcement through the North Carolina Constitution, Article I, Section 36. But Plaintiffs' own treatment of the theories in briefing bely this argument, as even they acknowledge that when the Court has recognized fundamental unenumerated rights in the past, it has never done so "in the specific context of 'unenumerated' rights under Article I, Section 36." (Pl. App. Br. p 19). Far from being within the "scope of the issue" on appeal, Plaintiffs' arguments for enforcement through Article I, Sections 10 or 19 are entirely new theories not raised in oral argument or briefs below.

[12] In their Complaint, Plaintiffs suggested that for the Free Elections Clause to have *value*, there must also be an unenumerated right that elections be fair (R p 27 at ¶ 94). Saying that the value of an enumerated right is contingent on the existence of an unenumerated right is different from arguing that the existence and enforceability of an unenumerated right is rooted in the enumerated one. Plaintiffs also argued in their Memorandum in Opposition to Legislative Defendants' Motion to Dismiss that "[i]t is indisputable that the right to 'fair' elections is a *precondition* to the guarantees 'of frequent' and 'free' elections. (R p 85) (emphasis added). But again, this is not the same argument Plaintiffs present on appeal. Because Plaintiffs did not raise or request a ruling on this constitutional issue, it is not preserved. *See Guerra v. Harbor Freight Tools,* 287 N.C. App. 634, 639, 884 S.E.2d 74, 78 (2023); *State v. Plaza*, 910 S.E.2d 279, 282 (N.C. Ct. App. 2024).

The law is clear. Plaintiffs must ride the trail with the horse they saddled at the start, no matter how spent it now is. *Weil*, 207 N.C. 6, 175 S.E. at 838. Because they were not argued below, Plaintiffs' new theories under the Free Elections Clause in Article I, Section 10, and the Law of the Land Clause in Article I, Section 19, have no place in this appeal.

B. Even if this Court could consider these new legal theories, which it cannot, Plaintiffs fail to demonstrate the existence of an unenumerated right to fair elections through Article I, Sections 10 or 19.

Plaintiffs' argument that a fundamental right to fair elections is enforceable through Article I, Sections 10 or 19 fails under the basic principles of North Carolina constitutional interpretation. According to the North Carolina Supreme Court, a law may only be struck down as unconstitutional if the violation is plain and clear based on the Constitution's text, historical context, and any relevant precedent. *State v. Berger,* 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016). Plaintiffs' arguments for enforcement through Sections 10 or 19 do not meet this standard.

Where the meaning of a constitutional clause is clear, the court will not search for meaning elsewhere. *In re Chastain*, 386 N.C. 678, 684, 909 S.E.2d 475, 479 (2024) (citing *State ex rel. Martin*, 325 N.C. at 449, 385 S.E.2d 473). This reflects the interpretive approach adopted by the North Carolina Supreme Court. *See supra* at 13-14. The plain language of Sections 10 and 19 does not introduce a justiciable concept of "fairness." *See* N.C. Const. art. I, §§ 10, 19. (*See* T p 60:11-12 ("[I]f [elections are] free and frequent they are fair.")).

The historical context of these clauses further underscores the point. The Free Elections Clause and the Law of the Land Clause were both included in the original 1776 version of the North Carolina Declaration of Rights, which expresses broad and abstract principles about rights and liberties but often without creating specific, enforceable legal rights. *Harper III*, 384 N.C. at 351, 886 S.E.2d at 431-32. In other words, many of the Declaration's provisions are nonjusticiable, meaning any underlying concepts contained therein are only enforceable through express constitutional provisions or statutes. *Id.*

Finally, there is clear precedent in *Harper III* that, for a prohibition or limitation on partisan gerrymandering to exist under North Carolina law, there must be an express provision in the state Constitution, and neither the Free Elections Clause nor the Law of the Land Clause expressly provide such a right. *Id.* To the contrary, under *Harper III*, partisan gerrymandering is a nonjusticiable political question under *any* constitutional theory. *Id.* at 378, 886 S.E.2d at 448-49. *Harper III* explicitly rejected any argument for an ephemeral, unenumerated right to political fairness, stating that such a right must be expressly included in the Constitution. *Id.* at 337, 345-46, 886 S.E.2d at 423, 428. The Supreme Court also directly addressed theories asserting a right to "fairer" political apportionment under Sections 10 and 19, and found no support in history or case law for a constitutional prohibition on partisan gerrymandering under these provisions. *Id.* at 369-70, 886 S.E.2d at 443.

i. There is no enforceable right to fair elections located in Article I, Section 10.

Analyzing a claim against partisan gerrymandering under the Free Elections Clause, the *Harper III* court held that:

> "Based upon its plain meaning as confirmed by its history and by this Court's precedent, the free elections clause means a voter is deprived of a 'free' election if (1) a law prevents a voter from voting according to one's judgment, or (2) the votes are not accurately counted, Thus, 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."

384 N.C. at 363-64, 886 S.E.2d at 439. Now, Plaintiffs ask this Court not to believe what *Harper III* court plainly said, but instead to believe that the Supreme Court left open a plethora of yet-to-be-identified rights within the meaning of the word "interference." (Pl. App. Br. p 25). But *Harper III*, by its plain language, foreclosed such semantic nitpicking, holding in unequivocal terms that "partisan gerrymandering claims do not implicate [Article I, Section 10]." 384 N.C. at 364, 886 S.E.2d at 439.

Plaintiffs attempt to distinguish their claim from *Harper III* by arguing that the holding in *Harper III* should be narrowly confined to proportional representation claims across entire maps[13]. (Pl. App. Br. pp 22-23). But *Harper III* broadly rejected any judicially imposed standard of "fairness" in redistricting, emphasizing that such standards are not derived from any express constitutional provision and instead

[13] A review of the *Harper* complaints shows that their claims were not narrowly limited to proportional representation across an entire map as Plaintiffs suggest. While proportional representation was mentioned, it was not the sole theory at issue.

reflect subjective notions of fairness without clear definitions or manageable standards. 384 N.C. at 339, 886 S.E.2d at 424. Moreover, Plaintiffs' distinction falters as a practical matter, as any adjustment to one district necessarily affects others—meaning no redistricting decision exists in isolation from the broader map.

Plaintiffs also contend that their claim presents a distinct issue—that the use of voter behavior data in map-drawing creates a fundamental fairness concern. (Pl. App. Br. pp 22-23). This is not a distinct issue— *Harper III* expressly addressed and rejected this very argument. It found that metrics of partisan fairness are inherently flawed, resting on assumptions about past voting behavior and party affiliation that fail to capture the dynamic realities of representative government, voter decision-making, and the broader issues influencing political alignment. 384 N.C. at 347, 886 S.E.2d at 429. Ultimately, *Harper III* held that these concerns are policy matters, not justiciable legal claims. *Id.*

ii. There is no enforceable right to fair elections located in Article I, Section 19.

Harper III also addressed claims of partisan gerrymandering under Article I, Section 19, concluding that the Equal Protection provision of the clause guarantees all voters equal voting power under the one-person, one-vote principle, but does not extend to claims of partisan gerrymandering. 384 N.C. at 364-68, 886 S.E.2d at 439-42. To their credit, Plaintiffs do not reassert the equal protection argument under Section 19 that was clearly foreclosed by *Harper III*. But as the court below noted, *Harper III* ends debate on all issues of partisan gerrymandering, (R p 145), because *Harper III's* holding is that partisan gerrymandering claims brought under any part

of the North Carolina Constitution are nonjusticiable political questions. 384 N.C. at 378, 886 S.E.2d at 448-49.

It is telling that the Law of the Land Clause, outside of the Equal Protection Clause, was not raised in *Harper III*—likely because it is not a tenable argument and finds no meaningful support in constitutional text, history, or precedent. As the case law Plaintiffs themselves cite shows, to establish a fundamental right under the Law of the Land Clause, a party must pinpoint the specific text of the clause that guarantees the right they claim—life, liberty, or property. *See Eller v. Board of Education*, 242 N.C. 584, 586, 89 S.E.2d 144, 146 (1955) (identifying a fundamental right to compensation for a taking under the property protection textually guaranteed in art. I, § 19); *Long v. City of Charlotte*, 306 N.C. 187, 195-96, 293 S.E.2d 101, 107 (1982) (same as *Eller*); *State v. Dobbins*, 277 N.C. 484, 497, 178 S.E.2d 449, 463 (1971) (recognizing a right to travel pursuant to the liberty protection included in the text of art. I, § 19).[14] Instead of engaging in this necessary analysis, Plaintiffs rely on broad assertions without demonstrating how their claimed right arises from the actual text of the Constitution. This is insufficient to state a claim upon which relief may be granted, because it fails to "identify an express provision of the constitution and demonstrate that the General Assembly violated that provision beyond a reasonable

[14] Additionally, in each case cited by Plaintiffs, the asserted right was already "deeply embedded" in federal constitutional principles. *See Eller*, 242 N.C. at 586, 89 S.E.2d at 146; *see also Long*, 306 N.C. at 195, 293 S.E.2d at 107 (citing the Fifth Amendment's right to compensation); *Dobbins*, 277 N.C. at 497, 178 S.E.2d at 456 (locating the right to travel in the Fifth and Fourteenth Amendments to the U.S. Constitution). Plaintiffs cannot identify any such twin federal right here, because *Rucho v. Common Cause* foreclosed the U.S. Constitution as a source of any fundamental right to a nonpartisan redistricting process. *See* 588 U.S. 684, 139 S. Ct. 2484, 204 L. Ed. 2d 931 (2019).

doubt." *Harper III*, 384 N.C. at 323, 886 S.E.2d at 414; *see also McKinney*, 911 S.E.2d at 7-9 (holding that a constitutional limitation on the General Assembly must be explicit in the text of the Constitution and demonstrated beyond reasonable doubt).

Moreover, the North Carolina Supreme Court recently reaffirmed the narrow scope of rights protected under the Law of the Land Clause in *McKinney v. Goins*, 911 S.E.2d 1 (N.C. 2025). As the Court explained, the clause's protections apply only when the State interferes with a vested right—defined as "something more than such a mere expectancy… based upon an anticipated continuance of the present general law," and as a "secured, established, and immune from further legal metamorphosis." *Id.* at 11-12 (quoting *Pinkham v. Unborn Child of Jather Pinkham*, 227 N.C. 72, 79, 40 S.E.2d 690, 695 (1946); *Gardner v. Gardner*, 300 N.C. 715, 718-19, 268 S.E.2d 468, 471 (1980)). The Court further emphasized that questions of public policy—such as the appropriate length or structure of statutes of limitations—are reserved to the General Assembly, not the courts. *Id.* at 8-9, 13. Because Plaintiffs offer no manageable or justiciable standard of fairness, the right they assert cannot plausibly be characterized as "secured, established, and immune from further legal metamorphosis." Instead, it reflects a policy decision reserved for the General Assembly to decide—not a vested right protected by Section 19.

Accordingly, Plaintiffs' effort to derive a novel fundamental right from Article I, Section 19 lacks both legal precedent and constitutional support.

CONCLUSION

For these reasons, the superior court did not err in granting Legislative Defendants' Motion to Dismiss.

Respectfully submitted, this the 7th day of April, 2025.

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N.C. R. App. P. 33(b) Certification:
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CERTIFICATE OF COMPLIANCE

Pursuant to North Carolina Rule of Appellate Procedure 28(j), the undersigned certifies that the foregoing brief, which was prepared using a 12-point proportionally spaced font with Century Schoolbook, is approximately 7,184/8,750 words, (excluding covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature blocks) as reported by the word-processing server's word count.

This the 7th day of April, 2025.

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