No. 413PA21-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
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| REBECCA HARPER; *et al.,*<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>REPRESENTATIVE DESTIN HALL; *et al.,*<br><br>Defendants-Appellees. | From Wake County<br>No. 21 CVS 500085 |
| NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., *et al.,*<br><br>Plaintiffs-Appellants,<br><br>v.<br><br>REPRESENTATIVE DESTIN HALL; *et al.,*<br><br>Defendants-Appellees. | From Wake County<br>No. 21 CVS 015426 |

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**AMICUS CURIAE BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW IN SUPPORT OF PLAINTIFFS-APPELLANTS ON REHEARING**

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## INTRODUCTION

The Brennan Center for Justice at N.Y.U. School of Law[1] urges this Court to reject Legislative Defendants' request that it upend precedents issued in this case

[1] No other persons or entities authored or paid for, in whole or in part, for the preparation of this brief. This brief does not purport to convey the position, if any, of N.Y.U. School of Law.

just last year holding that extreme partisan gerrymanders violate the North Carolina Constitution.[2]

More than 40 years ago, Justice William J. Brennan, Jr. wrote that "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). The U.S. Supreme Court reaffirmed that central wisdom in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019), writing that while partisan gerrymandering claims might be non-justiciable under the federal constitution, "our conclusion [does not] condemn complaints about districting to echo into a void." Rather, "state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* State constitutions, in fact, are the original and often strongest sources of protections for democratic rights. *See* Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law*, 10–12 (2018) [hereinafter Sutton, *51 Imperfect Solutions*].

In this case, this Court confronted some of the most aggressively gerrymandered maps in the nation and looked not to federal precedents but to the unique majoritarian and anti-entrenchment guarantees of the North Carolina

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[2] *Harper v. Hall*, 380 N.C. 317, 868 S.E.2d. 499 (2022) ("Harper I"); *Harper v. Hall*, 881 S.E.2d 156 (2022) ("Harper II").

Constitution, ruling that "our constitution's Declaration of Rights guarantees the equal power of each person's voice in our government through voting in elections that matter" and that, contrary to its claim, the General Assembly did not have "unlimited power to draw electoral maps that keep themselves and our members of Congress in office for as long as they want." *Harper I,* 868 S.E.2d. at 508–09.

In so ruling, this Court joined the growing number of state courts that in recent years have found workable frameworks for assessing partisan gerrymandering claims. Using discernible and manageable standards rooted in state constitutional guarantees, state courts have served as critical democracy backstops, protecting voters from severe gerrymandering by both Democrats and Republicans. Election experts and jurists across the country agree on the workability of these standards.

The checks-and-balances provided by state courts are especially important with issues like partisan gerrymandering. Partisan gerrymandering entrenches the political majorities of the day, making them immune from the ability of voters to "throw the rascals out" and undermining the democratic legitimacy of the bodies responsible for enacting laws. By ensuring that elections do not entrench the party that drew maps, *Harper I* and *Harper II* give force to deeply embedded majoritarian and anti-entrenchment principles that are common in state constitutions, including every North Carolina constitution since 1776.

As a court of general jurisdiction and the final authority on state law, this Court, like other state supreme courts, has long recognized that it has the duty to enforce limits imposed by the state's constitution and that only in the rarest of circumstances

will it be appropriate for it to abstain from deciding whether a legislative enactment comports with the requirements of state law. Although the U.S. Supreme Court concluded in *Rucho*, 139 S. Ct. at 2506-07, that partisan gerrymandering claims were nonjusticiable for purposes of federal law, the uniquely federal prudential concerns underlying that ruling should not be transplanted to claims brought under the distinct and broader provisions of the North Carolina Constitution. The multiple democracy-reinforcing elements of the North Carolina Constitution not only differentiate it from the federal constitution but also compel judicial action in the face of efforts by the political branches to undermine citizens' voting power.

## ARGUMENT

### I. North Carolina courts—like all state courts—have a duty to protect the democratic process distinct from, and broader than, that of federal courts.

The role played by this Court in *Harper I* and *Harper II* in safeguarding democratic rights is not an outlier, but one regularly undertaken by state courts around the country. Indeed, state courts have a long and rich history of enforcing their constitutions to provide remedies when elected officials attempt to undermine the democratic process, even when there is no federal remedy available. *See, e.g., League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 1, 96–97, 178 A.3d 737, 801–02 (Pa. 2018) (holding that congressional map drawn to be partisan gerrymander violated state constitution's Free Elections Clause); *State v. Schmid*, 84 N.J. 535, 569, 423 A.2d 615, 633 (1980) (declining to subject a private university to any First Amendment obligations, but nevertheless holding that it violated the state

constitution by prohibiting distribution of political literature); *Bowe v. Secretary of the Commonwealth*, 320 Mass. 230, 250, 252, 69 N.E.2d 115, 129, 131 (1946) (removing a ballot initiative to prohibit political spending by labor unions as inconsistent with the Declaration of Rights' speech, press, and assembly provisions and noting that "Federal decisions are persuasive, but not controlling").

This role is especially appropriate in light of states' unique constitutional language protecting democratic rights. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 Vand. L. Rev. 89, 110 (2019) (noting the "inherent dissonance" in lockstepping constitutional interpretation of rights *explicitly* protected by state constitutions with those only *implicitly* protected by the federal constitution). Virtually all state constitutions, including North Carolina's, contain strong express provisions manifesting a commitment to majority rule and an effective franchise. *See generally* Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions,* 119 Mich. L. Rev. 859 (2021) (discussing the strong commitment to majority rule, political equality, and popular sovereignty found in the American state constitutional tradition). State courts have accordingly seen it as their duty to give meaning to these distinct provisions when evaluating constraints on democratic participation. *See, e.g.*, *Weinschenk v. State*, 203 S.W.3d 201, 212, 221–22 (Mo. 2006) (striking down voter ID law and holding that "[d]ue to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart."); *see also City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013)

(upholding voter ID law under state constitution but leaving open the question of whether "a more stringent standard" applies than that of the federal constitution).

A. *Protecting majority rule and guarding against political entrenchment are "fundamental principles" under the North Carolina Constitution.*

In North Carolina, the democratic rights guaranteed by the state's constitution are of venerable lineage, dating back to the Declaration of Rights adopted in December 1776 by the people of the newly independent state to shape their emerging democracy and to help guard against a return to tyranny. *Harper I*, 868 S.E.2d. at 535–46. Given the unique substance, text, structure, and history of these provisions, which have no federal counterparts, and their interplay with the guarantees of free speech and equal protection which do, North Carolina courts have long insisted on independence in interpreting the state's constitution, holding that "[i]n construing provisions of the Constitution of North Carolina, this Court is not bound by opinions of the Supreme Court of the United States construing even identical provisions in the Constitution of the United States." *State v. Kelliher*, 381 N.C. 558, 580, 873 S.E.2d 366, 383 (2022) (quoting *State v. Arrington*, 311 N.C. 633, 642, 319 S.E.2d 254, 260 (1984)); Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. Rev. 1749, 1751 (1992). Legislative Defendants ask this Court to make mere surplusage of rights that have been part of North Carolina constitutions for nearly 250 years.

B. *The assumption that state constitutions would protect democratic rights is central to the design of the U.S. Constitution.*

The Framers' design of the federal constitution was built on the bedrock assumption that state constitutions would protect democratic rights.[3] Indeed, the prominence of rights in founding-era state constitutions is one of the principal reasons why the Framers initially did not include a bill of rights in the U.S. Constitution. By 1787, most states, including North Carolina, had adopted state constitutions enshrining a broad range of democratic and individual rights, many times, as in North Carolina, through a Declaration of Rights included as the very first section of the constitution. Jeffrey S. Sutton, *Who Decides?: States as Laboratories of Constititutional Experimentation* 124 (2021) [hereinafter Sutton, *Who Decides?*]; Gordon S. Wood, *The Creation of the American Republic, 1776-1787* 132–33, 271 (1998 ed.); Robert F. Williams, *"Experience Must Be Our Only Guide": The State Constitutional Experience of the Framers of the Federal Constitution,* 15 Hastings Const. L.Q. 403, 404 (1988). In fact, when the topic of a federal bill of rights came up during the Constitutional Convention, it was quickly rejected in a 10-0 vote of states, with Roger Sherman reminding the gathered delegates that "State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient[.]" *The Documentary History of the Ratification of the Constitution* 125 (John P. Kaminski, et al. eds., 2009); Leonard W. Levy, *Origins of the Bill of Rights* 13 (1999). Later,

[3] The U.S. Constitution relies on states when it comes to key elements of voting rights and democratic infrastructure. Article I, for example, sets the qualifications for voters in federal elections to be the same as those set by state law for voting in state legislative elections. U.S. Const. art. I, § 2. The Elections Clause, likewise, requires states to set the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to congressional override. U.S. Const. art. I, § 4.

when the first Congress faced pressure from state ratifying conventions to add a bill of rights, the pressure was not to create new positive rights but merely to ensure that the federal government did not trample on rights already protected by state law. Akhil Reed Amar, *America's Constitution: A Biography* 316–17 (2005). Not surprisingly, given this state-centric approach to protecting rights, "most of the constitutional-rights litigation of the first 150 years after 1776 took place in the States." Sutton, *51 Imperfect Solutions* at 13. In short, a foundational assumption of the U.S. Constitution's design is that states will be the first-line guarantors of the rights of Americans.[4]

C. *The federal political question doctrine is inappropriate under the North Carolina and other state constitutions.*

Under well-established North Carolina precedents, a matter is a political question *under state law* when the state constitution makes a "textually demonstrable constitutional commitment of the issue" to "the sole discretion" of another branch of government. *N. Carolina State Conf. of Nat'l Ass'n for the Advancement of Colored People v. Moore*, 382 N.C. 129, 144, 876 S.E.2d 513, 526 (2022) (quoting *Harper I*, 868 S.E.2d at 533)). This narrower political question doctrine reflects the North Carolina Constitution's longstanding commitment to ensuring meaningful protections against abuses of the people's rights. Indeed, 16 years before *Marbury v. Madison*, North Carolina courts were among the first in the country to establish the principle that laws are subject to judicial review to ensure

[4] While the Reconstruction Amendments made the Bill of Rights applicable to states and gave federal courts an expanded role in protecting rights, it did not divest state courts of their prior and ongoing rights-protecting function.

compliance with a state's constitution. *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7 (1787); Sutton, *Who Decides?* at 40–47. Since then, North Carolina courts have repeatedly noted the particular importance of preserving this judicial function especially where the legislature aggrandizes its own power at the expense of the public will. *Leandro v. State*, 346 N.C. 336, 345, 488 S.E.2d 249, 253–54 (1997); *Pope v. Easley*, 354 N.C. 544, 549, 556 S.E.2d 265, 268 (2001).

By contrast, federal political question doctrine is grounded in prudential concerns unique to the federal context that are inapplicable to state courts. To start, state courts do not need to craft a workable rule for the whole of a complex nation, only their own state. This gives state courts "a freer hand in doing something the Supreme Court cannot: allowing local conditions and traditions to affect their interpretation of a constitutional guarantee and the remedies imposed to implement that guarantee . . . allowing interpretations of the fifty state constitutions to account for [ ] differences in culture, geography, and history." Sutton, *51 Imperfect Solutions* at 17; *see also* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Court Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. Rev. 353 (1984). The fact that state courts adjudicate gerrymandering disputes only for their own states also means that the administrability concerns that animated the U.S. Supreme Court — the prospect of burdening its docket with hundreds of redistricting cases from across the country every ten years — do not apply.

Moreover, unlike in the federal system, there are stronger checks on state court decisions. In North Carolina, for instance, the legislature can, with relative ease,

propose constitutional amendments for consideration by the people if the legislature thinks a court has gotten it wrong.[5]

## II. Abundant experience from around the country shows partisan gerrymandering cases are judicially manageable.

Although Legislative Defendants make much about the supposed unmanageability of partisan gerrymandering claims, courts around the country have found the opposite. In a growing number of states, courts have shown that state constitutional provisions protecting majority rule and guarding against entrenchment are very judicially manageable. Experts — including social scientists, legal analysts, political analysts and scholars — agree. *See, e.g.*, Brief for Amici Curiae Political Science Professors, 2019 WL 1167919; *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), Brief for Professors Wesley Pegden, Jonathan Rodden, and Samuel S.-H. Wang, 2019 WL 1125802, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

In fact, since 2018 alone, state courts in Alaska, Florida, Maryland, New York, Ohio, Oregon, and Pennsylvania — and, of course, this Court — have each evaluated gerrymandering claims under state constitutional provisions and determined that a workable cause of action exists. Order at 4—7, *In re the 2021 Redistricting Cases*, No. S-18419 (Alaska May 24, 2022); Order at 5—6, *In re the 2021 Redistricting Cases*, No. S-18332 (Alaska Mar. 25, 2022); *In re Sen. J. Res. of Legis. Apportionment 100*, 334 So.3d 1282, 1290 (Fla. 2022); Memorandum Opinion and Order at 12—43, 88—

[5] Since 1868, the people of North Carolina have been asked to vote on 149 amendments to the state's constitutions, of which they approved 111, including 42 approved since adoption of the current constitution in 1970.John L. Sanders, *Our Constitutions: A Historical Perspective*, Carolana, https://www.carolana.com/NC/Documents/North_Carolina_Constitution_Historical.pdf; NC Legislative Library, *Amendments to the North Carolina Constitution of 1971*, North Carolina General Assembly, https://sites.ncleg.gov/library/wp-content/uploads/sites/5/2020/01/NCConstAmendsince1971.pdf

94, *Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct. 2022); *Harkenrider v. Hochul*, 197 N.E.3d 437, 440, 452—53 (N.Y. 2022); *League of Women Voters of Ohio v. Ohio Redistricting Comm'n*, 192 N.E.3d 379, 407—13 (Ohio 2022), *petition for cert. filed*, No. 22-362 (U.S. 2002); Opinion of the Special Judicial Panel, *Clarno v. Fagan*, No. 21-CV-40180, 2021 WL 5632371, at *3—6 (Or. Cir. Ct. Nov. 24, 2021); *Sheehan v. Or. Legis. Assemb.*, 499 P.3d 1267, 1271—72, 1277-78 (Or. 2021); *League of Women Voters of Penn. v. Pennsylvani*a, 178 A.3d 737, 801—21 (Pa. 2018).

To be clear, the existence of a cause of action does not mean that every claim should prevail. In some of these cases, courts found constitutional infirmity in the challenged plans. In others, the maps were upheld. But all of these courts found the review process manageable. They determined that courts could identify — and, when necessary, reject — the use of state power to injure one set of voters based on what they believe and to insulate particular partisan officials against popular sentiment. In contrast, only one state court has declared the judiciary unavailable to protect voters from intentional incumbent subjugation of a popular majority. *Rivera v. Schwab*, 512 P.3d 168, 180—87 (Kan. 2022), *petition for cert. filed*, No. 22—501 (U.S. 2002).[6]

The state constitutional provisions in the cases above vary. Some are more explicit, some less so. Unsurprisingly, the courts interpreting these provisions likewise differ modestly in their approach, each carefully grounded in the state's own

[6] Other cases are pending in state courts. *See, e.g., Black Voters Matter Capacity Building Inst., Inc. v. Byrd*, No. 2022-CA-000666 (Fla. Cir. Ct. 2022); *Graham v. Adams*, No. 2022-SC-0522 (Ky. S. Ct. 2022); *Brown v. Scanlan*, No. 2022-0629 (N.H. S. Ct. 2022); *Grisham v. van Soelen*, No. S-1-SC-39481 (N.M. S. Ct. 2022); *League of Women Voters of Utah v. Utah State Leg.*, No. 220901712 (Utah Dist. Ct. 2022).

history and context. But in each instance, the central judicial question has been whether the available evidence sufficiently demonstrates that decisionmakers intended to use government power to entrench allies and injure opposing voters, and whether the resulting map in fact resulted in injury.

Courts have found these cases to be highly manageable by approaching them in the same way that they approach any other case where the intent of a party is at issue, holistically examining the direct and circumstantial evidence presented, including expert testimony. Sometimes that evidence reveals a pattern clear to any objective finder of fact. Sometimes plaintiffs are unable to produce sufficient evidence to properly establish invidious intent — or the state actors rebut a prima-facie showing — and in that event, the claims are (and should be) rejected. This work is no less manageable when the state action involves political choices. There are many permissible ways to draw district lines but that does not mean all options are on the table, no matter how extreme.

All of this is familiar work for the judiciary, which is well equipped to assess invidious intent. As in many states, North Carolina courts have long undertaken such evaluations. *See, e.g.*, *State v. Peoples*, 131 N.C. 784, 784, 42 S.E. 814, 815—16 (1902) (requiring review of evidence to assess invidious intent); *State v. Speller*, 229 N.C. 67, 70-71, 47 S.E.2d 537, 538—39 (1948) (reviewing evidence in a discriminatory intent claim and rejecting offered pretext); *State v. Wilson*, 262 N.C. 419, 424—25, 137 S.E.2d 109, 114 (1964) (noting, in the context of jury selection, that though the state constitution does not demand proportionality, it does prohibit intentional

discrimination); *N. C. Dep't of Corr. v. Gibson*, 308 N.C. 131, 135—48, 301 S.E.2d 78, 82-88 (1983); *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 660—63, 178 S.E.2d 382, 385-87 (1971).

Moreover, in litigation concerning partisan gerrymanders, many tools exist to facilitate these inquiries, allowing a court, for example, to compare a challenged map to a broad range of alternatives consistent with state law. Critically, these analyses do *not* attempt to establish the "correct" amount of partisanship in any configuration of districts, just as the highway patrol does not use a radar gun to establish a "correct" automotive speed. Instead, these are tools to spot outliers — meant only to situate the challenged map in a landscape of possibilities, and to indicate whether the map at issue is so extraordinary that it is difficult to understand as anything other than a durable attempt to insulate representatives from those they purport to represent. *See* Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 2043 (2018).

No case has turned on statistical analyses alone. The geographic dispersion of partisan voters allocated to single-member districts may result in a partisan skew that is unavoidable in a good-faith application of neutral criteria. Courts have used circumstantial evidence above only to raise flags, as an aide to common-sense inference. But, in every case, they have also allowed state decisionmakers to rebut inferences of invidious intent with evidence of their own.

This same approach was also used by federal courts in assessing alleged partisan gerrymanders by both Democrats and Republicans prior to the U.S.

Supreme Court's decision in *Rucho v. Common Cause*. *See, e.g.*, *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018) (three-judge court), *rev'd*, 139 S. Ct. 2484 (2019); *Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018) (three-judge court), *rev'd*, *Rucho*, 139 S. Ct. 2484 (2019); *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016) (three-judge court), *vacated on other grounds*, 138 S. Ct. 1916 (2018); *Hulme v. Madison Cnty.*, 188 F. Supp. 2d 1041 (S.D. Ill. 2001); *see also Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016); *City of Greensboro v. Guilford Cnty. Bd. of Elections*, 251 F. Supp. 3d 935 (M.D.N.C. 2017); *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.) (three-judge court), *aff'd*, 542 U.S. 947 (2004). Those courts had generally coalesced on a set of manageable liability and evidentiary standards similar to those now applied by state judiciaries.

After *Rucho*, of course, such claims are not cognizable in federal court because the U.S. Supreme Court concluded that the federal constitution did not contain a clear, affirmative guarantee of majority rule or protections against political entrenchment. *Rucho*, 139 S. Ct. at 2506-07. Nonetheless, the U.S. Supreme Court recognized that extreme gerrymandering "is 'incompatible with democratic principles,'" *id.* at 2506 (quoting *Ariz. State Leg. v. Ariz. Ind. Redistricting Comm'n*, 576 U.S. 787, 791 (2015)); and specifically invited state courts to look to state law to address the problem, *id.* at 2507.

The North Carolina Constitution protects against this abuse. Absent meaningful guardrails, both political parties have demonstrated a growing willingness to engage increasingly extreme and durable partisan gerrymandering,

locking in unrepresentative supermajorities that diminish citizens' confidence that their government is democratically responsive. There is no reason for state courts to follow federal courts in retreating from partisan gerrymandering claims.

Respectfully submitted, this the 3rd day of March 2023.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, on the 3rd day of March 2023, the foregoing was served upon all counsel of record via email.

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