No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

REBECCA HARPER, et al.,

Plaintiffs,

v.

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

Defendants.

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

Plaintiffs,

v.

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

Defendants.

REPLY BRIEF OF *HARPER* PLAINTIFFS-APPELLANTS

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INTRODUCTION

The trial court's extensive factual findings put the legal issues before this Court in stark relief. Following a four-day trial, the court unanimously found that all three of the General Assembly's 2021 redistricting plans are extreme partisan gerrymanders. The plans, the court found, were intentionally drawn to maximize Republican advantage, ensure Republican dominance in North Carolina's congressional delegation, and guarantee Republican majorities or supermajorities in both chambers of the General Assembly for the next decade. The court found, with mathematical precision, that each plan exhibits more Republican bias than at least 99.9% of all possible plans that satisfy the official criteria adopted by the General Assembly. This extreme Republican bias, the court found, cannot be explained by North Carolina's political geography or the General Assembly's adopted criteria; it can only be explained by the intentional manipulation of the district boundaries to systematically minimize the electoral influence of North Carolina's Democratic voters.

The consequences for representation and democracy in this State are no less serious. The trial court found that the House and Senate Plans "are especially effective in preserving Republican supermajorities," including in elections where any fair map would not elect a supermajority. (FOF ¶ 142). And the Congressional Plan "was designed specifically to ensure that Republicans can efficiently and consistently win at least 10 congressional seats," regardless of how the people vote. (FOF ¶ 455). These plans, the court found, are "highly non-responsive to the changing opinion of the electorate." (FOF ¶ 140). The court denounced the plans' extreme partisan bias as "incompatible with democratic principles"—an "abuse of power" worthy of "ridicule," "derision," and "disdain." (COL ¶¶ 145–48).

Legislative Defendants identify no plausible basis to disturb the trial court's factual findings on appeal, especially under the deferential clear-error standard of review. The facts are thus settled—these maps are rigged to entrench Republicans in power. So the only questions remaining in this appeal are whether the North Carolina Constitution prohibits extreme partisan gerrymanders like the 2021 Plans, and whether this Court has the power to say so. The Court should hold that the answer to both questions is yes.

Rigged maps like the 2021 Plans violate multiple protections in North Carolina's Declaration of Rights. When the ruling party manipulates district boundaries to predetermine election outcomes and entrench itself in power, the elections are not "free." N.C. Const. art. I, § 10. When voters are classified and sorted into districts based on their political beliefs to minimize the minority party's electoral influence, their treatment is not "equal." *Id.* § 19. And when the minority party's voters are drawn into districts to ensure they cannot elect candidates of their choice, they are denied the rights of political speech and assembly—"great bulwarks of liberty" that "shall never be restrained." *Id.* §§ 12, 14.

North Carolina courts are not powerless to act in the face of these severe constitutional violations. While the General Assembly has authority to enact redistricting plans, "it is well within the power of the judiciary of [this] State" to determine whether those plans comply with the State Constitution, including broadly worded provisions like its Equal Protection Clause. *Stephenson v. Bartlett*, 355 N.C. 354, 362, 562 S.E.2d 377, 384 (2002). And the standards governing Plaintiffs' constitutional claims are not only manageable but readily familiar to courts, as courts in this State and elsewhere, including the trial court in this case, have applied those standards to identify extreme gerrymanders.

North Carolina's Constitution establishes a democracy, and this Court has a long tradition of safeguarding it. More than two centuries ago, even before *Marbury v. Madison*, this Court exercised the power of judicial review specifically to prevent the destruction of democracy itself—to prevent legislators from installing themselves in office "for life" without "further election of the people." *Bayard v. Singleton*, 1 N.C. 5, 7 (1787).

To preserve this State's democracy and protect the fundamental rights of its citizens to free and fair elections that reflect the will of the people, this Court should strike down the gerrymandered 2021 Plans, enjoin their use, and order a remedial process to adopt lawful new maps for use in the 2022 primary and general elections.

ARGUMENT

I. The trial court's extensive, unanimous factual findings of extreme and intentional partisan gerrymandering are not clearly erroneous.

The trial court unanimously found that the 2021 Plans were drawn, intentionally and effectively, to maximize Republican advantage, entrench Republican dominance in North Carolina's congressional delegation, and guarantee Republican majorities or supermajorities in both chambers of the General Assembly. *See* Opening Br. 4–32. The trial court reached these findings after a four-day trial, relying on extensive live witness testimony subject to searching cross-examination, and hundreds of documentary exhibits.

These factual findings are manifestly correct, but in any event are reviewed only "for clear error," LD Br. 30—a standard that affords "great deference" to the trial court. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619–20 (1982). "[A]n appellate court accords great deference to the trial court in this respect because it is entrusted with the duty

to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred." *Id*. In particular, "[w]hen a trial court sits without a jury, findings of fact are conclusive on appeal if supported by any substantial evidence." *Farm Bureau v. Cully's Motorcross Park*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013) (quotation marks omitted). "Substantial evidence" means simply "relevant evidence which a reasonable mind ... could accept as adequate to support a conclusion." *In re Burke*, 368 N.C. 226, 230, 775 S.E.d.2d 815, 819 (2015). Thus, factual findings will not be disturbed on appeal even if "the evidence could be viewed as supporting a different finding." *In re Skinner*, 370 N.C. 126, 139, 804 S.E.2d 449, 457 (2017).

Legislative Defendants do not engage with the trial court's factual findings under this highly deferential standard of review. They do not, for example, argue that any of the testimony provided by Plaintiffs' experts, which supported the trial court's conclusions that all three maps are intentional and effective extreme partisan gerrymanders, was somehow inadmissible. Nor do they make the implausible contention that the trial court's understanding of the evidence was *unreasonable*, as would be necessary to dislodge its findings on appeal. *See In re Burke*, 368 N.C. at 230, 775 S.E.2d at 819.

Instead, Legislative Defendants purport to identify "flaw[s]" in the experts' methodologies, LD Br. 101, and then propose alternative, non-partisan explanations for the district boundaries, *id.* at 113–60. But Legislative Defendants presented the same critiques and non-partisan explanations to the three-judge panel—in expert reports and testimony, in the legislators' own trial testimony, and in their proposed findings of fact. The panel

considered and rejected their positions across 180 pages of detailed factual findings. Legislative Defendants provide no basis for concluding that the panel's careful efforts to "weigh and resolve any conflicts in the evidence" were so misguided that these findings may be discarded on appeal. *Cooke*, 306 N.C. at 134, 291 S.E.2d at 620.

Standard of review aside, Legislative Defendants' attacks on the trial court's findings and the experts' analyses are unavailing. Legislative Defendants repeatedly assert that the trial court "credited" their "non-partisan explanations" for the district lines in the 2021 Plans. LD Br. 100–01; *see also id.* at 27, 28, 95, 99, 118, 120, 129, 131, 133, 135–36, 138–41, 145, 147, 149, 151, 152–53, 155. They claim that these explanations and their testimony that "they did not act with partisan intent" "remains unimpeached." *Id.* at 98. *None of this is true.* While the trial court recounted Legislative Defendants' "*stated* purposes of the configurations of the 2021 districts" (FOF ¶¶ 103–08 (emphasis added)), nowhere did it accept or credit those statements as the *actual* reasons for the district lines and the plans' extreme partisan bias. To the contrary, the next *140 pages* of the court's opinion not only impeached but dismantled the legislators' proffered explanations, finding that the evidence overwhelmingly showed them to be pretext for intentional and effective attempts to rig the maps for partisan advantage. *Compare, e.g.*, FOF ¶ 105 (Committees *stating* intent to minimize county and VTD splits), *with* FOF ¶¶ 429, 431 (court *finding* that mapmakers did *not* minimize county and VTD splits).

Legislative Defendants' potshots at Plaintiffs' experts are similarly baseless and rest on inaccurate assertions. Legislative Defendants accuse Dr. Chen, for example, of not properly controlling for municipality splits, pointing to what they describe as an "increase[

]" in splits between his reports at the preliminary-injunction and merits phases. LD Br. 103–04. But the figures Legislative Defendants cite report *unpopulated* municipality splits—*i.e.*, splits that affect no actual people. (T pp 78:1–79:8). Legislative Defendants themselves have asserted that counting unpopulated splits is inappropriate, and have criticized other experts for improperly considering municipal splits that affect "no population … at all." (*E.g.*, LD Proposed FOF ¶ 116). In unrebutted trial testimony that Legislative Defendants ignore, Dr. Chen explained that his algorithm sought to minimize *populated* municipality splits—*i.e.*, splits that actually divide people within a municipality. (T pp 78:4–80:12).

Legislative Defendants also criticize Dr. Pegden—who concluded that the enacted plans are all at least 99.9% partisan outliers—for generating comparison maps that "would not pass muster" in the legislature. LD Br. 108. But Legislative Defendants' main basis for this critique is simply wrong: they invent on appeal a theory that maybe some of Dr. Pegden's comparison maps were connected only by "point contiguity." *Id.* As shown in the very map Legislative Defendants include, Dr. Pegden's algorithm did *not* allow for districts that are contiguous only by a "point" connecting parts of the district. *Id.* And Legislative Defendants ignore that the enacted maps *themselves* have very narrow areas of contiguity—*e.g.*, the portion of Watauga County connected to the rest of Congressional District 11 by a "narrow passage of land that is roughly three miles wide" (FOF ¶ 549; PX-450), and in House District 63 in the center of Alamance County (PX-479).

Legislative Defendants' criticisms of Dr. Mattingly are similarly incorrect. They assert that Dr. Mattingly "concedes that he did not employ the same non-partisan goals as

the General Assembly," LD Br. 109, when the transcript they cite shows the opposite. And Dr. Mattingly did not "concede" that an *amendment* proposed by a Democratic legislator registered as a gerrymander in his analysis, *id.* at 110; he testified that the *district* subject to that minor amendment (which was offered just to unpair incumbents but otherwise left intact the lines drawn by Legislative Defendants) was a gerrymander. (T p 203:10–11).

Legislative Defendants also note that, in some elections, Dr. Mattingly's ensembles would produce the same number of Republican seats as the enacted map in some county groupings. But the whole point of a gerrymander, and what Dr. Mattingly's analysis shows, is that the enacted maps enable Republicans to retain seats in those clusters *when Democrats do so well that they would win under a nonpartisan map*. So when Legislative Defendants note that, for example, Dr. Mattingly's simulations produce three Republican districts and one Democratic district in Brunswick-New Hanover in four of the elections he looked at, and the enacted plan does too, this is just misdirection. LD Br. 149. Those are all elections where the Republicans do really well, winning 51% of the vote or more statewide. (FOF ¶ 406.) The whole problem with the map, however, is that it *sticks* at three out of four Republican districts in elections where the *Democrats* do well and where Dr. Mattingly's nonpartisan simulations overwhelmingly produce only two Republican seats. (*Id.*) As the trial court recognized, if a cluster is cracked and packed such that a seat sticks Republican regardless of how people vote and in situations where any nonpartisan plan would give the seats to the Democrats, it is a gerrymander. (FOF ¶ 140). And when cluster after cluster after cluster consistently exhibits this partisan skew, it adds up to have enormous consequences for representation statewide. Legislative Defendants' brief

studiously ignores the statewide effects of their gerrymanders, because they have no response.

In short, Legislative Defendants' narrow critiques of the expert testimony are wrong, but regardless Legislative Defendants have not come close to meeting the heavy burden necessary to overturn the trial court's factual findings that the 2021 Plans are extreme, intentional, and effective pro-Republican partisan gerrymanders.

II. *Harper* Plaintiffs' claims are justiciable under North Carolina's Constitution.

Legislative Defendants contend that Plaintiffs' claims are non-justiciable on the theories that the North Carolina Constitution gives the General Assembly sole and unchecked discretion to redistrict without judicial review, and that there are no judicially manageable standards for adjudicating these claims. LD Br. 31, 49. Both contentions are squarely at odds with the North Carolina Constitution and the factual record in this case.

A. The North Carolina Constitution constrains the General Assembly's exercise of its redistricting authority.

Legislative Defendants principally argue that Plaintiffs' claims are non-justiciable because "[t]he political question of where electoral district lines should fall is vested in the General Assembly alone, not in any court of law." LD Br. 31. But this fundamentally misunderstands the judiciary's role and the separation of powers under the Constitution. While the General Assembly has the power to enact redistricting plans, N.C. Const. Art. II, §§ 3, 5, North Carolina courts have the power to determine whether those plans comply with the Constitution. *See Stephenson v. Bartlett*, 355 N.C. 354, 362, 562 S.E.2d 377, 384 (2002) ("Indeed, within the context of state redistricting and reapportionment disputes, it

is well within the power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan." (quotation marks omitted)); Opening Br. 40–41. Courts do not "usurp," "seize," or assume a judicial "veto power" over the General Assembly's redistricting authority by adjudicating partisan gerrymandering claims. *See* LD Br. 31–32, 36–37, 45, 48. That is what the judiciary is supposed to do: "interpret[ ] the laws and, through its power of judicial review, determine[ ] whether they comply with the constitution." *State v. Berger*, 368 N.C. 633, 635, 781 S.E.2d 248, 250 (2016); *see also Cooper v. Berger*, 370 N.C. 392, 410–11, 809 S.E.2d 98, 109 (2018) (explaining that even the General Assembly's (and Governor's) specifically enumerated constitutional powers are "constrained by the limits placed upon that authority by other constitutional provisions," including the State's Equal Protection Clause, as interpreted and enforced by courts). And North Carolina statutes also recognize North Carolina courts' role in adjudicating the constitutionality of redistricting plans enacted by the General Assembly. *See* N.C.G.S. §§ 1-267.1, 120-2.3, 120-2.4 (establishing procedures for such challenges).

Legislative Defendants further assert that "the power to redistrict necessarily entails discretion to harbor political 'intent' and consider political 'effect.'" LD Br. 32. Even assuming that were true, it does not leave the courts powerless to protect North Carolinians from line-drawing designed to achieve extreme partisan advantage. As this Court suggested in *Stephenson*, the *federal* constitution permits the General Assembly to "consider partisan advantage" for certain limited purposes, such as achieving rough proportional representation between parties, as long as the legislature acts "in conformity with the State Constitution." 355 N.C. at 371–72, 562 S.E.2d at 390; *see* Opening Br. 41. But that is a far

cry from Legislative Defendants' contention that the *State* Constitution permits the ruling party to systematically manipulate the district boundaries to maximize its own electoral advantage and entrench itself in power. Such extreme partisan bias in the maps violates the constitutional rights of North Carolinians to vote in elections that fairly and truthfully reflect the popular will, Opening Br. 42, to participate equally in the political process, *id.* at 54, and to join with others to advance their political beliefs, *id.* at 65.

Forced to confront *Stephenson's* acknowledgement that any consideration of partisanship must conform with the State Constitution, Legislative Defendants concede that "*Stephenson* recognized that the State Constitution sets a balance of constitutional roles, empowering the judiciary to review redistricting plans according to objective and discrete criteria [in Article II, Sections 3 and 5 of the Constitution], such as the whole-county rules, and otherwise empowering the General Assembly to exercise political discretion." LD Br. 34. "[P]artisan redistricting," they claim, "is permissible *so long as these textually demonstrable rules are satisfied*." *Id.* (emphasis added)

This argument is untenable. There is no basis in either the Constitution or *Stephenson* for a rule that courts may review partisan considerations in redistricting for compliance with some constitutional requirements, but not others. *Stephenson* did not hold that the Whole County Provision and other requirements in Article II were the *only* bases on which courts may adjudicate challenges to redistricting plans. In fact, *Stephenson* simultaneously invalidated a *different* aspect of the plans at issue under North Carolina's Equal Protection Clause. 355 N.C. at 376–84, 562 S.E.2d at 392–98. This Court has since adjudicated additional claims that redistricting plans violate that Clause, confirming that

the judicial role is not limited to enforcing only select constitutional provisions. *See Blankenship v. Bartlett*, 363 N.C. 518, 681 S.E.2d 759 (2009); Opening Br. 34.

Legislative Defendants cannot have it both ways. The Constitution does not confer "a grant of unreviewable political discretion to the legislative branch" in redistricting, LD Br. 32–33, if courts can review the General Assembly's political redistricting considerations for consistency with constitutional constraints like the Whole County Provision. Courts do not "usurp" or assume an extra-constitutional "judicial veto" over the General Assembly's redistricting authority by hearing such claims. Courts are merely fulfilling their obligation to ensure that the General Assembly complies with the Constitution in the exercise of its redistricting authority.

Legislative Defendants note that some states' constitutions contain amendments that expressly prohibit partisan gerrymandering, and they argue that the absence of a similar provision in the North Carolina Constitution means that "there is no constitutional basis for this Court to infer such [a] restriction[ ]." LD Br. 35 (citing Mo. Const. art. III, § 3(b)(5); Fla. Const. art. III, §§ 20–21). But courts have adjudicated partisan gerrymandering claims under state constitutions that similarly lack such explicit bans. *See League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018) (invaliding Pennsylvania's 2011 congressional plan as an unconstitutional partisan gerrymander under Pennsylvania's free elections clause). And it is easy to see why. "[A] Constitution should generally be given, not essentially a literal, narrow, or technical interpretation, but one based upon broad and liberal principles designed to ascertain the purpose and scope of its provisions." *Elliott v. Gardner*, 203 N.C. 749, 753, 166 S.E. 918, 920–21 (1932). The constitutional provisions

at issue here necessarily employ broad language commensurate with their sweeping purposes and do not purport to catalogue every potential action by the General Assembly that would violate them. *See, e.g.*, *Blankenship*, 363 N.C. at 523–24, 681 S.E.2d at 763–64 (holding that North Carolina's Equal Protection Clause bars malapportioned judicial districts); *Stephenson*, 355 N.C. at 376–84, 562 S.E.2d at 392–98 (holding that North Carolina's Equal Protection Clause bars multi- and single-member districts in a plan).

Moreover, by faulting Plaintiffs for failing to propose to the legislature a constitutional amendment explicitly banning partisan gerrymandering, LD Br. 83, Legislative Defendants ignore critical differences between the North Carolina Constitution and the constitutions of states like Florida and Missouri. The Florida and Missouri constitutions allow citizens to enact new constitutional amendments on their own through ballot initiatives, *see* Mo. Const. art. III, § 50; Fla. Const. art. XI, § 3, and it is through this process that Florida and Missouri voters enacted bans on partisan gerrymandering, *see* Mo. Const. art. III, § 3(b)(5); Fla. Const. art. III, §§ 20–21. In contrast, the North Carolina Constitution does not allow for citizen-initiated amendments and can be amended only if a *supermajority* of the General Assembly agrees. N.C. Const. art. XIII, §§ 1–4. North Carolina voters therefore cannot amend their constitution to ban partisan gerrymandering without the permission of Legislative Defendants, who have readily and consistently enacted extreme and discriminatory gerrymanders at every opportunity since 2010—and who continue to reject the notion that "partisan redistricting is even a problem." LD Br. 84.

Legislative Defendants' remaining scattershot arguments are unavailing. Distorting the historical record, they assert that "courts in North Carolina have never exercised the

authority Plaintiffs-Appellants purport to invoke." LD Br. 42. But this Court has repeatedly adjudicated claims that the General Assembly's redistricting plans violate the North Carolina Constitution. *See* Opening Br. 34 (citing *Blankenship*, 363 N.C. at 522–28, 681 S.E.2d at 763–66; *Stephenson*, 355 N.C. at 376, 380–81, 562 S.E.2d at 392, 395; *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989)). And trial courts in North Carolina have adjudicated partisan gerrymandering claims, specifically. *Harper v. Lewis*, 19 CVS 12667, slip op. at 16 (N.C. Super. Ct. Oct. 28, 2019) ("*Harper I*"); *Common Cause v. Lewis*, 18 CVS 014001, 2019 WL 4569584, at *1–2 (N.C. Super. Ct. Sept. 3, 2019).

Legislative Defendants draw false analogies between redistricting cases and "the narrow category of exceptional cases covered by the political question doctrine." *Common Cause*, 2019 WL 4569584, at *126. They observe that this Court has held that the General Assembly's authority to create and dissolve municipalities is a political question and insist that redistricting is no different. LD Br. 38–39. And they cite cases that addressed the General Assembly's authority to determine "the proper age for schoolchildren," *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639–40, 599 S.E.2d 365, 391 (2004), the Governor's clemency power, *see Cooper*, 370 N.C. at 408–09, 809 S.E.2d at 107–08 (discussing cases), and the judgment of municipalities to determine "the necessity or expediency of devoting [condemned private property] to public use," *City of Charlotte v. McNeely*, 281 N.C. 684, 690, 190 S.E.2d 179, 184 (1972). *See* LD Br. 46. But as discussed, this Court has made clear that redistricting *is* different from these cases, explaining that it is "well within the

power of the judiciary of [this] State" to exercise judicial review over redistricting plans. *Stephenson*, 355 N.C. at 362, 562 S.E.2d at 384 (quotation marks omitted).[1]

B. *Harper* Plaintiffs' claims are governed by manageable standards.

Legislative Defendants further argue that Plaintiffs' claims are non-justiciable because there are purportedly no manageable standards for distinguishing between constitutional and unconstitutional partisan gerrymanders. LD Br. 50. They are mistaken. It is unconstitutional for the General Assembly to enact districting plans that have the intent and effect of advantaging one party over another and entrenching that party in power. This intent requirement necessarily distinguishes constitutional from unconstitutional gerrymanders because the circumstantial evidence needed to prove unlawful intent is generally available only in extreme cases. *See* Opening Br. 39.

Legislative Defendants retort that this standard supposedly will invalidate every redistricting plan, as evidenced by the purported "absence of any case" where a court has identified a plan that was *not* an illegal gerrymander. LD Br. 54. Not so. Last year, for example, a three-judge panel rejected a state-court partisan gerrymandering challenge to Oregon's congressional districts because the plaintiffs' circumstantial evidence was insufficient to show partisan intent. *See Clarno v. Fagan*, No. 21CV40180, 2021 WL

[1] This Court's decision in *Howell v. Howell*, 151 N.C. 575, 66 S.E. 571 (1909) (cited at LD Br. 38), is not to the contrary. *Howell* did not hold that partisan gerrymandering challenges to redistricting plans are non-justiciable. Rather, it declined to invalidate a special-tax school district on the basis that county boards of education had been delegated "discretion" in the creation of such districts. *Id.* at 573–74. *Howell* said nothing about the power of courts to review the General Assembly's exercise of its redistricting authority, and the case did not involve any of the constitutional provisions at issue here.

5632371, at *5 (Or. Cir. Ct. Nov. 24, 2021) ("Far from reflecting a partisan purpose, the enacted map's treatment of the Portland area—and the state as a whole—is consistent with prior maps adopted with both judicial imprimatur and bipartisan support."). And the trial court in this case found that one of the challenged House county groupings was "not … the result of intentional, pro-Republican partisan districting" (FOF ¶ 418), proving that the standard can distinguish gerrymandered districts from non-gerrymandered ones. In any event, plaintiffs generally refrain from bringing lawsuits they cannot win, ensuring that partisan gerrymandering jurisprudence will gravitate toward the most egregious and plainly unconstitutional gerrymanders.

In the same vein, Legislative Defendants complain that there is "nothing the General Assembly could do to avoid" a finding of extreme gerrymandering. LD Br. 54. This is a remarkable assertion given Legislative Defendants' track record of enacting some of the most extreme gerrymanders in modern history since gaining power in 2010. And it is not credible in light of the trial court's unanimous factual findings. Legislative Defendants assert, for example, that "[i]t is not enough even for the General Assembly to hire an expert to show that the plans are not outliers," *id.*, but in fact their expert testified that the House and Senate Plans *are* pro-Republican partisan outliers, and the trial court cited his analysis in support of its findings of intentional partisan bias. (T pp 670:10-671:5, 672:2-24); *see* Opening Br. 39. They also note that Plaintiffs' standard would invalidate Legislative Defendants' prior redistricting plans, LD Br. 53, but that is because Legislative Defendants have repeatedly engaged in extreme partisan gerrymandering: The 2016 congressional plan, for instance, was struck down in large part due to Legislative Defendants' open

admission that they "dr[e]w the maps to give a partisan advantage of 10 Republicans and 3 Democrats because [they] did not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." *Harper I*, slip op. at 13. And the trial court likewise found that the 2021 Congressional Plan was an intentional partisan gerrymander because it "was designed specifically" to be just as extreme by "ensur[ing] that Republicans can efficiently and consistently win at least ten [of the State's fourteen] congressional seats." (FOF ¶ 455).

Unsatisfied, Legislative Defendants move the goalposts by asserting that Plaintiffs must provide a standard that will distinguish constitutional from unconstitutional partisan gerrymandering in every case, including some hypothetical future close case. LD Br. 51. That is not how justiciability works. Courts are inherently in the business of developing and refining standards through the adjudication of particular cases. Take, for example, the principle of "one person, one vote," which Legislative Defendants describe as "the most significant protection" for "ensuring voting equality in redistricting." *Id.* at 86. The U.S. Supreme Court initially held that malapportionment claims were justiciable without articulating any standard for resolving them, *Baker v. Carr*, 369 U.S. 168, 209 (1962), then announced the principle of "one person, one vote" in broad terms two years later, *Reynolds v. Sims*, 377 U.S. 533, 578 (1964), and allowed courts to refine the "one person, one vote" standard in subsequent litigation. *See* Opening Br. 38. If courts were required to announce rigid numerical cutoffs to decide every possible case in the first instance, they would lack the power to resolve essential constitutional claims, including malapportionment claims. In any event, if this Court prefers to adopt a more specific numerical cutoff now, the record provides ample support. *See, e.g.*, Opening Br. 39; Governor/AG Amicus Br. 35.

Legislative Defendants further assert that Plaintiffs' standard is not in the Constitution itself, which, they assert, says nothing about the standard and methodologies that courts should use to identify illegal gerrymanders. LD Br. 56–58. By this logic almost *any* constitutional claim would be non-justiciable. The Constitution protects individual rights and democratic values using broad terms like "free" and "equal"; it is the role of the judiciary to develop and refine standards that properly vindicate those rights. North Carolina's Equal Protection Clause, for example, does not expressly specify how malapportioned a judicial district must be to violate the Clause's requirement of equality. This Court nonetheless held that the Clause requires "population proportionality" and developed its own standard for the showing plaintiffs must make to show unconstitutional population disparities. *Blankenship*, 363 N.C. at 527, 681 S.E.2d at 766.[2]

Lastly, Legislative Defendants advance a slew of policy considerations that purportedly counsel against recognizing partisan gerrymandering claims. LD Br. 82–93. They assert that Plaintiffs "have not made a compelling case that partisan redistricting is even a problem" and that "[t]he trial record shows that any impact of gerrymandering in this case is muted." *Id.* at 84, 86. But the trial court unanimously found that the 2021 Plans' partisan bias preserves Republican supermajorities in the General Assembly and locks in

[2] Legislative Defendants also contend that partisan gerrymandering claims are non-justiciable under *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014), *vacated*, 575 U.S. 959 (2015). *See* LD Br. 50. *Dickson* held that a partisan gerrymandering challenge under North Carolina's "Good of the Whole" clause, N.C. Const. art. I, § 2, was not "based upon a justiciable standard." *Dickson*, 367 N.C. at 757; 766 S.E.2d at 260. But the U.S. Supreme Court vacated this Court's decision, and regardless, the case did not involve the constitutional provisions at issue here. As *Harper* Plaintiffs have explained, those provisions supply manageable standards for adjudicating the claims in this case.

at least 10 Republican congressional seats even in electoral environments that favor Democrats. (FOF ¶¶ 142, 455). Legislative Defendants also insist that recognizing partisan gerrymandering claims will "damage the judiciary's reputation for non-partisanship and impartiality" because "litigants will view their prospects of success in gerrymandering litigation as a matter of court composition" and there is "little assurance that judgments in gerrymandering cases will be accurate." LD Br. 88, 93. But this case disproves this concern. The bipartisan trial court panel was duly appointed by the Chief Justice and *unanimously* found that the 2021 Plans are intentional and effective partisan gerrymanders that exhibit more partisan bias than trillions of possible non-partisan maps that could have been drawn using the General Assembly's adopted redistricting criteria.[3]

III. The 2021 Plans violate North Carolina's Constitution.

The 2021 Plans violate the North Carolina Constitution's Free Elections Clause, Equal Protection Clause, and Free Speech and Assembly Clauses.

A. The 2021 Plans violate the Free Elections Clause.

The Free Elections Clause mandates that "All elections shall be free." N.C. Const., art. I, § 10. Elections under the 2021 Plans are rigged and un-democratic, not "free." Legislative Defendants drew the district boundaries, intentionally and effectively, to predetermine election outcomes and entrench their party in control. By design, the 2021 Plans are "highly non-responsive to the changing opinion of the electorate." (FOF ¶ 140); *see* (FOF ¶ 151, 253, 328). The Congressional Plan "was designed specifically to ensure

[3] The three-judge panel that found the 2016 congressional plan and 2017 House and Senate plans to be extreme partisan gerrymanders was also unanimous and bipartisan.

that Republicans can efficiently and consistently win at least ten congressional seats," and the House and Senate Plans are "especially effective in preserving Republican supermajorities." (FOF ¶¶ 142, 455). The 2021 Plans thus reflect the will of the mapmakers, not "the will of the People." *Common Cause*, 2019 WL 4569584, at *110. Under the Free Elections Clause, "[o]ur government is founded on the consent of the governed," and free elections "must be held inviolable to preserve our democracy." *Swaringer v. Poplin*, 211 N.C. 700, 191 S.E. 746, 747 (1937); *see State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 428, 26 S.E. 638, 638 (1897) ("the will of the people … must govern"). But the 2021 Plans are "incompatible with democratic principles." (COL ¶ 145).

Legislative Defendants' responses are unpersuasive. *First*, they argue that the 2021 Plans do not violate the Free Elections Clause because voters can still cast ballots. LD Br. 69 ("No Voting Restriction"). Under this exceedingly narrow view of the clause's protections, it makes zero difference how gerrymandered the maps are. The ruling party could openly announce that they were manipulating every district boundary to predetermine the outcome of every individual race and to guarantee their continued control of government in perpetuity, and the elections would still be "free" under Legislative Defendants' interpretation. Legislative Defendants' vision of free elections is not a democracy; it is not a government founded on the consent of the governed or the will of the people; and it is not a faithful interpretation of the Free Elections Clause.

Second, Legislative Defendants assert that the 2021 Plans do not in fact manipulate election outcomes or subvert the will of the people. LD Br. 70 ("No Manipulation of Election Outcomes"). But the trial court's extensive factual findings show otherwise. The

trial court found that the 2021 Plans are "highly nonresponsive" to the votes cast and the "changing opinion of the electorate" (FOF ¶ 140), and that the plans give Republicans an outsized number of seats in both Congress and the General Assembly—races that Republicans would not win absent the maps' extreme partisan bias. According to Legislative Defendants, none of this matters because the election in each gerrymandered district is still "majority-rule," meaning the candidate who gets more votes prevails. LD Br. 71. But the whole point is that the "majority" in each district has been preordained by manipulation of its boundaries, as is often true of rigged elections. If Legislative Defendants were right, the Free Elections Clause would allow *any* election manipulation short of awarding seats to candidates that received fewer votes than their opponents. For the reasons discussed above, such a narrow interpretation of free elections is "incompatible with democratic principles" (COL ¶ 145), and incorrect.

Third, Legislative Defendants contend that it is "ahistorical" to construe the Free Elections Clause to restrict extreme partisan gerrymandering. LD Br. 71. But they acknowledge that the clause's original English precursor was enacted specifically to prevent the manipulation of legislative elections through changes to the composition of the electorate in individual districts. *Id.* at 71–72; *see* Opening Br. 43–44, 47. And they do not deny that Pennsylvania's free elections clause likewise arose in response to laws that manipulated legislative elections to deny representation to certain geographic areas. *League of Women Voters*, 178 A.3d at 804–06; *see* Opening Br. 43–44. Legislative Defendants also ignore that North Carolina's Free Elections Clause, in conjunction with Article I, § 9, was intended to safeguard the people's ability, through free and frequent

elections, to pursue a "redress of grievances and for amending and strengthening the laws." John V. Orth & Paul M. Newby, The North Carolina State Constitution 55–57 (2d ed. 2013); *see* Opening Br. 44. The 2021 Plans trample these principles. As the trial court's findings make clear, these plans manipulate North Carolina's congressional and state legislative elections to ensure Republican victories and control, thereby denying Democratic voters an opportunity to elect candidates who will represent their interests and be responsive to their needs and concerns.

Legislative Defendants argue that the 1689 English provision was designed to prevent manipulation *by the King* and not "to limit parliamentary control over parliamentary elections." LD Br. 71–72. In their view, the Free Elections Clause thus addresses only "separation-of-powers concerns" and imposes no limitations on the General Assembly's ability to manipulate elections. *Id.* at 72. They cite no authority supporting that the North Carolina Constitution is so limited, and this Court's precedents refute the supposed limitation. In *Clark v. Meyland*, this Court struck down a law enacted by the General Assembly because it "violate[d]" the Free Elections Clause. 261 N.C. 140, 134, 134 S.E.2d 168, 170 (1964); *see also Obie v. N.C. State Bd. of Elections*, 762 F. Supp. 119, 121 (E.D.N.C. 1991) (same). Textual differences between this State's Free Elections Clause and its English precursor further show that the former broadly prohibits election manipulation by *any* branch of government. Opening Br. 51–52. Simply put, the Free Elections Clause does not give the General Assembly free rein to rig elections.

Echoing the trial court, Legislative Defendants note that malapportioned "rotten boroughs'" persisted in England for many decades after enactment of the 1689 English Bill

of Rights. LD Br. 72–73. But malapportioned districts persisted in this country for nearly a century after ratification of the Fourteenth Amendment, yet that did not prevent the U.S. Supreme Court from holding that such districts violate the amendment's Equal Protection Clause. *Reynolds v. Sims*, 377 U.S. 533 (1964). Malapportioned judicial districts existed in this State until this Court held in 2009 that they violate the State's Equal Protection Clause. *Blankenship*, 363 N.C. at 681, S.E.2d at 761. While the framers of these constitutional provisions may not have envisioned these specific applications, the framers chose to write broad, flexible provisions that courts have properly read to prohibit these noxious practices.

Fourth, Legislative Defendants characterize *Harper* Plaintiffs' Free Elections Clause claim as seeking "an equal opportunity *to prevail*." LD Br. 70 (emphasis added). As the trial court recognized, however, *Harper* Plaintiffs' experts' methodologies do not rest on "any ideas of proportional representation or notions of fairness." (FOF ¶ 138). *Harper* Plaintiffs contend, rather, that North Carolina's Constitution prohibits the current majority party from manipulating the district lines, intentionally and effectively, to predetermine the outcome of elections and ensure its continued control of government.

Finally, Legislative Defendants turn the Constitution on its head in arguing that a decision by this Court in favor of Plaintiffs would constitute "a violation of the Free Elections Clause." LD Br. 72. By manipulating district lines to ensure that elections are "highly nonresponsive" to the votes cast (FOF ¶ 140), the 2021 Plans are "incompatible with democratic principles" and an "abuse of power" by the General Assembly (COL ¶ 145). Ending this abusive and un-democratic practice is in line with this Court's long tradition of enforcing the Constitution to safeguard democracy.

B. The 2021 Plans violate the Equal Protection Clause.

The 2021 Plans violate the Equal Protection Clause because they classify similarly situated North Carolinians based on their political beliefs and past votes, and sort them into and out of districts with the goal of maximizing the electoral influence of Republican voters and minimizing the influence of Democratic voters. *Stephenson*, 355 N.C. at 377–78, 562 S.E.2d at 393–94. And the plans achieve this goal, denying "substantially equal voting power" to the State's Democratic voters and eliminating the "fundamental right to vote on equal terms." *Id.* at 378-79, 382, 562 S.E.2d at 393–94, 396.

Legislative Defendants' responses are not persuasive. *First*, Legislative Defendants say that there is no differential treatment because every voter is in an "equally apportioned district" and can "cast a vote." LD Br. 62. But *Stephenson* emphasized that North Carolina's Equal Protection Clause focuses on practical consequences, not formalities: it barred districting plans that contained both multi-member and single-member districts because, as a practical matter, voters in single-member districts "may not enjoy the same representational influence or 'clout' as voters" in multi-member districts. 355 N.C. at 377, 562 S.E.2d at 393. The entire objective of partisan gerrymandering is to minimize disfavored voters' ability to elect a representative with whom they will have any clout. The notion that there is "nothing objectively inferior about being drawn into one congressional or state legislative district over another," LD Br. 63—that Democrats in Guilford County who are cracked into three separate districts where they have no chance of electing a Democratic representative to Congress are not receiving "objectively inferior" treatment—is farcical. If a group of Democratic voters are intentionally removed from a district where

their votes might tip the election for the Democrat, and placed in a district where their votes will not matter, their votes in the new district do not hold "equal sway." *Id.*

Second, Legislative Defendants note that some voters will always "find themselves" in districts where they are unlikely to influence the outcome, even under a nonpartisan plan. LD Br. 64. This does not mean it is any less of an equal protection violation to *intentionally and effectively* draw districts so that a disfavored class of voters is less likely to be able to cast votes that matter. The reason why equal protection violations require proof of intent is to distinguish between naturally occurring disparate impacts (which are not necessarily unconstitutional) and intentionally achieved disparities (which are).

Third, nothing about *Harper* Plaintiffs' claims depends on any notion that the "Republican or Democratic parties … have, on an aggregate basis, a right to equal opportunity to win." *Contra* LD Br. 64. Each of *Harper* Plaintiffs' experts accounted for the natural geography of North Carolina and found extreme Republican bias based on extreme cracking and packing of Democratic voters. (FOF ¶¶ 159, 183, 473, 481–82). These findings did not compare the enacted map to some theoretical map in which each party is given an "equal opportunity," but to the maps that would naturally occur in North Carolina if there were no intentional manipulation and the mapmakers just focused on legitimate considerations like compactness or municipality splits. Legislative Defendants' professed concern about what happens if "voters change their mind" rings hollow. LD Br. 65. As the trial court found, the evil of the 2021 Plans' partisan bias is that it locks in results even when voters change their mind, ensuring, for example, at least 10 Republican congressional seats even in elections where Democrats do well and should win 7 or 8 seats.

Fourth, Legislative Defendants say that "the intent to draw a distinction lacking any cognizable harm is not invidious." LD Br. 66. But extreme partisan gerrymandering of course causes enormous benefit to some voters and enormous harm to others. That is why the mapmakers do it. Voting is a fundamental right in North Carolina. The point is not that the right to vote entails the right to "districts of a given favorable composition," *id.* at 68, but that when rights are fundamental, the legislature cannot impermissibly discriminate among citizens to make it harder for some to exercise that right effectively.

Finally, the 2021 Plans fail even rational basis review because deliberate inferior treatment of a particular group of voters based on their political beliefs and the way they vote is not a legitimate government interest. Legislative Defendants do not argue otherwise; instead, they say that the Court is not allowed to consider the basis for the 2021 Plans because it was a "hidden motive." LD Br. 68 (citing *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937)). Of course, federal equal protection cases do not limit this Court's construction of the State's constitutional protections, but even if they did, Legislative Defendants' argument is incorrect. The U.S. Supreme Court has expressly held that in equal protection cases where rational basis review applies, the Court should consider the legislature's motivation, and "some objectives—such as a bare . . . desire to harm a politically unpopular group—are not legitimate state interests." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446–47 (1985) (internal quotation marks omitted). The case Legislative Defendants cite, *Sonzinsky*, is not an equal protection case at all. And it should hardly need stating that the 2021 Plans do not pass rational basis review merely because they "classif[y] tracts of land, precincts, [and] census blocks." LD Br. 68.

Legislative Defendants did not crack the Democratic voters of the Piedmont Triad into three separate congressional districts because they have anything against the "land, precincts, [and] census blocks" in Greensboro, Winston-Salem, or High Point. People, not land, cast ballots, and classifying people based on their political beliefs and their past votes is not rationally related to any legitimate government objective.

C. The 2021 Plans violate the Free Speech and Assembly Clauses.

The 2021 Plans' intentional packing and cracking of Democratic voters impermissibly burdens their protected expression and association, and does so based on their political viewpoint. Opening Br. 68-70. This packing and cracking violates the North Carolina Constitution's Freedom of Speech and Freedom of Assembly Clauses, which provide broader protection than their federal counterparts. *See* Opening Br. 65–74; *see Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992).

Legislative Defendants' sole argument is that redistricting plans *never* implicate the rights of free speech or assembly. They assert that redistricting by its nature imposes no "restraint or burden" on expression—it just "separate[s] different tracts of land into different districts." LD Br. 79. But partisan gerrymandering is not aimless cartography, and describing it that way trivializes its real harms. District lines affect voters' ability to band together and elect candidates of their choice—activities are expressly protected under the North Carolina Constitution. *See* Opening Br. 67. This case is no exception: the trial court found that the 2021 Plans place many North Carolina citizens into election districts where they have no chance of electing a candidate of their choice, simply because mapmakers believe those voters are likely to cast ballots for Democratic candidates.

Legislative Defendants ignore that restrictions on expression and association often operate indirectly—not by banning speech outright, but by making it more less effective. For example, laws that "dilute[ ] dollars spent" can be unconstitutional. LD Br. 81 (citing *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011)). That is true not because dollars *are* speech, but because "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo*, 424 U.S. 1, 19 (1976). Yet, by Legislative Defendants' logic, caps on political expenditures cannot restrict expression. What those caps "actually do" (LD Br. 79) is restrict transactions, not prohibit messages. Extreme partisan gerrymandering burdens political expression and association, and the fact that it does so by drawing lines around voters is immaterial.

Finally, Legislative Defendants warn that all manner of ordinary government policy decisions—from public-health warnings to environmental guidance—would be "forbid[den]" under Plaintiffs' theory. LD Br. 80. They would not, and Legislative Defendants' effort to analogize these actions to partisan gerrymandering only underscores the constitutional harm of packing and cracking one party's voters. In a democracy, we elect government officials to make difficult and often divisive choices about policy questions like environmental protection, public health, and civil rights. Thus, to use Legislative Defendants' example, a legislature of course may take a stance on climate change and reject dissenting views. But that does not mean the legislature could prohibit dissenting advocates from casting absentee ballots, or require them to use a different form

of ID to vote. That is because we elect government officials to make policy, not to determine who gets elected. Burdening a person's political expression based on their views is a quintessential constitutional injury, and it violates the North Carlina Constitution.

IV. Legislative Defendants' remaining arguments lack merit.

Legislative Defendants argue that *Harper* Plaintiffs lack standing and that the federal Elections Clause forecloses *Harper* Plaintiffs' claims challenging the 2021 Congressional Plan. Neither argument withstands scrutiny.

A. *Harper* Plaintiffs have standing.

Legislative Defendants first argue that *Harper* Plaintiffs lack standing because the North Carolina Constitution does not prohibit partisan gerrymandering. But this contention merely rehashes their merits arguments, which are incorrect as explained above and in any event are not a proper basis to object to a plaintiff's standing. *See Town of Boone v. State*, 369 N.C. 126, 138, 794 S.E. 2d 710, 719 (2016) (standing is a "threshold issue[ ]" that "must be addressed in order for the Court to reach the merits of the constitutional claims that have been advanced for our consideration").

The trial court correctly rejected Legislative Defendants' other standing arguments—namely, that Plaintiffs may not challenge districts where they do not reside or any "packed" districts. LD Br. 161–62. To begin with, *Harper* Plaintiffs reside in all 14 congressional districts, so they have standing to challenge the entire Congressional Plan. (FOF ¶ 615); *see* Opening Br. 75. *Harper* Plaintiffs also reside in every House and Senate county grouping that they challenge in this appeal, and the trial court correctly concluded

that in light of the "unique manner" North Carolina redistricts, this entitles them to challenge their county groupings as a whole. (COL ¶ 8); *see* Opening Br. 75.

Legislative Defendants' argument that Plaintiffs cannot challenge packed Democratic districts fares no better. The U.S. Supreme Court recognized plaintiffs' standing to challenge both "cracked" and "packed" districts. *Rucho*, 139 S. Ct. at 2492 (discussing *Gill v. Whitford*, 138 S. Ct. 1916, 1931–32 (2018)). And the notion that Democratic voters in packed Democratic districts "get[ ] exactly what they want" is absurd. LD Br. 162. "[C]racking Democrats from the more competitive districts *and packing them into the most heavily Republican and heavily Democratic districts* is the key signature of intentional partisan redistricting and it is responsible for the enacted congressional plan's non-responsiveness when more voters favor Democratic candidates." (FOF ¶ 151 (emphasis added)); *see* (FOF ¶ 152–53 (same for House Plan); (FOF ¶ 154 (same for Senate Plan)). This is the opposite of what Democrats want.

Harper Plaintiffs also have standing to challenge the House and Senate Plans as a whole. On a statewide basis, these plans are "especially effective at preserving Republican supermajorities." (FOF ¶ 142). Every Democratic voter in the State is harmed by plans that enable Republicans in the General Assembly to override the Governor's veto. And every Democratic voter is harmed when the plans give Republicans a regular majority they would not have absent the plans' extreme pro-Republican bias. *Harper* Plaintiffs have standing.

B. Legislative Defendants' federal Elections Clause theory is baseless.

Grasping at straws, Legislative Defendants assert that the U.S. Constitution's Elections Clause bars this challenge to the 2021 Congressional Plan. LD Br. 183–84.

Specifically, they argue that the word "Legislature" in the Elections Clause, U.S. Const. art. I, § 4, forbids state courts from reviewing whether a congressional districting law enacted by the state legislature violates the state's own constitution. This erroneous theory runs headlong into more than a half-dozen U.S. Supreme Court decisions as well as a federal statute and multiple North Carolina statutes.

For starters, Legislative Defendants' Elections Clause theory directly contradicts the U.S. Supreme Court's recent decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). In holding that federal courts cannot adjudicate partisan gerrymandering claims, *Rucho* explained that "[p]rovisions in … *state constitutions* can provide standards and guidance for *state courts* to apply" in reviewing congressional districting laws enacted by state legislatures. *Id.* at 2507 (emphases added). This recognition that state courts can apply state constitutional provisions to rein in partisan gerrymandering was essential to *Rucho*'s holding: it permitted the Court to foreclose federal constitutional claims while ensuring that "complaints about districting" would not "echo into a void." *Id.*

Even before *Rucho*, an unbroken line of U.S. Supreme Court decisions dating back a century confirmed that state courts may review state laws governing federal elections to determine whether they comply with the state constitution. In *Smiley v. Holm*, 285 U.S. 355 (1932), the Court held that the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the *Constitution of the state* has provided." *Id.* at 368 (emphasis added). Because the state legislature's enactment of election laws reflects an exercise of the lawmaking power, the legislature must comply with all of "the conditions which attach to the making of state laws," *id.* at

365, including "restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power," *id.* at 369; *see also Koenig v. Flynn*, 285 U.S. 375, 379 (1932) (affirming a state supreme court decision striking down the state's congressional districting law because it violated "the requirements of the Constitution of the state"); *Carroll v. Becker*, 285 U.S. 380, 381–82 (1932) (same); *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916) (state legislatures may not enact laws under the Elections Clause that are invalid "under the Constitution and laws of the state").

Not only are state courts *permitted* to adjudicate the validity of congressional districting laws under state constitutions, the U.S. Supreme Court's decision in *Growe v. Emison*, 507 U.S. 25 (1993), makes clear that state-court review is actually *preferable* to federal-court review. Writing for a unanimous Court, Justice Scalia expressly recognized "[t]he power of the judiciary of a State to require valid reapportionment" of congressional districts, and rejected the federal district court's "mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts." *Id.* at 33–34.

More recently, in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), the U.S. Supreme Court held that "[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Id.* at 2673.

Legislative Defendants' view that the Elections Clause limits congressional redistricting authority exclusively to state legislatures and Congress also conflicts with *Wesberry v. Sanders*, 376 U.S. 1 (1964). There, the Court rejected the plurality opinion in

Colgrove v. Green, 328 U.S. 549 (1946), which had concluded that the Elections Clause's reference to "Congress" deprives *federal* courts of power to review congressional maps. *Wesberry*, a seminal redistricting decision, explained: "[N]othing in the language of [the Elections Clause] gives support to a construction that would immunize state congressional apportionment laws … from the power of courts to protect the constitutional rights of individuals from legislative destruction." 376 U.S. at 6.

It is not only that the U.S. Supreme Court has repeatedly rejected the notion that the word "Legislature" in the first part of the Elections Clause precludes state courts from enforcing state constitutions with respect to state congressional-districting laws. The second part of the Elections Clause allows Congress "at any time" to alter state laws related to congressional redistricting, U.S. Const. Art. I, § 4, and the U.S. Supreme Court held in *Branch v. Smith*, 538 U.S. 254 (2003), that Congress has validly done so by conferring remedial authority *on state courts*. *Branch* held that 2 U.S.C. § 2c authorizes both state and federal courts to "remedy[ ] a failure" by the state legislature "to redistrict constitutionally," and "embraces action *by state and federal courts* when the prescribed legislative action has not been forthcoming." *Id.* at 270, 272 (emphasis added). "[Section] 2c is as readily enforced by courts as it is by state legislatures, and is just as binding on courts—federal or state—as it is on legislatures." *Id.* at 272. The Court in *Arizona State Legislature* upheld this interpretation. Under § 2a(c), "Congress expressly directed that when a State has been redistricted in the manner provided by state law—whether by the legislature, *court decree*, or a commission established by the people's exercise of the initiative—the resulting

districts are the ones that presumptively will be used to elect Representatives." 135 S. Ct. at 2670 (emphasis added).

If the word of the U.S. Supreme Court and Congress were not enough, Legislative Defendants' Elections Clause theory independently fails because the "Legislature" of this State has *itself* recognized the power of the State's courts to review congressional districting laws under the State's constitution. Multiple statutes enacted by the General Assembly establish a comprehensive scheme for North Carolina courts to review the "validity" of congressional districting laws. N.C.G.S. §§ 1-267.1, 120-2.3, 120-2.4. And Legislative Defendants' own brief recognizes that those statutes apply when, as here, a case challenges a congressional plan under the State's own constitution. LD Br. 192–94. Legislative Defendants cannot plausibly contend that the word "Legislature" in the Elections Clause forecloses state-court review under the state constitution when that very "Legislature" has recognized and established a comprehensive scheme for such review.

In short, nothing in the federal Elections Clause restricts this Court's unreviewable authority to decide whether the 2021 Congressional Plan—a statute enacted by the General Assembly—is invalid *solely* under the North Carolina Constitution.

CONCLUSION

For the foregoing reasons, the trial court's decision should be reversed, and this Court should enjoin use of the 2021 Plans and order a remedial process to adopt lawful new plans for use in the 2022 primary and general elections.

Respectfully submitted, this 31st day of January, 2022.

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

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate procedure, counsel for Plaintiff certifies that the foregoing brief, which was prepared using a 13-point proportionally spaced font with serifs.

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The undersigned hereby certifies that on the 31st day of January, 2022, a copy of the foregoing Plaintiff-Appellants' Reply Brief was electronically filed and served by electronic mail on counsel of record for the other parties as follows:

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