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SUPREME COURT OF KENTUCKY
Nos. 2022-SC-0522; 2023-SC-0139
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DERRICK GRAHAM, *et al.*, *Appellants*

v. Court of Appeals, No. 2022-CA-1403
Franklin Circuit Court, No. 22-CI-47

MICHAEL ADAMS, in his Official Capacity as Secretary of State, *et al.*, *Appellees*

and

COMMONWEALTH OF KENTUCKY. *Intervenor*

Brief of the NRCC, Republican National Committee, and Republican Party of Kentucky as Amici Curiae Supporting Appellees

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CERTIFICATE OF SERVICE

I certify that on the 11th day of July, 2023, a copy of this electronically-filed brief was sent via U.S. Mail, postage fully prepaid, to: Hon. Victor B. Maddox, Hon. Heather L. Becker, Hon. Alexander Y. Magera, Office of the Attorney General, 700 Capital Ave., Suite 118, Frankfort, Kentucky 40601; Hon. Michael G. Adams, Hon. Jennifer Scutchfield, Hon. Michael R. Wilson, Office of the Secretary of State, 700 Capital Ave., Suite 152, Frankfort, Kentucky 40601; Hon. Taylor A. Brown, Kentucky State Board of Elections, 140 Walnut St., Frankfort, Kentucky 40601; Hon. Michael P. Abate, Hon. Casey L. Hinkle, Hon. William R. Adams, Kaplan Johnson Abate & Bird LLP, 710 West Main St., 4th Floor, Louisville, Kentucky 40202; and Hon. Bridget M. Bush, Hon. R. Kent Westberry, Hon. Hunter Rommelman, Landrum & Shouse LLP, 220 West Main Street, Suite 1900, Louisville, Kentucky 40202.

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STATEMENT OF POINTS AND AUTHORITIES

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INTERESTS OF AMICI

The amici curiae—the NRCC (formerly the National Republican Congressional Committee), Republican National Committee (RNC), and Republican Party of Kentucky (RPK) (collectively, the "Amici" or "Republican Committees")—respectfully submit this brief to expound upon the lower court's opinion regarding the justiciability of partisan gerrymandering claims.

The NRCC supports the election of Republicans to the United States House of Representatives by providing direct financial contributions, technical and political guidance, and by making independent expenditures to advance political campaigns.

The RNC manages the affairs of the Republican Party at the national level, supports the elections of Republican candidates up and down the ballot, including for the House of Representatives and Kentucky General Assembly, and develops and promotes the national Republican platform.

The RPK is the statewide political organization of the Republican Party, which represents the interests of Republican voters and candidates at all levels throughout Kentucky. It carries out the day-to-day functions of the political party within the state, including recruiting candidates for office and supporting those candidates and party officials elected under its banner.

The Republican Committees also undertake voter education, registration, and turnout programs, as well as other party-building activities. Amici have a vital interest in the law regarding redistricting because congressional districts and legislative redistricting directly impact its members, members' constituents, campaigns, elections, and successors in office.

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INTRODUCTION

The North Carolina Supreme Court's recent failed experiment with partisan gerrymandering claims in the *Harper* cases is a cautionary tale for courts that attempt to create such claims out of constitutional language that does not exist. Here, the circuit court avoided the temptation to invent a new claim out of whole cloth and correctly concluded that Kentucky's 2022 legislative and congressional districting plans were constitutional. (Opinion at 63). Although the circuit court erred by making a factual determination that the 2022 plans were "partisan gerrymanders"—and, like the North Carolina Supreme Court, failed to define the term or elucidate the line between a district that is "too" partisan versus one that is not—it ultimately reached the correct conclusion that the Plaintiffs' claims here were non-justiciable. The Republican Committees provide this brief to support the legal conclusion that partisan gerrymandering claims are non-justiciable political questions under the Kentucky Constitution, especially in light of the North Carolina Supreme Court's failed attempt at declaring such claims justiciable.

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ARGUMENT

As shown by the recent analogous North Carolina litigation in *Harper v. Hall*, whether a legislative or congressional voting district is politically "fair" is a nonjusticiable political question. The North Carolina Supreme Court finally came to this conclusion, one that the Supreme Court of the United States reached years ago, after three rounds of costly litigation for the taxpayers, and a publicly failed judicial experiment with so-called partisan gerrymandering claims. This Court should learn the lessons of the cautionary tale out of North Carolina and determine that under the Kentucky Constitution, partisan gerrymandering claims are non-justiciable political questions, representing policy choices reserved only for the Kentucky General Assembly.

The political question doctrine is a "natural corollary to the more familiar concept of separation of powers." *Bevin v. Commonwealth ex rel. Beshear*, 563 S.W.3d 74, 81 (Ky. 2018). Under this doctrine, the judicial branch "should not interfere in the exercise by another department of a discretion that is committed by a textually demonstrable provision of the Constitution to the other department." *Id.* (quoting *Fletcher v. Commonwealth*, 163 S.W.3d 852, 860 (Ky. 2005)). Nor should the judicial branch "seek to resolve an issue for which it lacks judicially discoverable and manageable standards." *Id.* (citing *Vieth v. Jubelirer*, 541 U.S. 267, 276 (2004)).

In *Philpot v. Haviland*, 880 S.W.2d 550, 553 (Ky. 1994), this Court, relying upon the decision by the United States Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962), identified six standards for determining whether an issue is a nonjusticiable political question. Three of those standards apply to this case and require a finding that Plaintiffs' claims raise non-judicial, political questions:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or
>
> [2] a lack of judicially discoverable and manageable standard for resolving it; or

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> [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion . . . .

Philpot, 880 S.W.2d at 553 (quoting *Baker*, 369 U.S. at 217).

I. Like the North Carolina Constitution, the Kentucky Constitution expressly commits to the General Assembly the discretion to draw districts.

The Kentucky General Assembly has complete discretion on all legislative matters except as limited by the Kentucky Constitution. *Ragland v. Anderson*, 100 S.W. 865, 867 (Ky. 1907); *Richardson v. McChesney*, 108 S.W. 322, 323 (Ky. 1908) ("[E]xcept where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case." (quotation omitted)). The Kentucky Constitution expressly vests the discretion to draw legislative districts to the General Assembly in Section 33, which provides in full:

> The first General Assembly after the adoption of this Constitution shall divide the State into thirty-eight Senatorial Districts, and one hundred Representative Districts, as nearly equal in population as may be without dividing any county, except where a county may include more than one district, which districts shall constitute the Senatorial and Representative Districts for ten years. Not more than two counties shall be joined together to form a Representative District: Provided, In doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated. At the expiration of that time, the General Assembly shall then, and every ten years thereafter, redistrict the State according to this rule, and for the purposes expressed in this section. If, in making said districts, inequality of population should be unavoidable, any advantage resulting therefrom shall be given to districts having the largest territory. No part of a county shall be added to another county to make a district, and the counties forming a district shall be contiguous.

Thus, since 1891, Section 33 has expressly set forth anti-gerrymandering limitations on the General Assembly's power to draw the State's legislative districts: (1) that "[n]o part of a county shall be added to another county to create a district[;]" (2) "counties forming a district shall be contiguous[;]" and (3) each district must be "nearly equal in population[.]" Ky. Const. § 33 (1891).

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These anti-gerrymandering provisions mirror North Carolina's express constitutional limits on legislative districting, including its Whole County Provision ("WCP"), which limits the division of counties in drawing legislative districts, and contains requirements for contiguous territory, and an equal population mandate. *Harper v. Hall*, 886 S.E.2d 393, 418 (N.C. 2023) ("*Harper III*") (discussing N.C. Const. art. II, §§ 3, 5 and their predecessors). Like North Carolina, Kentucky's Constitution "commit[s] the redistricting authority to the General Assembly and set[s] express limitations on that authority."[1] *Id.* at 420 (internal citation omitted); *Jensen v. Kentucky State Bd. of Elections*, 959 S.W.2d 771, 776 (Ky. 1997).

The Kentucky Constitution has never precluded the General Assembly from considering partisan data when adopting legislative districting plans. The same is true in North Carolina, where other than the objective anti-gerrymandering limits of the WCP, contiguity, and equal population, the "General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions." *Harper III*, 886 S.E.2d at 420–21 (quoting *Stephenson v. Bartlett*, 562 S.E.2d 377, 390 (N.C. 2002)). Kentucky courts have the power of judicial review to determine whether legislative districting plans comply with the express constitutional requirements, but not over political considerations that are solely within the General Assembly's discretion. *Richardson*, 108 S.W.2d at 323. Because the Kentucky Constitution expressly commits the redistricting process to the General Assembly without regard to whether districts are politically fair, how much politics is too much is a nonjusticiable political question. *See Richardson*, 108 S.W. at 323; *Harper III*, 886 S.E.2d at 422 ("When the General Assembly

[1] Also like the North Carolina Constitution, the Kentucky Constitution contains no provision regarding congressional redistricting. Instead, the federal Elections Clause "makes clear that the redistricting power is expressly committed to the state legislative branch." *Id.* at 419 (citing U.S. Const. art. 1, § 4); *Richardson*, 108 S.W. at 324.

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properly performs its constitutionally assigned role, its discretionary decisions present a political question that is nonjusticiable.").

II. The North Carolina experience demonstrates that the sole result of so-called partisan gerrymandering claims in this context is to arrogate the redistricting power from the General Assembly to the courts.

The failed experiment of the North Carolina *Harper* litigation illustrates the lack of a judicially discoverable and manageable standard for judicial review of partisan gerrymandering claims where such claims must be invented by a court out of whole cloth from its state constitution. In February 2022, the North Carolina Supreme Court issued *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022) ("*Harper I*"), which held for the first time that partisan gerrymandering claims were justiciable under the North Carolina Constitution despite the absence of an express partisan fairness provision in that constitution. *Harper I*, 868 S.E.2d at 551. The *Harper I* majority acknowledged that it had an obligation to use "judicially manageable standards[,]" but declined to "identify an exhaustive set of metrics or precise mathematical thresholds" to apply. *Id.* at 547. Predicting that "bright-line standards" would emerge in subsequent cases, the majority identified a few specific standards that it deemed to be "entirely workable," including (1) setting a "seven percent efficiency gap threshold as a presumption of constitutionality," or (2) establishing "that any plan with a mean-median difference of 1% or less . . . is presumptively constitutional." *Id.* at 510, 548–49.

The North Carolina General Assembly then enacted remedial plans for the state's legislative and congressional districts that all complied with the metrics set forth in *Harper I* using an election composite relied upon by an expert for the Plaintiffs at the trial phase. Upon review of these remedial plans, the Court in *Harper II*, reneged on its promise of a forthcoming bright line rule. Instead, after being flooded with competing information and data, the Court stated only ten

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months after *Harper I* that no bright-line test would ever come to measure partisanship of districts. *Compare Harper I*, 868 S.E.2d at 548–49, *with Harper II*, 881 S.E.2d 156, 174 (N.C. 2022). The Court then gutted the tests it illuminated in *Harper I* and invalidated the remedial state senate plan in the process.[2] *Id.* at 179. The *Harper II* majority disclosed that it was "neither accident nor oversight" that *Harper I* failed to identify a "statistical measure" or "one datapoint" as a standard "of constitutional compliance," *id.* at 161, and faulted the trial court for relying on the very thresholds *Harper I* called "entirely workable," *Harper I*, 868 S.E.2d at 549; *Harper II*, 881 S.E.2d at 174–75.

After granting a petition for rehearing, the North Carolina Supreme Court recognized the fallacy of partisan gerrymandering claims. The *Harper III* majority determined that "the same four-justice majority from *Harper I* found their own standard unmanageable when they tried to apply it in *Harper II*." *Harper III*, 886 S.E.2d at 426. An apt illustration of the unmanageability of partisan "fairness" metrics is shown by the trial court in the remedial process following *Harper I*. On remand, the trial court hired three special masters and the special masters hired four advisors to assess proposed remedial districting plans submitted by the parties. The four advisors, party experts, and the districting software utilized by the General Assembly each came up with different results for the remedial plans despite utilizing the same two tests of partisanship—mean-median and efficiency gap. In his *Harper II* dissenting opinion, Chief Justice Newby highlighted the stark differences amongst the social scientists and their methodology, as illustrated by the following charts:

[2] Further abandoning their previously identified "workable" metrics, the North Carolina Supreme Court reached this conclusion, in part, due to the fact that the North Carolina House districts were passed with bi-partisan support, whereas the Senate districts were not.

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Remedial Senate Plan							
	Grofman 6 election composite	McGhee Planscore	Wang 2016-2020	Jarvis	Mattingly 16 new Election Composite	Barber General Assembly's Mattingly Election Set	Maptitude
Mean-Median Diff.	0.77%	2.2%	0.8%	1.4%	1.3%	0.65%	0.63%
Efficiency Gap	4.24%	4.8%	2.2%	4.0%	4.07%	3.97%	3.98%

Remedial House Plan							
	Grofman 6 election composite	McGhee Planscore	Wang 2016-2020	Jarvis	Mattingly 16 new Election Composite	Barber General Assembly's Mattingly Election Set	Maptitude
Mean-Median Diff.	0.89%	1.4%	0.9%	1.5%	1.45%	0.7%	0.71%
Efficiency Gap	2.72%	3.0%	3.1%	2.7%	3.23%	0.84%	0.84%

	Remedial Congressional Plan							
	Grofman 6 election composite	McGhee Planscore	Wang 2016-2020	Wang 10 Election	Jarvis	Mattingly 16 new Election Composite	Barber General Assembly's Mattingly Election Set	Maptitude
Mean-Median Diff.	0.66%	1.1%	0.7%	1.2%	0.9%	1.01%	0.61%	0.61%
Efficiency Gap	6.37%	6.4%	7.4%	6.8%	6.8%	7.31%	5.29%	5.3%

Harper II, 881 S.E.2d at 198 (Newby, C.J., dissenting). Because of the nature of the policy decisions underlying the statistical mean-median and efficiency gap tests, the North Carolina Supreme Court later determined that it could not provide clear guidance for how to resolve the statistical differences in a politically neutral way. *Harper III*, 886 S.E.2d at 428 (describing the

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standard set forth in *Harper I* as involving a "type of unmoored discretion" that was "a quintessential characteristic of an unmanageable standard and a nonjusticiable, political question").

Instead, the *Harper I* "standard" simply arrogated the redistricting power to the Court, not the General Assembly. Like North Carolina, the Kentucky Constitution does not define what "fairness" looks like. If this Court determines that partisan gerrymandering claims are justiciable, it will likely follow the same fraught path as the *Harper* litigation trying to find workable metrics where there are none. And like North Carolina, only the justices in the majority at the time the opinion is written will truly know what their interpretation of the "standard" is:

> By its actions today, the majority confirms the dangers of judicial usurpation of the legislative redistricting role. By intentionally stating vague standards, it ensures that four members of this Court alone understand what redistricting plan is constitutionally compliant. Apparently, the General Assembly, the three Special Masters (each a former jurist), and the three-judge panel were unable to discern the constitutional 'standard' set out in *Harper I*. Only the four justices here know what meets their standard.

Harper II, 881 S.E.2d at 183 (Newby, C.J., dissenting). And as shown in North Carolina, this was no "standard" at all, simply words, with meaning only to a few. Instead, the "standard" which could not be rooted in any specified rules in the state constitution, was meant to result in continual re-draws for the General Assembly, at the expense of the taxpayers, until the maps met the subjective preferences of the Court at the time. Kentucky should heed the lessons learned in North Carolina and not wade into nonjusticiable political waters. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019).

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III. The North Carolina experience demonstrates that partisan gerrymandering claims created out of whole cloth from a state constitution require courts to make policy, not legal, decisions that are reserved to the General Assembly.

It is impossible for this Court to fashion a remedy for partisan gerrymandering from whole cloth out of the Kentucky Constitution without making numerous policy determinations which require the exercise of legislative, not judicial, discretion. *Philpot*, 880 S.W.2d at 553; *see Harper III*, 886 S.E.2d at 428–431. To begin, because the text of the Kentucky Constitution is silent on this issue, the Court will need to make a "policy decision" that the state constitution "prohibits a certain level of partisan gerrymandering." *Id.* at 428. After making this policy decision, the Court will need to decide whether "fairness" under the Kentucky Constitution means more competitive districts or proportional representation of political parties. In either case, to prevent "too much" partisan gerrymandering, the Court will need to either order the General Assembly to primarily focus on partisan data in order to construct districts that can be won by either party or to create the number of safe Republican or Democratic districts that this Court decides would be fair. *Id.* at 429. Thus, and most ironically, whether the Court chooses proportional representation or competitive districts as the best measure of fairness, the only way for the Court to stop its perception of a "bad" partisan gerrymander, is by ordering the General Assembly to replace the bad gerrymander with the Court's notion of a "good" partisan gerrymander. *See id.*

Then the Court will have to decide what data must be used to achieve a combination of districts that this Court deems to be fair. Should the General Assembly look at prior election results in statewide races to determine which party's statewide candidate would have won any hypothetical districts in the past? If so, which statewide races should the General Assembly use and which should it exclude? Should the General Assembly use only federal statewide elections, or only state elections, or some combination of both? Or should the General Assembly evaluate

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future performance of districts by only using presidential elections to predict who might win the district in the future, as was done by one of the *Harper* experts. *Id.* at 429–30 (use of a program called "PlanScore" to predict future partisan outcomes). Alternatively, would it be more "fair" to evaluate fairness by measuring the distribution of registered Republicans versus registered Democrats? *Id.* at 428. And should the legislature determine fairness only by reference to the two major political parties or is it only fair that it give other groups some consideration? *Davis v. Bandemer*, 478 U.S. 109, 147 (1986) (O'Connor, J., concurring) ("If members of the major political parties are protected by the Equal Protection Clause from dilution of their voting strength, then members of every identifiable group that possesses distinctive interests and tends to vote on the basis of these interests should be able to bring similar claims.").

Regardless of the data it would use, the Court will need to adopt benchmarks for determining when a seat is either "competitive" or when it is safely Democratic or Republican. And then how will the Court define how a safe or competitive district can be measured? Is a district "competitive" when past elections show that each party in state-wide elections would have received at least 49%, 45%, 40%, or some other percent? *See* McDonald, *Drawing the Line on District Competition*, 39 Pol. Sci. & Pol. 91, 91–94 (Jan. 2006), https://doi.org/10.1017/S1049096506060161.

And if the Court decides that fairness requires that each of the major parties receive their "fair share" of safe seats, how many seats constitute a fair share? And what percent of prior vote totals is required to declare the seat as being sufficiently safe? And what social science or fairness test should the Court use?[3] Plaintiffs here advocated for efficiency gap and declination. But there

[3] The Supreme Court of the United States has stated that mathematical formulas alone are not "reliable measure[s] of unconstitutional partisanship." *Gill v. Whitford*, 138 S. Ct. 1916, 1928 (2018) (quoting *League of United Latin American Citizens v. Perry*, 548 U.S. 339, 420 (2018)).

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are many other alleged fairness tests that are also based upon an analysis of vote totals for prior state-wide elections. *See* Eggers et al., *On the Validity of the Regression Discontinuity Design for Estimating Electoral Effects: New Evidence from over 40,000 Close Races*, 59Am. J. Pol. Sci. 259, 259–74 (2015), https://doi.org/10.1111/ajps.12127. In deciding which fairness test to use, the Court will need to be mindful that even experts who have used these mathematical formulas now question their validity. Meaning that the Court could adopt a specific fairness test by a specific expert, only to have that expert repudiate the methodology a few years later. *See* DeFord & Duchin, *Redistricting Reform in Virginia: Districting Criteria in Context*, XII Va. Pol. Rev. 120, 120–46 (Spring 2019), https://mggg.org/VA-criteria.pdf.

Then how will the Court apply its favored fairness test to decide when partisanship has gone "too far"? As discussed *supra*, in North Carolina, "the General Assembly and each advisor calculated different scores for the Remedial Plans, even though they all used the same test." *Harper III*, 886 S.E.2d at 430. That is because measuring partisan gerrymandering requires a variety of policy decisions in executing the statistical analysis itself. *See id.* at 430–31.

These are only a few examples of the many policy choices this Court will need to attempt to establish a standard for determining when politics has gone too far. *Id.* at 428–31. And this Court will need to make these policy choices, despite the Kentucky General Assembly being "the maker of public policy in this Commonwealth." *Estate of Worrall ex rel. Worrall v. J.P. Morgan Bank, N.A.*, 645 S.W.3d 441, 451 (Ky. 2022).

IV. The Court may not usurp the power of the General Assembly under the Federal Elections Clause and *Moore v. Harper*.

A reversal of the circuit court on the congressional plan would also raise serious issues under the federal Elections Clause and the U.S. Supreme Court's recent decision in *Moore v. Harper*, No. 21-1271, 600 U.S. ---, 2023 WL 4187750 (U.S. June 27, 2023). *Moore v. Harper*

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clarifies that although the Elections Clause does not vest exclusive and independent authority in state legislatures to enact laws regarding federal elections, state courts cannot usurp the legislative authority or "circumvent federal constitutional provisions." *Id.* at *16 ("Although we conclude that the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein . . . [as] the Elections Clause expressly vests power to carry out its provisions in 'the legislature' of each state a deliberate choice that []court[s] must respect.").

Although "[a] state legislature may not "create congressional districts independently of" requirements imposed "by the state constitution with respect to the enactment of laws," *id.* at *12 (internal citations omitted), state courts in turn "may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections." *Id.* at *16; *see also Com. Ex rel. Dummit v. O'Connel*, 181 S.W.2d 691, 694–96 (Ky. App. 1944) (holding the federal Elections Clause vested the duty of administering presidential and congressional elections in the General Assembly notwithstanding Section 6 of the Kentucky Constitution). As discussed *supra* in pages 3–5, the Kentucky Constitution does not create any "independent" requirements on the Kentucky General Assembly to impose voting districts of a certain partisan makeup or with a certain partisan lean. That choice, including the choice of whether to consider partisanship at all in drawing districts, belongs solely to the General Assembly.

A reversal of the circuit court to impose requirements on the General Assembly beyond those explicitly stated in the Kentucky Constitution, would "transgress the ordinary bounds of judicial review" by mandating that the General Assembly draw districts in a certain way or make certain policy choices, when the power to make those policy choices is vested solely to the General

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Assembly. Such a decision would raise serious implications under the federal Elections Clause, and *Moore v. Harper*. And although the Supreme Court in *Moore v. Harper* declined to adopt a bright line standard for when a state court has "transgress[ed] the ordinary bounds of judicial review," in part because the *Moore* petitioners abandoned this argument, the Supreme Court after *Moore*, granted the petition for certiorari presented in *Huffman v. Neiman*, 22-362, 2023 WL 4278436 (U.S. June 30, 2023), and vacated the judgment of the Ohio Supreme Court, which struck down Ohio's Congressional plan, remanding the case to the Ohio Supreme Court for further consideration in light of *Moore*. These cases present a cautionary tale of what happens when state courts arrogate the power of the legislature.

CONCLUSION

The Court should decline to enter this "political thicket" and affirm the decision by the circuit court dismissing plaintiffs' claims. *Colegrove v. Green*, 328 U.S. 549, 556 (1946). All three indicators of a nonjusticiable political question are present here. This Court should heed the warning from the failed *Harper* experiment in North Carolina: "The decision to implement a proportionality or political fairness requirement in the constitution without explicit direction from the text inherently requires policy choices and value determinations and does not result in a neutral, manageable standard." *Harper III*, 886 S.E.2d at 431. The decision by the circuit court dismissing Plaintiffs' claims should be clarified and affirmed.

Respectfully submitted, this the 11th day of July, 2023.

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WORD-COUNT CERTIFICATE

This document complies with the word limit of RAP 34(B)(2) because, excluding the parts of the document exempted by RAP 15(E), this document contains 4,076/5,250 words.

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