No. 413PA21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, et al., Plaintiffs-Appellants, COMMON CAUSE, Plaintiff-Intervenor-Appellant, v. REPRESENTATIVE DESTIN HALL, et al., Defendants-Appellees.	From Wake County

REBECCA HARPER, et al., Plaintiffs-Appellants, v. REPRESENTATIVE DESTIN HALL, et al., Defendants-Appellees.	From Wake County

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BRIEF OF AMICI CURIAE GOVERNOR ROY A. COOPER, III AND ATTORNEY GENERAL JOSHUA H. STEIN IN SUPPORT OF PLAINTIFFS-APPELLANTS[1]

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[1] No outside persons or entities wrote any of this brief or contributed any money to support the brief's preparation. *See* N.C. R. App. P. 28(i)(2).

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INTRODUCTION

In the decision below, the trial court found that the current legislative majority intentionally drew legislative and congressional districts to entrench its party in power. The majority's leaders have claimed repeatedly that they did not gerrymander districts for partisan gain. As the trial court found, however, those claims were false. Not only did the majority gerrymander districts, it did so with remarkable precision. Among trillions of possible plans, the legislative majority drew districts that would be as effective as possible at securing its power—and, often, unchecked supermajority power—no matter the will of the voters. Such subversion of popular will, the court below recognized, is "incompatible with democratic principles." Slip. op. at 245.

Despite these remarkable findings, the trial court went on to hold that our courts are powerless to protect our democracy. That view rested on a profoundly mistaken understanding of our State's constitution. Our constitution is based on the principle that political power must be "vested in and derived from the people" and that our government must be "founded upon their will only." N.C. Const. art. I, § 2. But our elected leaders flout that principle when they seek to perpetuate their power irrespective of the

will of the voters. Partisan gerrymandering therefore violates many of the protections in our declaration of rights. When elections are impervious to democratic sentiment, they are not "free." N.C. Const. art. I, § 10. When certain voters are systematically discriminated against by self-serving legislators, they are not "equal." *Id.* § 19. And when districts burden voters based on their political expression, they violate the people's freedoms of speech and assembly. *Id.* §§ 12, 14.

The trial court's ruling also grossly discounted the judiciary's role in safeguarding constitutional rights. This Court has a proud tradition of securing the people's fundamental liberties—as well as maintaining the balance of powers that make our constitutional democracy work. It should not shrink from that duty now when the people's very right to govern themselves is at stake. This is all the more true when, as here, this Court represents the people's only hope to vindicate their right to self-government.

The Governor and the Attorney General therefore respectfully urge this Court to reverse the judgment below.[2] In so doing, they urge the Court to clarify that the North Carolina Constitution bars the legislature from

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[2] The Attorney General has recused himself from representing the State Board of Elections, its members, or any of the other parties in this case.

drawing districts that unduly favor one political party except when the burden can be justified by nonpartisan districting criteria. Finally, they ask this Court to oversee remedial proceedings directly, to ensure that our State has fair and competitive elections that are responsive to the popular will.

ARGUMENT

I. Partisan Gerrymandering Violates the North Carolina Constitution.

A. Partisan gerrymandering violates our state constitution's fundamental guarantee of democracy.

Partisan gerrymandering clashes with a central feature of our state constitution: its guarantee of popular sovereignty. Popular sovereignty is the foundation upon which a government of right is formed. Without it, government cannot be said to originate from the people, nor be founded upon their will only. There is no political principle more foundational to our democracy than popular sovereignty.

For this reason, a central purpose of our state constitution has always been to secure government by the people. The framers of our first constitution affirmed, in that charter's very first clause, that "[a]ll political power is vested in and derived from the people." N.C. Const. of 1776, Declaration of Rights, § I; *see* N.C. Const. art. I, § 2. A government of right,

moreover, is "founded upon [the people's] will only." N.C. Const. art. I, § 2. In keeping with that guarantee, our General Assembly is meant to be a representative body, whose members serve "as the arm of the electorate." *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001).

Partisan gerrymandering, however, subverts popular sovereignty. It allows legislators, not voters, to control the results of elections by drawing districts to ensure that one party almost always wins the most seats—and, in some years, a disproportionately large supermajority of seats—without regard to the popular will. Drawing districts to further the interests of one party is fundamentally in conflict with a government founded "only" on the will of the people. N.C. Const. art. I, § 2. When districts are gerrymandered, the people lose control over the General Assembly, and legislation does not "derive[ ] from the people," but rather from incumbent legislators, who need not be responsive to the people. *Id.* A government unmoored from the will of the people loses its legitimacy.

But partisan gerrymandering not only undermines the sovereignty of the people; it distorts the governance of our State in other ways too. It does so by disabling the checks and balances built into our state constitution that protect against legislative abuses of power. Gerrymandered districts, for

instance, can create unrepresentative supermajorities that can override the Governor's vetoes and prevent the Governor from protecting the other branches from laws that weaken separation of powers. Indeed, the last time that gerrymandered plans artificially created legislative supermajorities, the legislature sought to eliminate gubernatorial power, undermine the judiciary's independence, and concentrate power in the gerrymandered General Assembly. *See* Gov. & Att'y Gen. Amicus Br. in Support of Pet. for Dis. Rev. at 7-15 (describing these problems in greater detail).

By disrupting the balance of powers among the branches, moreover, gerrymandering threatens individual liberty. "Separating the powers of the government preserves individual liberty by safeguarding against the tyranny that may arise from the accumulation of power in one person or one body." *Cooper v. Berger*, 371 N.C. 799, 804, 822 S.E.2d 286, 292 (2018). Thus, when gerrymandering prevents the people from governing themselves, our State suffers multiple, fundamental harms.

Fortunately, the framers of our constitution put measures in place to secure popular sovereignty, because they feared that our legislature might become unrepresentative. As early as 1776, the framers warned that a popularly elected legislature might try to entrench itself in office, denying

the people their right to self-government. For instance, William Hooper, one of our delegates to the Continental Congress, urged that our state constitution prevent legislators from making "their own political existence perpetual." 10 *Colonial and State Records of North Carolina* 867-68 (William L. Saunders ed., 1886) [hereinafter Colonial Records vol. 10], https://docsouth.unc.edu/csr/index.php/document/csr10-0407.

Likewise, to protect against the legislature "vot[ing] itself perpetual," John Adams recommended in 1776 that our constitution split the General Assembly into two chambers, so that one chamber could check the other. 11 *Colonial and State Records of North Carolina* 324 (Walter Clark ed., 1895), https://docsouth.unc.edu/csr/index.php/document/csr11-0189. Taking his advice, our first constitution divided our legislature into two chambers, as it remains today. *See* N.C. Const. of 1776, § I; N.C. Const. art. II, § 1.

Another key check on the risk of legislative entrenchment was an independent judiciary. More than two centuries ago, our state courts held in *Bayard v. Singleton* that they could strike down statutes that violate our constitution. 1 N.C. 5, 7 (1787). The court reasoned that the power to review the constitutionality of the legislature's laws was necessary to prevent democracy from being "destroy[ed]." *Id.* The *Bayard* court explained that if

courts abdicated their responsibility to resolve such challenges, then legislators could make themselves "Legislators of the State for life" by insulating themselves from "any further election of the people." *Id.*

Consistent with *Bayard*, a key structural safeguard against this risk is our independent judiciary. Our first constitution guaranteed that independence by mandating that judges would serve for life during their good behavior. *See* N.C. Const. of 1776, § XIII. That independence is today secured through the right of the State's voters to elect this Court's members, whose independence allows them to protect the people against legislative aggrandizement. *See* N.C. Const. art. IV, § 16.

In addition to creating and guaranteeing these structural protections, our constitution also safeguards the mechanism that most directly allows the people to exercise their sovereignty: elections. As one of these safeguards, our original constitution mandated that all elections be "free." N.C. Const. of 1776, Declaration of Rights, § VI. That protection remains in our constitution today. N.C. Const. art. I, § 10.

As shown below, partisan gerrymandering makes elections unfree. It also violates other important rights—to equal protection, and to freedom of speech and assembly—that protect the people's ability to govern themselves.

B. Partisan gerrymandering violates the free elections clause.

The free elections clause, section 10 of article I, is one of the clauses that makes our state constitution "more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). Partisan gerrymandering is incompatible with this guarantee of free elections.

The history of the free elections clause shows that it prohibits practices, like partisan gerrymandering, that systematically manipulate elections to try to control their outcome. Those origins are relevant because, in construing the provisions of our constitution, this Court considers "the history of . . . provision[s] and [their] antecedents." *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980).

Our constitution's free elections clause was modeled on a nearly identical clause in Virginia's declaration of rights. Virginia's clause was, in turn, inspired by a clause in the English Bill of Rights that was adopted after the Glorious Revolution of 1688.[3] That clause provided that the "election of

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[3] *See* Va. Const. of 1776, Bill of Rights, § 6; 1 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 86 (1974); Earle H. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. Hist. Rev. 215, 221 (1929).

members of parliament ought to be free." Bill of Rights 1689, 1 W. & M. c. 2 (Eng.).

The English free elections clause was a response to a king's efforts to manipulate parliamentary elections. King James II used a number of strategies to pack Parliament with his allies. These strategies included manipulating the composition of the electorate—to pick voters and thereby try to control election outcomes, rather than letting voters freely choose their representatives. *See* George H. Jones, *Convergent Forces: Immediate Causes of the Revolution of 1688 in England* 75-78 (1990).

At that time, the king had the power to modify voting rights by issuing new municipal charters. In some constituencies, the king issued new charters to shrink the electorate to help his allies, while in others, he expanded the electorate to ensure that his opponents would lose. *See id*. In these ways, the English precursor to gerrymandering meted out voting power based "on probable results, not on principle." *Id.* at 76; *see also* J.R. Jones, *The Revolution of 1688 in England* 148 (1972); 6 David Hume, *The History of England from the Invasion of Julius Caesar to the Revolution in 1688*, at 486 (Liberty Fund 1983) (1778).

James II's plan to pack Parliament helped incite the Glorious Revolution in England, with William and Mary dethroning James II. Among the central reforms of the revolutionaries was the call for the election of a "free and lawful parliament," chosen without manipulation of the franchise. Gary S. De Krey, *Restoration and Revolution in Britain: A Political History of the Era of Charles II and the Glorious Revolution* 250 (2007).

When North Carolina colonists later challenged British rule, they consciously sought to emulate the rights achieved after the Glorious Revolution. *See* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 9 (2d ed. 2013) (observing that another clause in the declaration of rights "deliberately echo[es] the English Bill of Rights of 1689"). James Iredell, whom George Washington would soon name as our State's first member of the U.S. Supreme Court, explained in a 1778 speech that the American Revolution represented the fulfillment of the same principles vindicated in the "glorious revolution." 13 *Colonial and State Records of North Carolina* 434-36 (Walter Clark ed., 1896), https://docsouth.unc.edu/csr/index.php/document/csr13-0498. Similarly, in 1775, North Carolina's delegates to the Continental Congress urged the colony to fight against any British attempts to violate "glorious Revolution

principles." Colonial Records vol. 10, *supra*, at 23, https://docsouth.unc.edu/csr/index.php/document/csr10-0011. In keeping with these principles, the new State's leaders demanded that the election of delegates to our Provincial Congress "be free and impartial," presaging the clause that would soon appear in our declaration of rights. *Id.* at 702, https://docsouth.unc.edu/csr/index.php/document/csr10-0302.

As this history shows, the free elections clause was designed to protect against efforts to manipulate the electoral process to control the outcomes of legislative elections. In England, elections were not free when James II manipulated the composition of the electorate to ensure that his supporters would control Parliament. In North Carolina, likewise, elections are not free when legislators manipulate the composition of the electorate to ensure that a favored political party controls the General Assembly. *See, e.g.*, *State v. Driver*, 78 N.C. 423, 428 (1878) (consulting English history to assess meaning of provision of declaration of rights derived from English Bill of Rights).

Indeed, consistent with this history, this Court has already invoked the free elections clause to strike down statutes enacted by our legislature that have the effect of controlling election outcomes. In *Clark v. Meyland*, for example, this Court invalidated a statute that controlled election outcomes

by requiring voters to swear an oath to support their party's candidates in elections. 261 N.C. 140, 142-43, 134 S.E.2d 168, 170 (1964).

Thus, partisan gerrymandering violates the free elections clause. Free elections preserve the sovereignty of the people by ensuring that there is a responsive relationship between the people's will and the results of elections. *See* N.C. Const. art I, § 2. By severing that link, partisan gerrymandering deprives "North Carolina citizens of the right to vote for General Assembly members in elections that are conducted freely and honestly to ascertain, fairly and truthfully, the will of the people." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *112 (Wake Cnty. Super. Ct. Sept. 3, 2019).

C. Partisan gerrymandering denies voters equal protection.

Partisan gerrymandering also denies voters equal protection when they cast their ballots.

In 1971, our state constitution was amended to give North Carolinians an express guarantee of equal protection of the laws. N.C. Const. art. I, § 19. This clause protects, among other rights, "the right to vote on equal terms." *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990). That right is so crucial to our democracy that its scope is greater under our state constitution than the federal constitution.

See Blankenship v. Bartlett, 363 N.C. 518, 522-24, 681 S.E.2d 759, 763-64 (2009); *Stephenson v. Bartlett*, 355 N.C. 354, 376, 380-81 & n.6, 562 S.E.2d 377, 393, 395 & n.6 (2002). Specifically, under our constitution, "the right to vote on equal terms" for legislative representatives "is a fundamental right" that gives rise to "strict scrutiny." *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 393.

Applying our constitution's guarantee of equal protection, this Court has struck down laws that single out voters for disfavored treatment. For instance, in *Stephenson*, this Court held that electing the General Assembly from a combination of single-member and multiple-member districts would burden "the fundamental right to vote on equal terms." *Id*. Designing districts in that way burdens voters' rights because it unfairly grants voters who live in districts that elect multiple members more "representational influence" than other voters. *Id.* at 377, 562 S.E.2d at 393. Favored voters unfairly have a larger number of "responsive Senators and Representatives to press their interests." *Id.* at 379, 562 S.E.2d at 394. For that reason, strict scrutiny applies to plans that give certain voters access to more "responsive" representatives. *Id.* And such plans can survive that scrutiny only if they are "narrowly tailored to advance a compelling governmental interest." *Id*. at 377-78, 562 S.E.2d at 393.

Here, partisan gerrymandering inflicts the same harm that this Court identified in *Stephenson*: It relegates certain voters to second-class status. By gerrymandering districts, a legislature makes it harder for disfavored voters to elect their preferred candidates. Disfavored voters thus enjoy less "representational influence" than favored voters, because gerrymandering gives them access to fewer likeminded legislators who are "responsive" to their concerns and who can work together to "press their interests." *Id.* at 377, 379, 562 S.E.2d at 393-94.

Ensuring that voters have equal representational influence, moreover, helps ensure that the people's sovereignty is preserved and that government is "founded upon their will only." N.C. Const. art. I, § 2. In a statewide election, where all voters cast their ballots in a single pool, ascertaining the will of the electorate is straightforward. In legislative elections, however, voters only have equal "representational influence" if results fairly reflect the will of voters not only in a single district, but also in aggregate. *See Stephenson*, 355 N.C. at 377, 562 S.E.2d at 393. While our constitution does not require absolute proportionality between parties' statewide voter share and their composition in the legislature, it requires a responsive relationship between the people's will and the election's results. This democratic

accountability is integral to ensuring that political power is "derived from the people," and not incumbent legislators. N.C. Const. art. I, § 2.

Thus, because partisan gerrymandering systematically denies disfavored voters equal representational influence, it is subject to strict scrutiny. *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 393. Voters can establish that districts have been gerrymandered for partisan gain by proving that districts were intentionally drawn for that purpose. *See S.S. Kresge v. Davis*, 277 N.C. 654, 660, 178 S.E.2d 382, 385 (1971) (holding that intentional discrimination denies equal protection). In keeping with our State's equal protection jurisprudence, voters can also establish that districts have been gerrymandered by showing that they have the *effect* of unduly favoring one party over the other. *See, e.g.*, *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 393 (assessing whether burden of constitutional dimension existed without considering discriminatory animus). If voters can make such a showing, plans can survive strict scrutiny only if they "are narrowly tailored to advance a compelling governmental interest"—that is, when some legitimate, non-partisan justification can explain the burden that plans impose on voters. *Id*.

D. Partisan gerrymandering violates voters' rights to free speech and association.

Partisan gerrymandering is unconstitutional for another reason: It burdens certain citizens based on their speech and association.

In 1971, when the people amended the constitution to guarantee equal protection, they also amended it to secure freedom of speech. N.C. Const. art. I, § 14. This Court has reserved the right to extend the reach of this state constitutional guarantee beyond the scope of the First Amendment to the U.S. Constitution. *See, e.g.*, *Libertarian Party v. State*, 365 N.C. 41, 47, 707 S.E.2d 199, 203 (2011); *Evans v. Cowan*, 345 N.C. 177, 177, 477 S.E.2d 926, 926, *aff'g* 122 N.C. App. 181, 184, 468 S.E.2d 575, 577 (1996).

Our constitution also protects the people's right "to assemble together to consult for their common good." N.C. Const. art. I, § 12. This Court has recognized that the "associational rights rooted in the free speech and assembly clauses" are "of utmost importance to our democratic system." *Libertarian Party*, 365 N.C. at 49, 707 S.E.2d at 204-05.

There can be no serious question that people exercise their speech and associational rights when they vote for candidates of their preferred political party. As this Court has explained, "citizens form parties to express their

political beliefs and to assist others in casting votes in alignment with those beliefs." *Id.* at 49, 707 S.E.2d at 205.

Because voting involves protected speech and association, only rarely may the government selectively burden the political expression of certain voters. To do so, a law must survive strict scrutiny—that is, the law must be narrowly drawn to advance a compelling state interest. *See State v. Petersilie*, 334 N.C. 169, 183-84, 432 S.E.2d 832, 840-41 (1993).

Partisan gerrymandering creates just such a selective burden that triggers strict scrutiny. It targets the expression of voters who support the disfavored political party. And it makes their votes less effective by preventing them from effectively associating with like-minded voters to elect their preferred candidates.

Furthermore, under the speech and association clauses, the government may not retaliate against voters based on how they vote. In this Court's landmark decision in *Corum v. University of North Carolina*, for instance, the Court recognized that these clauses bar state officials from penalizing citizens based on disagreement with their views. *See* 330 N.C. at 769-70, 781, 413 S.E.2d at 282, 289.

Yet, that is exactly what partisan gerrymandering does. When legislators gerrymander districts, they dilute the influence of certain voters based on their past political expression. Gerrymandering therefore penalizes voters for their prior votes. This retaliation against voters based on their political speech is unconstitutional. Voters cannot be punished for their engagement with our democratic system. *See id.*

Thus, partisan gerrymandering infringes voters' speech and associational rights. Because partisan gerrymandering is a form of viewpoint discrimination that triggers strict scrutiny, it will only be upheld if districts are "drawn . . . narrowly" to serve a "compelling [state] interest." *Petersilie*, 334 N.C. 169, 182, 432 S.E.2d 832, 840. Gerrymandered districts are also invalid when they are drawn to "retaliat[e] against" voters "for [their] exercise of . . . speech rights." *Corum*, 330 N.C. at 766, 413 S.E.2d at 280.

II. The Enacted Plans Are Unconstitutional Partisan Gerrymanders.

Under the tests above, the enacted plans are unconstitutional. Though these different tests vary in certain respects, they all broadly ask two questions. First, they ask whether a districting plan selectively burdens the

rights of voters by unduly favoring one party over the other.[4] Second, they ask whether that burden can be justified by proper considerations, like adherence to nonpartisan districting criteria.[5] If not, then the plan is invalid.

Here, the enacted plans are unconstitutional, because they burden the rights of voters without any legitimate justification.

First, the enacted legislative and congressional plans burden the rights of voters because, as the trial court found, they are all the result of "intentional . . . partisan redistricting" designed to benefit the favored party. Slip op. at 187. Indeed, the trial court specifically found that districts were intentionally drawn to disproportionately favor the same party in seven of the Senate's county clusters, in nine of the House's county clusters, and in all

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[4] *See, e.g.*, *Stephenson*, 355 N.C. at 379, 562 S.E.2d at 394 (assessing whether districts burdened voting rights); *Petersilie*, 334 N.C. at 183, 432 S.E.2d at 840 (assessing whether law burdened "the espousal of a particular viewpoint"); *Clark*, 261 N.C. at 143, 134 S.E.2d at 170 (assessing whether law had "deterrent" effect on voters' ability to cast free ballot).

[5] *See, e.g.*, *Blankenship*, 363 N.C. at 527, 681 S.E.2d at 766 (assessing whether districting plan could be justified by "governmental interests unrelated to vote dilution"); *Petersilie*, 334 N.C. at 185, 432 S.E.2d at 841 (holding that law could only be upheld if it were "evenhanded"); *Clark*, 261 N.C. at 143, 134 S.E.2d at 170 (assessing whether interest in ensuring that voters act in "good faith" could justify burden on free elections); *Evans v. Cowan*, 132 N.C. App. 1, 9, 510 S.E.2d 170, 175 (1999) (asking whether expressive conduct was but-for cause of retaliation).

fourteen of our State's congressional districts. *Id.* at 81-106 (Senate districts), 106-43 (House districts), 147-85 (congressional districts).

These findings, moreover, were more than amply supported by the record. The evidence shows that the enacted plans will have a pivotal effect on the outcome of legislative and congressional elections in our State. *See State v. Kaley*, 343 N.C. 107, 109, 468 S.E.2d 44, 46 (1996) (observing while reviewing sufficiency of evidence that persons can be presumed to intend "the consequences of [their] acts").

The trial court found, for example, that the enacted plans will likely prevent competitive elections by awarding the favored party "an outright majority in the state's congressional delegation, the State House, and the State Senate," even when the other party wins "statewide by clear margins." Slip. op. at 68. These disparate effects, moreover, are durable: They endure "despite large shifts in the statewide vote." *Id.* at 53; *see also* at 68.

The legislative plans, however, have another equally important effect: The trial court found that they are "especially effective" at "preserving . . . supermajorities" for the favored party in elections where that party might lose them under unbiased plans. *Id.* at 54. The House plans, for instance, will likely grant a supermajority to the favored party in future elections

where virtually all alternative possible plans would not. *Id.* at 55. This effect is even more pronounced in the Senate: That plan could grant a supermajority to the favored party even when *the disfavored party wins a majority* of the statewide vote. *Id.* at 70-71.

The burden that these intentionally discriminatory plans impose on voters is unmistakable: They virtually guarantee that the favored party will have a disproportionately large share of the members of the General Assembly. This result burdens voters who support the disfavored party by giving them unequal access to representatives who are "responsive" to their concerns. *Stephenson*, 355 N.C. at 377, 379, 562 S.E.2d at 393-94.

This burden has especially far-reaching implications for the broader governance of our State. The enacted legislative plans will often stop voters from electing a governor who can fulfill his or her constitutional role by vetoing ill-advised legislation that would harm the State as a whole. *See* N.C. Const. art. II, § 22; *see also* slip op. at 220 (observing that one purpose of veto is to ensure that legislation meets the needs of the whole State). The plans

unfairly dilute the ability of a majority of the State's voters to influence policy by electing statewide officials like the Governor.[6]

Second, this profound burden cannot be justified or explained by adherence to nonpartisan districting criteria. The trial court credited testimony from multiple witnesses who showed that (1) there are innumerable alternate districting plans that our legislature could have enacted, *see, e.g.*, slip. op. at 52, 62, 148, (2) those alternate plans generally comply with the General Assembly's stated nonpartisan districting criteria, *see, e.g.*, *id.* at 52-53, 60-61, 148, and (3) those alternate plans do not confer such considerable advantages on one party. *See, e.g.*, *id.* at 54, 63-64, 159-60. Indeed, the trial court found that the enacted plans are more skewed in favor of the favored party than 99.99% of trillions of possible alternate plans. *Id.* at 63-64, 66. Thus, the enacted plans reflect systematic bias in favor of

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[6] Below, the trial court properly relied on the evidence concerning the staggering effect of the enacted plans to find that they were enacted with discriminatory intent. But evidence of effect standing alone—even without a finding of intent—is enough to trigger strict scrutiny. This Court, after all, often assesses claims based on the constitutional rights at issue here without considering whether the challenged laws were motivated by discriminatory intent. *See, e.g.*, *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 393; *Petersilie*, 334 N.C. at 183-84, 432 S.E.2d at 840-41; *Clark*, 261 N.C. at 143, 134 S.E.2d at 170. In these and other cases, this Court has sustained challenges because the law at issue solely had the effect of violating the constitution.

certain electoral results and cannot be explained by any legitimate nonpartisan redistricting principle. Indeed, the trial court explicitly found that the partisan skew of the plans "cannot be explained by North Carolina's political geography." *Id.* at 66.

In sum, the evidence shows that the enacted plans are partisan gerrymanders that prevent competitive elections by unduly favoring one party over the other, insulating that party from the will of the people. They therefore violate our state constitution in multiple ways.

III. The Trial Court Erred When It Held That the North Carolina Constitution Allows Partisan Gerrymandering.

Despite the patent unconstitutionality of the enacted plans, the trial court upheld them. It did so by narrowly construing the relevant constitutional provisions. It also reasoned that courts lack manageable standards to adjudicate partisan gerrymandering claims. It further held that partisan gerrymandering must be legal given the long history of unfair voting practices. And it finally read this Court's prior decisions to allow the legislative majority to manipulate districts to entrench itself in power.

As shown below, the trial court's analysis on all these points was deeply flawed. It therefore erred when it held that courts lack the power to

combat practices like partisan gerrymandering that are fundamentally "incompatible with democratic principles." *Id.* at 245.

A. The free elections, equal protection, speech, and assembly clauses should be broadly construed to protect democracy.

The trial court held that the free elections, equal protection, speech, and assembly clauses must be construed narrowly to allow partisan gerrymandering. That approach misapplied this Court's precedent.

1. The free elections clause should be broadly construed to protect democracy.

On the free elections clause, the trial court acknowledged the history described above concerning the clause's origins. It correctly noted, for instance, that the original English clause was a "response to abuses and interference by the Crown in elections for members of parliament which included changing the electorate in different areas to achieve electoral advantage." Slip op. at 227.

The court nevertheless held that the clause should be "interpreted narrowly." *Id.* at 254. It reasoned that because the English clause was directed at the Crown, and the drafters of our first constitution created a strong legislature in response to royal abuses, the clause should not be read to limit legislative authority over districting in any way. *See id.* at 227-31.

None of this reasoning, however, supports the court's belief that the free elections clause should be "interpreted narrowly" to allow rigging elections through partisan gerrymandering. *Id.* at 254.

To begin, the trial court's reasoning is irreconcilable with the longstanding principle that our constitution should be construed to promote democracy. More than a century ago, this Court, citing the popular sovereignty clause of the declaration of rights, reaffirmed that our constitution establishes "a government of the people, in which the will of the people,—the majority,—legally expressed, must govern." *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 428, 26 S.E. 638, 638 (1897) (citing N.C. Const. art. I, § 2). To make real this bedrock principle of popular sovereignty, the Court held that those clauses in our constitution "that tend to promote a fair election or expression of this popular will," such as the free elections clause, must be "liberally construed." *Id.*

That admonition is consistent with section 35 of the declaration of rights, which directs courts to make "frequent recurrence to fundamental principles" when they construe our constitution. N.C. Const. art. I, § 35. Commentators have explained that this clause serves as a direction to all generations to "rethink for themselves the implications of the fundamental

principles of self-government that animated the revolutionary generation." Orth & Newby, *supra*, at 91. That rule of construction provides further confirmation that the provisions in our constitution that protect popular sovereignty should be liberally and flexibly applied to address today's problems. After all, no principle of government is more fundamental than the constitution's pledge that "all government of right originates from the people" and "is founded upon their will only." N.C. Const. art. I, § 2.

Applying these principles to read the free elections clause broadly is also consistent with the clause's text. The free elections clause is broadly worded to guarantee that "[a]ll elections shall be free." N.C. Const. art. I, § 10. Thus, the clause prohibits *all practices* that make elections unfree, including *legislative actions* that render elections unfree like partisan gerrymandering. *Cf. Weems v. United States*, 217 U.S. 349, 373, 376 (1910) (holding that provision derived from English Bill of Rights necessarily must be read to have "wider application than the mischief which gave it birth").

Indeed, the trial court's narrow reading of the clause is inconsistent with this Court's precedent. As noted above, this Court has already applied the free elections clause to invalidate *statutes* that make elections unfree. *Clark*, 261 N.C. at 142-43, 134 S.E.2d at 170-71. Doing so, moreover, is

consistent with one of the fundamental purposes of our constitution: protecting the people from *the General Assembly* making its "own political existence perpetual." Colonial Records vol. 10, *supra*, at 867-68, https://docsouth.unc.edu/csr/index.php/document/csr10-040.

Thus, even if the clause's English predecessor initially sought to secure parliamentary independence from the Crown, applying the clause in that limited way today, centuries after the Revolution, makes little sense. The clause should instead be read in context with the rest of the declaration of rights and our post-revolutionary tradition of judicial review, which allows our courts to protect the people against legislative abuses of power. As recognized in *Bayard* and reaffirmed in *Corum*, our system of government is not premised on parliamentary supremacy, but instead recognizes "the judiciary's responsibility to guard and protect" the rights of the people. 330 N.C. at 785, 413 S.E.2d at 291; *see also Bayard*, 1 N.C. at 7.[7]

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[7] *See also* John P. Reid, *The Rule of Law*, in *A Companion to the American Revolution* 647 (Jack P. Greene & J. R. Pole eds., 2000) (explaining that during revolutionary period "[l]egal theory in Britain was drawing apart from legal theory in the colonies primarily on the issue of constitutional restraint on legislative authority"); Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 Va. L. Rev. 1421, 1425-26, 1434-38 (1999) (describing shift away from parliamentary supremacy toward judicially enforced rights during revolutionary period).

2. The other clauses at issue in these cases should also be construed broadly to protect democracy.

The trial court was also wrong to hold that our constitution's equal protection and speech clauses should be narrowly construed not to prohibit partisan gerrymandering.

The trial court stated that these clauses cannot prohibit "the legislature's ability to redistrict for partisan advantage" because when they were added to our constitution in 1970, other clauses of our constitution already dealt with redistricting. Slip op. at 236. The court also reasoned that because the equal protection and speech clauses do not expressly address redistricting, they cannot be read to "impose new restrictions on the political process of redistricting." *Id.* Thus, the trial court apparently believed that these clauses cannot prohibit any districting practices used in the 1970s.

That holding is flatly inconsistent with this Court's precedents. In *Dunn v. Pate*, for example, this Court explained that historical understandings of equality do not define the scope of the equal protection clause today. Instead, the clause's scope must "be resolved under our *present* understanding of the principle of equal protection." 334 N.C. 115, 121, 431 S.E.2d 178, 182 (1993) (emphasis added).

This Court has applied that principle to rein in redistricting practices that deny equal protection to voters—including those practices that were common during the 1970s when the clause was ratified. In 2002, for example, this Court held in *Stephenson* that the use of single-member and multiple-member districts in the same districting plan denies voters equal protection. 355 N.C. at 378, 562 S.E.2d at 393. In 1971, however, the General Assembly elected by the same voters who ratified the equal protection clause enacted districting plans that combined both single-member and multiple-member districts. *See* Act of July 21, 1971, ch. 1177, 1971 N.C. Sess. Laws 1743, 1743-44; Act of June 1, 1971, ch. 483, 1971 N.C. Sess. Laws 412, 412-14.

Thus, contrary to the trial court, this Court has already applied the equal protection clause to impose "new restrictions" on redistricting practices that were used in the 1970s. Slip op. at 236. The trial court therefore erred when it concluded that the equal protection and speech clauses must be narrowly construed not to address the burdens that partisan gerrymandering places on voters.

B. Challenges to partisan gerrymandering do not present nonjusticiable political questions.

The trial court also erred when it held that challenges to partisan gerrymandering are nonjusticiable political questions. *See* slip op. at 242-49. That holding was particularly flawed because a core purpose of judicial review is to ensure that the General Assembly remains responsive to the people. As noted above, the central premise of the court's holding in *Bayard* was that an independent judiciary is needed to prevent legislators from insulating themselves from the popular will. 1 N.C. at 7; *see supra* pp 7-8.

In keeping with *Bayard*, the political-question doctrine poses no barrier to adjudicating challenges to partisan gerrymanders. Under our constitution, a question is a political question only if (1) the constitution grants unreviewable power to the other branches to resolve the question or if (2) the question lacks satisfactory standards for judicial determination. *Cooper v. Berger*, 370 N.C. 392, 407-08, 809 S.E.2d 98, 107 (2018). This case meets neither of those criteria.

First, the trial court was wrong that "redistricting is in the exclusive province of the legislature." *See* slip op. at 243. To be sure, the constitution does give the General Assembly authority to "revise" legislative districts after

each decennial census. *See* N.C. Const. art. II, §§ 3, 5. But the legislature's exercise of that authority is limited by the protections in our constitution's declaration of rights, which this Court has repeatedly applied to review the General Assembly's districting decisions. *See, e.g.*, *Blankenship*, 363 N.C. at 522-24, 681 S.E.2d at 763-64; *Stephenson*, 355 N.C. at 378-79, 562 S.E.2d at 394; *cf. Cooper*, 370 N.C. at 410, 809 S.E.2d at 109 (holding that legislature's constitutional power to reorganize the executive branch is "necessarily constrained" by separation of powers).

Second, the trial court was also wrong that courts lack manageable standards to identify unconstitutional partisan gerrymanders. *See* slip op. at 243-45. As shown above, courts can do so by assessing whether districting plans unduly favor one party over the other without legitimate justification. *See supra* pp 9-20. This test is no different than tests that this Court applies in countless other areas of the law. In *Stephenson*, for example, the Court similarly held that a plan burdened the "right to vote on equal terms" and could only survive if the burden "advance[d] a compelling governmental interest." 355 N.C. at 377-78, 562 S.E.2d at 394.

And here, the trial court's own opinion inadvertently shows that this standard is manageable. The trial court conducted a grouping-by-grouping

analysis of the State's legislative districts and held that certain groupings were intentionally gerrymandered, while others were not.[8] For instance, it found that the two House districts in the Duplin-Wayne county grouping *had not* been intentionally gerrymandered. Although expert analysis showed that those districts did favor one party, the court found that this outcome resulted from the State's political geography and normal districting criteria, not partisan bias. *See* slip op. at 144-46. That sort of inferential reasoning, moreover, was hardly novel. The courts of our State routinely engage in similar reasoning in a wide variety of cases.[9]

Despite the trial court's own ability to apply these standards, it still held that they are not manageable. It specifically asserted that courts have

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[8] The trial court's grouping-by-grouping analysis shows that plaintiffs' statistical methods for assessing whether districts are gerrymandered provide manageable standards for courts to apply. When courts assess whether plans unduly burden voters' rights, however, they should not only review county groupings in isolation. Analyses that are limited to certain county groupings alone may miss patterns of bias that would become apparent if districts were assessed collectively statewide.

[9] *See, e.g.*, *N.C. Dep't of Pub. Safety v. Ledford*, 247 N.C. App. 266, 268, 786 S.E.2d 50, 52 (2016) (deciding whether termination of employee was politically motivated); *State v. Headen*, 206 N.C. App. 109, 115, 697 S.E.2d 407, 412 (2010) (assessing whether juror strikes were racially motivated).

no way to discern how much partisan advantage districting plans can confer onto one party without violating the constitution. *See* slip op. at 244.

But this case again disproves that theory. Wherever the line between constitutional and unconstitutional plans, the considerable partisan bias exhibited by the plans here lies plainly on the unconstitutional side of the line. *See supra* pp 20-24 (describing the trial court's findings that the enacted districts were drawn intentionally to maximize the favored party's political advantage).

In any event, the trial court's assertion that it is impossible for courts to draw administrable lines to police partisan gerrymandering is simply incorrect. Courts are adept at developing and applying standards to enforce constitutional rights. The U.S. Supreme Court, for example, has held that, under the federal Equal Protection Clause, state legislative districts trigger heightened scrutiny where they deviate from population equality by more than 5% in either direction. *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983); *see Stephenson*, 355 N.C. at 386, 562 S.E.2d at 397 (applying this principle).

Should the need arise, this Court could establish a similar test to distinguish between plans that unduly favor one party without justification, triggering elevated scrutiny, and those that do not. As shown at trial,

advances in computer modeling make it possible to easily compare enacted districting plans with other alternative plans, to assess how much the enacted plans deviate from median neutral plans that were drawn based on nonpartisan redistricting criteria. *See, e.g.*, slip op. at 52-53.

Thanks to those advances, this Court could adopt a rule that is similar to the one the U.S. Supreme Court has developed to govern allowable population deviations. Under that rule, an enacted plan would be subject to strict scrutiny unless the plan stays within 5% of the median outcome, measured by seat count, at a statewide level across a range of electoral circumstances. And even within this framework, the Court could still scrutinize plans when the record otherwise suggests that legislators have drawn districts for partisan gain. *Cf. Wright v. North Carolina*, 787 F.3d 256, 263-68 (4th Cir. 2015) (holding that plaintiffs stated equal protection claim even where population deviation among districts was less than 10%); *Cox v. Larios*, 542 U.S. 947, 949-50 (2004) (Stevens, J., concurring) (noting that the Supreme Court has correctly rejected "creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever").

It is true that, no matter what rule this Court ultimately adopts, close cases could arise that might require this Court to exercise careful judgment to resolve future gerrymandering claims. The existence of those cases, however, provides no basis for affirming the decision below. This Court routinely resolves constitutional claims by applying tests that require careful consideration of the record. For example, the difficult and fact-sensitive questions that arise when courts discern whether speech constitutes a "true threat" do not render the entire inquiry nonjusticiable. *See State v. Taylor*, 2021-NCSC-164, ¶¶ 43-54.

Nor has this Court previously shrunk from its duty to enforce our constitution merely because applying broad constitutional provisions to specific cases can raise difficult line-drawing questions. To name just a few examples:

- In *Cooper v. Berger*, this Court expressly rejected an argument that separation-of-powers claims are nonjusticiable. 370 N.C. at 411-12, 809 S.E.2d at 109-10. The Court did so even though it acknowledged that it could not "adopt a categorical rule that would resolve every [future] separation of powers challenge" and thus had to "resolve each challenge by carefully examining its specific factual

and legal context." *Id*. at 414, 809 S.E.2d at 111 (quoting *State ex rel. McCrory v. Berger*, 368 N.C. 633, 646-47, 781 S.E.2d 248, 257 (2016)).

- In *Leandro v. State*, this Court rejected an argument that claims based on the constitutional right to education are nonjusticiable. 346 N.C. 336, 344-48, 488 S.E.2d 249, 254-55 (1997). It did so even though such claims depend on a flexible test that assesses whether a child's education is sufficient given the demands of "a complex and rapidly changing society." *Id.* at 347, 488 S.E.2d at 255.
- This Court has repeatedly enforced our constitution's guarantee of a speedy trial, even though the right turns on the application of a balancing test that makes it "impossible to determine precisely when the right [to a speedy trial] has been denied." *State v. Farmer*, 376 N.C. 407, 414, 852 S.E.2d 334, 340 (2020) (citing *State v. McKoy*, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978)).
- And this Court has also heard challenges to uses of public funds under the constitution's public-purpose clause, even though a "slide-rule definition to determine public purpose for all time cannot be formulated" and "the concept expands with the population, economy, scientific knowledge, and changing

conditions." *Mitchell v. N.C. Indus. Dev. Fin. Auth.*, 273 N.C. 137, 144, 159 S.E.2d 745, 750 (1968).

Thus, the mere hypothetical existence of close cases in the partisan gerrymandering context does not make such claims nonjusticiable. It would simply make those claims like almost every other type of constitutional claim that this Court regularly decides. This Court should therefore not hesitate to fulfill the purpose of judicial review in our state: Ensuring that the members of the General Assembly cannot make themselves "Legislators of the State for life." *Bayard*, 1 N.C. at 7.[10]

C. The long history of partisan gerrymandering does not legalize the practice.

The trial court further erred when it held that the long history of partisan gerrymandering and other unfair election practices prevents courts from addressing those practices today. *See* slip op. at 232-35. It is true that

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[10] The trial court also mistakenly relied on the U.S. Supreme Court's holding that federal courts cannot hear partisan gerrymandering claims. Slip. op. at 244 (citing *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019)). *Rucho* explicitly recognized that state constitutions "can provide standards and guidance" to stop partisan gerrymandering. 139 S. Ct. at 2507. Indeed, the scope of our State's political question doctrine is an issue of state law. *Cooper*, 370 N.C. at 407-08, 809 S.E.2d at 107. And it is axiomatic that this Court may interpret the state constitution to exceed the protections in its federal counterpart. *E.g.*, *Blankenship*, 363 N.C. at 522, 681 S.E.2d at 763.

legislators inherently suffer a "[c]onflict of interest" when they draw districts that they ultimately have to run in, tempting them to "abuse their power" for partisan gain. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 815-16 (2015). But as the evidence here shows, modern mapmaking techniques allow "representatives [to] choos[e] voters based upon sophisticated partisan sorting" that allows "the carefully crafted will of the map drawer [to] predominate[]" over the will of the voters. *Common Cause*, 2019 WL 4569584, at *3. These developments allow incumbent legislators to draw districts that are "nonresponsive to the actual votes cast in North Carolina's elections" in ways that are different in kind from methods that were used in the past. *Id.* at *35; *see supra* pp 20-24.

But even aside from these material differences, this Court has not hesitated to condemn unconstitutional practices simply because they have a long historical pedigree. This is especially true where, as here, a practice had not before been challenged in this Court under a particular constitutional provision.

This Court has a proud tradition of protecting the liberties guaranteed by our declaration of rights when called upon to do so for the first time. In *Leandro*, for instance, this Court held that section 15 of our declaration of

rights guarantees a right to "a sound basic education" more than *one hundred years* after that clause was first ratified. 346 N.C. at 345, 488 S.E.2d at 254. Likewise, in *Corum*, this Court held that damages can be available to remedy violations of the declaration in non-takings cases, more than *two centuries* after the declaration was first ratified. 330 N.C. at 783, 413 S.E.2d at 290. Here, too, the fact that this Court has not yet applied the clauses that protect our constitution's guarantee of popular sovereignty to restrict partisan gerrymandering does not mean that the Court is powerless to protect North Carolinians from this unique subversion of democracy.

This Court's recent decision in *State ex rel. McCrory v. Berger* is particularly instructive. 368 N.C. 633, 781 S.E.2d 248. In *McCrory*, this Court held by a 6-1 margin that the General Assembly violates the separation of powers clause—which, like the free elections clause, dates from 1776—when it reserves to itself the power to appoint a majority of the membership of executive boards and commissions. *Id.* at 647, 781 S.E.2d at 257. The Court reached that holding, even though the General Assembly had long enacted statutes granting itself the power to fill all of the seats on certain boards and commissions. *See* Brief of Carolinas AGC et al. as Amici Curiae at 19 n.7, *McCrory*, 368 N.C. 633, 781 S.E.2d 248 (No. 113A15).

Despite that history, this Court nonetheless protected separation of powers by preventing the legislature from interfering with the execution of the law through the use of its appointment power. In doing so, it observed that the Court had never before been presented with a separation-of-powers challenge to an analogous legislative appointments scheme. *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257. The lack of precedent therefore did not say either way whether such schemes were constitutional. After all, this Court lacks a roving commission to examine the constitutionality of state laws. It may only decide those claims that are presented to it.

More broadly, the Court closed its decision in *McCrory* by making clear that an unconstitutional practice does not become valid merely because it has previously gone unchallenged. The Court stressed that because separation of powers is a "cornerstone" of our state government, it was necessary to make a "recurrence to fundamental principles" in deciding how the separation-of-powers clause should be applied today. *Id.* at 649, 781 S.E.2d at 258.

Whereas separation of powers is a cornerstone of our government, popular sovereignty is its foundation. Partisan gerrymandering is irreconcilable with the principle that political power is in fact derived from

the people and that government is "founded upon their will only." N.C. Const. art. I, § 2. And this case is the first one in the Court's history to challenge this unconstitutional practice. The absence of a ruling from this Court on an issue of such extraordinary importance thus makes the Court's intervention now *more* urgent, not less.

D. This Court has not held that partisan gerrymandering is constitutional.

The trial court also erred when it read this Court's precedents to allow partisan gerrymandering, free from any judicial review. *See, e.g.*, slip op. at 208, 224, 242-43, 245. That conclusion was based on a clear misreading of this Court's precedents.

As an initial matter, though the trial court correctly acknowledged that "no appellate court in North Carolina" has ever addressed whether our constitution prohibits districting plans that unduly benefit one party over the other, it nonetheless read this Court's decision in *Stephenson* to endorse partisan gerrymandering. Slip op. at 208, 224. There, this Court stated in passing that "[t]he General Assembly may consider partisan advantage" in its "redistricting decisions." 355 N.C. at 371, 562 S.E.2d at 390.

That dictum, however, hardly holds that partisan gerrymandering is constitutional. After all, when *Stephenson* reached this Court, no party before it was asserting that gerrymandering for partisan gain, standing alone, violates our constitution. *See* Plaintiffs-Appellees' Brief at 60, *Stephenson*, 355 N.C. 354, 562 S.E.2d 377 (No. 94PA02) ("Plaintiffs are not seeking relief under a political gerrymandering theory."). Thus, *Stephenson* did not provide this Court with any occasion to address whether partisan gerrymandering is constitutional. Indeed, this Court has often instructed lower courts *not* to do what the trial court did below: give sweeping effect to statements that this Court has made about issues that were not squarely before it. *E.g.*, *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 2021-NCSC-6, ¶ 75 (holding that passing reference to "injury in fact" in prior opinion did not incorporate federal standing principles into state law); *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257 (holding that precedents under the *appointments clause* are not relevant to deciding a challenge to a similar arrangement under the *separation-of-powers clause*).

In any event, in *Stephenson*, this Court also stated that the legislature could only consider partisanship in its districting decisions "in conformity with . . . constitutional limitations." 355 N.C. at 371, 562 S.E.2d at 390. While

our constitution prohibits partisan gerrymandering, the General Assembly could consider partisanship to achieve certain legitimate goals. But given our constitution's recognition that proper government is founded "only" on the will of the people, consideration of partisanship in districting would be appropriate only to ensure that plans create competitive districts that are responsive to the will of the people. N.C. Const. art. I, § 2.

The trial court also wrongly read this Court's prior decisions to hold that "the creation of boundaries" are never subject to judicial review. Slip op. at 242-43, 245. Those decisions provide no support for the trial court's reasoning. None of the cases that the trial court cited, except one, even involved a constitutional challenge to electoral districts drawn by the General Assembly.[11] That can hardly be surprising, because this Court *has*

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[11] *See Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 13-14, 269 S.E.2d 142, 150-51 (1980) (resolving corporation's claims concerning municipal annexation); *State ex rel. Tillett v. Mustian*, 243 N.C. 564, 570, 91 S.E.2d 696, 700-01 (1956) (holding that local vote to disincorporate municipality did not comply with statutory requirements); *Carolina-Virginia Coastal Highway v. Coastal Tpk. Auth.*, 237 N.C. 52, 62, 74 S.E.2d 310, 317 (1953) (holding that legislature has authority to establish municipal corporations subject to constitutional limits); *Norfolk & S.R. Co. v. Washington Cnty.*, 154 N.C. 333, 70 S.E. 634, 635 (1911) (holding in tax dispute that legislature has authority to set county boundaries); *Howell v. Howell*, 151 N.C. 575, 577-78, 66 S.E. 571, 572-73 (1909) (rejecting statutory challenge to creation of special tax district).

repeatedly reviewed the General Assembly's decisions about drawing such districts, including in *Stephenson* itself. *See supra* pp 14-16.

The one case that the trial court cited that did involve a constitutional challenge to electoral districts was this Court's recent decision in *Dickson v. Rucho*. 367 N.C. 542, 575, 766 S.E.2d 238, 260 (2014), *rev'd on other grounds*, 575 U.S. 959 (2015). In that case, the Court's attention was largely focused on racial gerrymandering claims. *See id.* at 548-70, 766 S.E.2d at 244-57. Although the Court did summarily reject a claim that excessive use of partisanship in districting violated our constitution's good-of-the-whole clause, it did so only because, as the defendants pointed out, the plaintiffs had "proposed no standards for the Court" to resolve such claims. Defendants' Brief at 160, *Dickson*, 367 N.C. 542, 766 S.E.2d 238 (No. 201PA12-2). In response to that argument, plaintiffs again proposed no standards in their reply brief, ignoring the issue entirely. *See* Plaintiffs' Reply Brief, *Dickson*, 367 N.C. 542, 766 S.E.2d 238 (No. 201PA12-2).

Here, in contrast, the parties *have* provided judicially manageable standards to resolve partisan-gerrymandering claims. *See supra* pp 9-20. And unlike in *Dickson*, these cases do not concern claims under the good-of-

the-whole clause. This Court's narrow justiciability holding in *Dickson* thus has no bearing on the outcome here, where different claims are at issue.[12]

In sum, none of the reasons that the trial court provided to excuse its failure to protect our democracy from gerrymandering were persuasive.

IV. This Court Should Remedy These Partisan Gerrymanders Swiftly and Completely.

Finally, the Governor and the Attorney General respectfully submit that this Court should ensure that the constitutional violations here are remedied swiftly and completely. *See Stephenson*, 355 N.C. at 375-76, 562 S.E.2d at 392 (holding that North Carolina courts have authority to fashion remedies to districting plans that violate the state constitution). To assist this Court in remedying these violations, the Governor and the Attorney General respectfully make the following suggestions for this Court's consideration.

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[12] *Dickson*'s narrow holding, based on the arguments there, that claims under the good-of-the-whole clause are nonjusticiable does not limit the relevance of our constitution's sovereignty clause for this case. *See* N.C. Const. art. I, § 2 (affirming that "[a]ll political power is vested in and derived from the people" and that "all government of right originates from the people" and "is founded upon their will only"). After all, in *Lattimore*, this Court relied on the sovereignty clause to hold that clauses that protect the sovereignty of the people should be "liberally construed" to safeguard democracy. 120 N.C. at 428, 26 S.E. at 638.

First, if necessary, this Court could issue an interim order that further delays the primaries that are currently scheduled for May 17th. If this Court believes that it can decide these cases and ensure that all constitutional violations are remedied on the current primary schedule, then delaying primaries would be unnecessary. But if this Court concludes that additional time is required to ensure that future elections are held under constitutional maps, then it could—and should—further delay primaries to a later date.

Second, this Court could announce its decree in this case immediately, *before* releasing full opinions, to allow the remedial process to begin as soon as possible. Issuing a decree before releasing full opinions would be consistent with the approach of other courts in similar circumstances. For example, in 2018, when the Pennsylvania Supreme Court held that partisan gerrymandering violated Pennsylvania's charter, that court issued an order starting the remedial process before it released formal opinions. *See League of Women Voters v. Commonwealth*, 178 A.3d 737, 741-42 (Pa. 2018).

Third, this Court could manage the remedial process itself. This Court has sometimes, as in *Stephenson*, remanded for trial courts to manage this process. 355 N.C. at 385-86, 562 S.E.2d at 398. Here, however, it is respectfully suggested that it would be appropriate for this Court to oversee

the remedial process directly to ensure that the constitutional violations are cured promptly.

Fourth, this Court could provide the General Assembly an opportunity to prepare remedial plans if there is sufficient time to do so. In *Stephenson*, this Court held that the legislature "should be accorded the first opportunity to draw . . . new plans," but only "if so doing will not disrupt the timing of the . . . general election." 355 N.C. at 385, 562 S.E.2d at 398. Allowing the General Assembly to enact remedial plans would also be consistent with section 120-2.4(a) of the General Statutes, which requests that the General Assembly be provided two weeks to prepare such plans.

In such a decree, this Court should provide clear guidance to the General Assembly on how to draw districts that comply with the constitution. For example, the Court could direct the legislature to draw districts within 5% of the median outcome expected from nonpartisan redistricting criteria, at a statewide level, across a range of electoral circumstances. *Cf. Brown*, 462 U.S. at 842-43. This Court could make clear that plans that fall within 5% of that median outcome are presumptively valid, but still review any plans to ensure that they do not again unduly favor one political party in ways that cannot be explained through nonpartisan

redistricting criteria. *See Stephenson v. Barlett*, 357 N.C. 301, 314, 582 S.E.2d 247, 254 (2003) (holding that General Assembly's newly enacted remedial plans had failed to remedy past constitutional violations).

Fifth, this Court could appoint a special master to assist the Court in reviewing any remedial plans enacted by the General Assembly. *Stephenson*, 355 N.C. at 385 n.8, 562 S.E.2d at 398 n.8 (suggesting that trial court "consider whether a court-appointed expert would be of assistance in ensuring compliance"); *Common Cause*, 2019 WL 4569584, at *134 (immediately appointing referee to assist court upon invalidating plans).

This Court could direct the special master to immediately create a collection of plans, using a process similar to the one used by the parties' experts in these cases, that comply with the mandatory districting criteria that the General Assembly adopted in August 2021. *See* slip op. at 19-20.[13]

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[13] When the General Assembly selected its districting criteria, it made certain criteria (like drawing compact districts) mandatory, while it made others (like preserving municipal boundaries) permissive. *See* slip op. at 20. Below, the trial court found that the General Assembly used the discretion afforded by the permissive criteria to draw districts for partisan gain. *See, e.g.*, *id.* at 58, 179. Given the permissive nature of these criteria and the legislature's prior abuse of them, this Court could direct a special master to ignore the permissive criteria when creating a random collection of plans against which to compare remedial plans enacted by the General Assembly.

Those plans could then be used to assess whether the remedial plans enacted by the General Assembly comply with this Court's order. To assist the General Assembly in drawing remedial maps, this Court could release the special master's collection of plans to the General Assembly once the collection has been prepared. If the General Assembly fails to comply with the constitution's bar on partisan gerrymandering a second time, this Court could order the State to use one of the median plans created by the special master.

Finally, if this Court does order new remedial plans, it should clarify that those plans are not limited by section 120-2.4(a1) of the General Statutes. That provision purports to limit this Court's authority to remedy constitutional violations: It states that if "the General Assembly does not act to remedy any identified defects [in an invalidated plan], the court may impose an interim districting plan *for use in the next general election only*." N.C. Gen. Stat. § 120-2.4(a1) (emphasis added).

The General Assembly, however, lacks authority to place limits on this Court's power to remedy constitutional violations. This Court has long recognized that policies "recognized by the General Assembly" cannot limit the scope of this Court's authority to fashion remedies to constitutional

violations. *Corum*, 330 N.C. at 784-85, 413 S.E.2d at 291; *see also Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987) (holding that "inherent power" of courts cannot "be abridged by the legislature"). And at least with respect to state legislative districts, any interpretation of section 120-2.4(a1) that would allow mid-decade redistricting would independently violate our state's constitution. *See* N.C. Const. art. II, §§ 3, 5.

* * * * *

For all the reasons above, the Governor and the Attorney General respectfully urge this Court to hold that partisan gerrymandering violates our constitution. This Court is the people's only hope. The people of our State need this Court to uphold their right to self-government through free elections and to remedy these constitutional violations because the people have no other means to make sure that the General Assembly truly represents them. They cannot turn to the federal courts. *See Rucho*, 139 S. Ct. 2484. They cannot, unlike the people of many other states, propose constitutional amendments or ballot initiatives to prohibit gerrymandering. Only the General Assembly has that power. *See* N.C. Const. art. XIII. And as the record in this case shows, its members cannot reasonably be expected to voluntarily give up a power that lets them retain political power without

regard to the people's will. The Governor and Attorney General therefore urge this Court to fulfill its solemn duty under our constitution to guarantee our government's most foundational principle—that political power in our state is vested in and derived from the people and that the government is founded only upon their will.

CONCLUSION

Governor Cooper and Attorney General Stein respectfully request that this Court declare that the enacted plans are unconstitutional, enjoin their use in future elections, and grant any other appropriate relief.

This 21st day of January, 2022.

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