No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR., et al., Plaintiffs, REBECCA HARPER, et al., Plaintiffs, COMMON CAUSE, Plaintiff-Intervenor, v. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al., Defendants.	From Wake County

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BRIEF OF PLAINTIFFS-APPELLANTS
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., ET AL.

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR., et al., Plaintiffs, REBECCA HARPER, et al., Plaintiffs, COMMON CAUSE, Plaintiff-Intervenor, v. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al., Defendants.	From Wake County

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BRIEF OF PLAINTIFFS-APPELLANTS
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., ET AL.

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ISSUE PRESENTED

Did the trial court err in approving a remedial Senate redistricting plan that systematically prevents voters of the disfavored political party from translating their votes into seats on an equal basis, when Plaintiffs offered multiple alternative maps that treat all voters fairly while complying as well or better with traditional districting principles?

INTRODUCTION

In February 2022, this Court invalidated the redistricting plans the General Assembly enacted in November 2021 (the "2021 Enacted Plans") as "extreme partisan outliers" and held that, under our Constitution, lawful remedial plans must give "voters of all political parties substantially equal opportunity to translate votes into seats." *Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, ¶¶ 27, 163, 182, *petition for cert. filed*, 90 U.S.L.W. 3301 (U.S. Mar. 21, 2022) (No. 21-1271). It then remanded to the trial court "to oversee the redrawing of the maps by the General Assembly or, if necessary, by the court." *Id.* ¶ 223. These "new maps," the Court emphasized, must "ensure that the channeling of 'political power' from the people to their representatives … is done on equal terms"—"so that ours is a 'government of right' that 'originates from the people' and speaks with their voice." *Id.* (quoting N.C. CONST. art. I, § 2).

On remand, the trial court correctly rejected the General Assembly's remedial congressional plan because it did not satisfy this standard, and the court adopted its own, compliant map. (R pp 4876–77, 4884–88) It also accepted the General Assembly's remedial House plan, which passed with overwhelming bipartisan majorities in both legislative houses. (R pp 4881–82) The court erred, however, in approving the Legislative Defendants' Senate

plan (the "Legislative Senate Plan"), which passed on a party-line vote and fails to satisfy the standard this Court set. (R pp 4878–79)

This Court's decision set a clear standard: Districting plans are unlawful if "voters supporting one political party have their votes systematically devalued by having less opportunity to elect representatives to seats, compared to an equal number of voters of the favored party." *Harper*, 2022-NCSC-17, ¶ 162. A "meaningful … skew," the Court held, is lawful only if it "***necessarily*** results from North Carolina's political geography." *Id.* ¶ 163 (emphasis added).

The trial court, however, approved a party-line Senate plan that persists in favoring one political party over another, notwithstanding the will of North Carolina's voters. And it did so even though it had before it alternative remedial plans (from the NCLCV Plaintiffs and the *Harper* Plaintiffs) that all but eliminated this bias while complying as well or better with North Carolina's traditional neutral districting principles. Dr. Bernard Grofman—the expert upon whom the three Special Masters appointed by the trial court relied to redraw the General Assembly's congressional plan—underscored the point: When he compared the partisan bias in the Legislative Senate Plan to the partisan bias in the *Harper* and NCLCV Senate Maps, he found that "the legislatively proposed … map is much more extreme with respect to partisan bias than either of the alternatives," with the "bias … at least twice as high in the legislative map as in the alternatives." (R p 5042)

Indeed, Dr. Grofman found that the Legislative Senate Plan shared similar properties with the invalid congressional plan in that it was "very lopsidedly Republican." (R p 5042) Hence, as the person who drew the trial court's remedial congressional plan found, the Legislative Senate Plan does not provide an adequate remedy for the Legislative Defendants' partisan gerrymandering.

This Court should reverse the trial court's decision to approve an unlawful Senate map and should remand with directions to adopt a map that vindicates the principles of free and equal elections that the North Carolina Constitution guarantees.

STATEMENT OF THE CASE

Plaintiffs North Carolina League of Conservation Voters, Inc., et al., filed this action against Defendants on 16 November 2021, along with a motion for a preliminary injunction. (R pp 30–127) On 19 November 2021, the Chief Justice assigned Judges A. Graham Shirley, Nathaniel J. Poovey, and Dawn M. Layton to serve on a "Three-Judge Panel for Redistricting Challenges, as defined in N.C.G.S. § 1-267.1." (R p 177) On 3 December 2021, this case was consolidated with *Harper v. Hall*, No. 21-CVS-500085, in which the plaintiffs also sought a preliminary injunction. (R pp 208, 867–69) Also on 3 December 2021, the panel declared partisan-gerrymandering claims "not justiciable" under the North Carolina Constitution and denied the preliminary-injunction

motions. (R pp 877, 883)

Plaintiffs appealed and sought immediate injunctive relief in this Court. (R pp 885–90) On 8 December 2021, this Court granted a preliminary injunction and moved the 2022 primary election to 17 May 2022. (R pp 893–95) This Court also ordered the panel to issue a final judgment on Plaintiffs' claims by 11 January 2022. (R p 894) On remand, Common Cause sought and obtained permission to intervene as a plaintiff. (R pp 965, 1237)

From 3 January to 6 January 2022, the panel held a bench trial. (R p 3523) On 11 January 2022, the panel entered judgment for Defendants. (R p 3769) Pursuant to this Court's 8 December 2021 Order, the NCLCV Plaintiffs filed their Notice of Appeal in this Court the same day. (R pp 894, 3772)

On 4 February 2022, this Court reversed the panel's judgment and issued a detailed Order invalidating the 2021 Enacted Plans and directing the panel to hold remedial proceedings. (R pp 3816–24) On 14 February 2022, this Court issued a full Opinion detailing its reasoning. *Harper*, 2022-NCSC-17.

On 17 February 2022, the General Assembly enacted a remedial state House plan with overwhelming bipartisan support. (R p 4881; SL-2022-4) It enacted remedial congressional and state Senate plans, however, on party-line votes. (R pp 4876, 4878; SL-2022-2; SL-2022-3) The NCLCV Plaintiffs and other Plaintiffs submitted alternative remedial plans to the panel on 18 February 2022. (R pp 4445–594)

The trial court appointed Justice Robert F. Orr (Ret.), Justice Robert H. Edmunds, Jr. (Ret.), and Judge Thomas W. Ross (Ret.) to serve as Special Masters to assist with assessing and potentially developing remedial plans. (R pp 4179–80) Pursuant to the court's appointment order, the Special Masters engaged four expert advisors—Dr. Bernard Grofman, Dr. Tyler Jarvis, Dr. Eric McGhee, and Dr. Samuel Wang—to assist with their task. (R p 4871)

Under the schedule this Court set, the parties submitted comments on the proposed remedial plans on 21 February 2022 (R pp 4618–54, 4738–857); and on 23 February 2022, the panel issued its remedial order (R pp 4866–88). The panel approved the remedial House and Senate plans. (R pp 4880, 4884, 4888) The panel rejected the legislature's remedial congressional plan and adopted a map—developed by the Special Masters and Dr. Grofman—that modified the legislature's plan to meet the standard that this Court had established. (R pp 4875–77, 4884–88, 4894) That same day, all Plaintiffs filed notices of appeal and moved this Court for an emergency stay of the order accepting the state Senate map; Plaintiff Common Cause moved for a stay of the order accepting the state House map. (R pp 5147–59) The Legislative Defendants filed a notice of appeal and moved for a stay on the congressional map. (R p 5142)

This Court, with no noted dissents, denied all stay motions on 23 February. *Harper v. Hall*, 868 S.E.2d 100, 102 (N.C. 2022) (mem.); *Harper v.*

Hall, 868 S.E.2d 97, 100 (N.C. 2022) (mem.); *Harper v. Hall*, 868 S.E.2d 95, 97 (N.C. 2022) (mem.); *Harper v. Hall*, 868 S.E.2d 90, 92–93 (N.C. 2022) (mem.).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This Court has jurisdiction under N.C.G.S. §§ 7A-27 and 7A-31 because Plaintiffs are appealing the trial court's final judgment, because this Court's 8 December 2021 Order certified the case for discretionary review prior to determination by the Court of Appeals, and because this Court's 4 February 2022 Order contemplated that review of the trial court's remedial rulings would occur in this Court. (R pp 894, 3823–24) Pursuant to those Orders, all Plaintiffs filed Notices of Appeal to this Court from the trial court's final judgment on 23 February 2022. (R pp 5147–59)

BACKGROUND

On 4 February 2022, this Court held that the North Carolina General Assembly's 2021 Enacted Plans were "unconstitutional beyond a reasonable doubt under the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause of the North Carolina Constitution." (R p 3819) The Court ruled that the 2021 Enacted Plans were "unlawful partisan gerrymanders" that violated the "fundamental right to vote." (R pp 3819–20) That fundamental right, the Court explained, "includes the right to enjoy 'substantially equal voting power and substantially equal legislative representation.'" (R p 3820 (quoting *Stephenson v. Bartlett*, 355

N.C. 354, 382, 562 S.E.2d 377, 396 (2002))) The Court therefore "enjoin[ed] the use of these maps in any future elections, commencing with the upcoming candidate filing period scheduled to commence on 24 February 2022 for elections in 2022, including primaries scheduled to take place on 17 May 2022." (R p 3820)

The Court gave the General Assembly "the opportunity to submit new … districting plans that satisfy all provisions of the North Carolina Constitution," consistent with N.C.G.S. § 120-2.4(a). (R p 3823) Any such plan, the Court emphasized, had to "give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan." (R p 3822) The Court remanded the matter to the trial court for remedial proceedings.

On 14 February 2022, this Court issued a full Opinion. *Harper*, 2022-NCSC-17. In that Opinion, the Court explained that constitutional plans must "give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan" and that a "meaningful partisan skew" is tolerable only if it "necessarily results from North Carolina's unique political geography." *Id.* ¶ 163. The Court declined to identify particular metrics or thresholds for determining an unconstitutional partisan gerrymander but noted that several methods—the mean-median difference analysis, efficiency-gap analysis, close-votes-close-seats analysis, and partisan-symmetry analysis—could be useful. *Id.*

On 18 February 2022, the General Assembly and the other parties, including the NCLCV Plaintiffs, submitted proposed remedial maps and accompanying written submissions to the trial court. (R pp 4185–607) The maps submitted by the NCLCV Plaintiffs were identical to those they had submitted with their Complaint on 16 November 2021, litigated through discovery and trial, and addressed in their briefing and argument before this Court. (R pp 4475, 4503, 4523) On 21 February 2022, all parties submitted comments on each others' proposed remedial maps. (R pp 4618–73, 4738–57)

On 23 February 2022, the Special Masters issued a report on the proposed remedial plans. (R pp 4890–95) In addition to the report filed by the Special Masters, each of the Special Masters' expert assistants also submitted individual reports with their findings. (R pp 5027–136) Pursuant to the reports' recommendations, the trial court rejected the congressional plan enacted by the General Assembly. (R pp 4876–77, 4885–88) In lieu of accepting any of the remedial congressional plans proposed by the Plaintiffs, the Special Masters and their expert assistant Dr. Grofman modified the General Assembly's plan. (R pp 4884–85) The court, however, accepted the Legislative Senate Plan. (R pp 4878–80)

STANDARD OF REVIEW

On appeal, "[c]onclusions of law are reviewed de novo." *Dickson v. Rucho*, 367 N.C. 542, 551, 766 S.E.2d 238, 245 (2014), *summarily vacated on*

other grounds, 575 U.S. 959 (2015). Factual findings may be set aside if not "supported by competent evidence found by the trial judge." *Id.*

ARGUMENT

I. The Legislative Senate Plan Is a Partisan Gerrymander that Fails the Unambiguous Standard that this Court Set.

When this Court struck down the plans that the General Assembly enacted in November 2021, it set a clear standard for remedial plans to satisfy: Plans must treat voters of both political parties fairly, so long as North Carolina's unique political geography permits doing so. The Legislative Senate Plan fails that test. It is not fair, or close to fair. Instead, this plan—passed over unanimous Democratic opposition—is again severely biased to favor Republicans. And nothing in North Carolina's political geography dictates that bias. The experts retained to assist the Special Masters reached similar conclusions. The trial court's decision to nonetheless approve the Legislative Senate Plan was erroneous.

A. This Court Required that Redistricting Plans Give "Voters of All Political Parties Substantially Equal Opportunity to Translate Votes into Seats."

This Court grounded its 4 February Order and 14 February Opinion on a clear principle. "A system of fair elections is foundational to self-government." *Harper*, 2022-NCSC-17, ¶ 3 (quoting *Comm. to Elect Dan Forest v. Emps. Political Action Comm.*, 376 N.C. 558, 2021-NCSC-6, ¶ 86 (Newby, C.J., concurring in the result)). And under the North Carolina Constitution,

redistricting plans must "give … voters of all political parties substantially equal opportunity to translate votes into seats." *Id.* ¶ 163. Or put otherwise, maps must create "a level playing field for all voters." *Id.* ¶ 164. That was no loose language, or offhand remark. It was the Court's carefully considered statement of its holding, as also reflected in its 4 February Order. (R pp 3821–22; *see Harper*, 2022-NCSC-17, ¶¶ 160–163, 179–180)

This Court located that core principle—a principle of partisan fairness—in the constitutional provisions the Plaintiffs invoked: "When the legislature denies to certain voters … substantially equal voting power," the Court explained, "elections are not free and do not serve to effectively ascertain the will of the people," in violation of the Free Elections Clause. *Harper*, 2022-NCSC-17, ¶ 140. Likewise, when redistricting plans do not treat voters of both parties evenhandedly, they violate the Equal Protection Clause's guarantees of "substantially equal voting power," "substantially equal legislative representation," and substantially equal "representational influence." *Id.* ¶ 148 (quoting *Stephenson*, 355 N.C. at 377, 562 S.E.2d at 393). Finally, when a redistricting plan "systematically diminishes or dilutes the power of votes on the basis of party affiliation," it violates the core promises of the Free Speech and Free Assembly Clauses. *Id.* ¶ 157.

The Court thus held that a redistricting plan is unconstitutional where the plan "makes it systematically more difficult for a voter to aggregate his or

her vote with other likeminded voters." *Id.* ¶ 180. The Court also identified particular metrics courts might deploy. A violation can be measured "by comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect." *Id.* ¶ 161. Alternatively, a plan's unconstitutionality can be demonstrated "by comparing the relative chances of voters from each party electing a supermajority or majority of representatives under various possible electoral conditions." *Id.*

This Court also described various quantitative measures other courts had employed, including "median-mean difference analysis; efficiency gap analysis; close-votes-close[-]seats analysis," and "partisan symmetry analysis." *Id.* ¶ 180. The Court, however, was careful to emphasize that it was identifying only "possible" metrics that "may" be helpful. *Id.* ¶¶ 163–164; *accord id.* ¶ 165 (stating that Dr. Duchin's "close votes, close seats" measure "could be considered"); *id.* ¶ 166 (noting that a particular mean-median difference "could be a threshold"); *id.* ¶ 167 (recounting what other "courts have found" with respect to the efficiency gap). Those metrics could serve to inform, but could never replace, the core principle this Court announced: Plans must "give … voters of all political parties substantially equal opportunity to translate votes into seats," and any "meaningful … skew" can be constitutional

only if it "***necessarily*** results from North Carolina's unique political geography." *Id.* ¶ 163 (emphasis added). If a map meets that standard, it is presumptively constitutional. *Id.* If not, not.

As the 23 February 2022 amicus brief that the Governor and the Attorney General filed in this Court explained, this standard invites a "narrow tailoring" inquiry: "[I]f a court is presented with two plans that both satisfy neutral criteria but diverge in how well they allow voters to translate votes into seats, then the plan that performed less well could not [satisfy this Court's standard]." Br. of Amici Curiae Gov. Roy A. Cooper, III & Att'y Gen. Joshua H. Stein 9, *Harper v. Hall*, No. 413PA21 (N.C. Feb. 23, 2022) ("Gov./AG Br."). Hence, if "an alternative plan imposes meaningfully lesser burdens on the rights of voters than an enacted plan while still complying with neutral redistricting criteria, the enacted plan would fail narrow tailoring." *Id.*

B. The Legislative Senate Plan Does Not Give "Voters of All Political Parties Substantially Equal Opportunity to Translate Votes into Seats."

The Legislative Senate Plan fails to comply with the principle this Court established—that districting plans must "give … voters of all political parties substantially equal opportunity to translate votes into seats." *Harper*, 2022-NCSC-17, ¶ 163. The trial court had before it multiple alternative plans—including one offered by the NCLCV Plaintiffs—that all but eliminated the substantial bias in the Legislative Senate Plan, while complying as well or

better with traditional districting criteria. By nonetheless approving the Legislative Senate Plan, the trial court erred.

Every expert assistant retained by the Special Masters concluded that the Legislative Senate Plan fails to treat voters evenhandedly.

Dr. Grofman. Dr. Grofman, a political science professor at the University of California, Irvine, whom the Special Masters employed to redraw the Legislature's invalid congressional plan, concluded that the Legislative Senate Plan was "very lopsidedly Republican." (R pp 4871, 4894, 5042) As Dr. Grofman explained, the plan creates "24 Republican leaning districts that, based on averaged recent data will, barring a political tsunami, elect Republicans; 17 Democratic leaning districts that will, barring a political tsunami, elect Democrats;" and 9 competitive districts. (R p 5042) Dr. Grofman pointed out that "Democrats would have to win nine of the nine competitive seats to win a majority in the Senate." (R p 5042) This skew, he explained, translated to a "***substantial*** pro-Republican bias" across the map. (R p 5042 (emphasis in original))

Dr. Grofman also emphasized that "[w]hen we compare these levels of partisan bias to the level of partisan bias in the Harper and NCLCV [Senate] maps we see that each of these two bias measures is at least twice as high in the legislative map as in the alternatives and, even when we look at differences in absolute value rather than ratios, it is still clear that the legislatively

proposed … map is much more extreme with respect to partisan bias than either of the alternatives." (R p 5042) Hence, Dr. Grofman concluded: "Because they all point in the same direction, the political effects statistical indicators of partisan gerrymandering argue for the conclusion that this NC Senate map should be viewed as a ***pro-Republican gerrymander***. While, overall, the dilutive effects of this map do not appear quite as severe as in the congressional map they are still … ***quite substantial***." (R p 5043 (emphasis added))

Dr. McGhee. Dr. Eric McGhee, Senior Fellow at the Public Policy Institute of California, emphasized that "in a tied election Republicans would still hold 27 or 28 [of the Senate's 50] seats" under the Legislative Senate Plan, while "Democrats would need to win as much as 53 percent of the vote to claim 25 seats." (R pp 4871, 5074) Dr. McGhee also found that the plan had a mean-median difference of 2.2%.[1] (R p 5072) That figure far exceeds the mean-median difference in the NCLCV Plaintiffs' plan (1.1%) and the *Harper* Plaintiffs' plan (0.8%), *id.*—as well as the average historical mean-median

[1] The mean-median difference "is just like it sounds: it is the difference between the average district vote share and the median district vote share." (R p 5047) The metric shows that one party is favored when that party's "median vote share is higher than its mean vote share." (R p 5047)

difference for North Carolina's congressional districting plans from 1972 to 2016 (about 1.0%), *see Harper*, 2022-NCSC-17 ¶ 166.

Dr. Jarvis. Dr. Tyler Jarvis, a mathematics professor at Brigham Young University, used electoral data from 11 statewide elections and analyzed the Legislative Senate Plan against an ensemble of tens of thousands of possible Senate maps. (R pp 2573, 4871, 5103, 5116) He concluded that the legislature's plan "is often a significant outlier in favor of the Republicans." (R pp 5103, 5116) He also found "strong evidence of partisan gerrymandering" in the Legislative Senate Plan. (R p 5119)

Dr. Wang. Dr. Samuel Wang, a Princeton University professor, concluded that the Legislative Senate Plan favored Republicans "in [all] six metrics evaluated: seat partisan asymmetry, mean-median difference, partisan bias, lopsided wins, declination angle, and efficiency gap." (R pp 4871, 5075) He found that the partisan asymmetry was 2.1 seats in the Legislative Senate Plan while the NCLCV Plaintiffs' Senate plan showed "mixed or no advantage for [either party]."[2] (R p 5075) Dr. Wang concluded that "[i]n no

[2] Partisan symmetry "is the idea that parties with equal vote shares should receive equal seat shares." (R p 5046) As calculated by Dr. Wang, a partisan asymmetry of 2.1 seats shows that, on average, Republicans will win 2.1 more Senate seats than Democrats given identical vote shares. (R p 5077)

case did the Legislative Defendants' remedial map come closer to partisan symmetry than the plaintiffs' alternative(s)." (R p 5075)

Those conclusions accord with the evidence the NCLCV Plaintiffs (and other Plaintiffs) presented below. Indeed, to see that the Legislative Senate Plan fails to satisfy the core principle this Court established, no complicated calculations or statistics are required. The NCLCV Plaintiffs' expert, Tufts University mathematician Dr. Moon Duchin, overlaid the Legislative Senate Plan (along with the equivalent NCLCV and *Harper* maps) on all 52 contested partisan statewide general elections since 2012, which provide a rich dataset that identifies how plans would perform under historical election patterns. (*See* R p 4808) A map that treated the parties evenhandedly would yield closely divided outcomes in nearly tied elections and would treat narrow Democratic victories symmetrically to narrow Republican victories, without favoring one party over the other.

The Legislative Senate Plan does not treat the parties evenhandedly:

- ***Near ties.*** In the 9 nearly tied statewide elections (of 52 total) decided by less than 1 percentage points, Republican candidates carried 27 or 28 of the 50 Senate districts in 8 elections; Democratic candidates typically carried 22 or 23 districts, and reached 25 wins—a bare tie—just once. (R p 4808)
- ***1 to 3 pp victories.*** In the 12 elections that ***Republican*** statewide candidates won by 1 to 3 percentage points, Republican candidates carried an average of more than 28 districts and twice carried a supermajority of 30 districts. (R p 4808)

> By contrast, in the 5 elections that ***Democratic*** statewide candidates won by 1 to 3 percentage points, Democratic candidates often did not win even a majority of districts and averaged only 25 Senate districts of 50. (R p 4808)

Table 1 summarizes the same information—and vividly underscores the skew in the Legislative Senate Plan.

Table 1: Senate Seats Across Remedial Plans for Close Elections

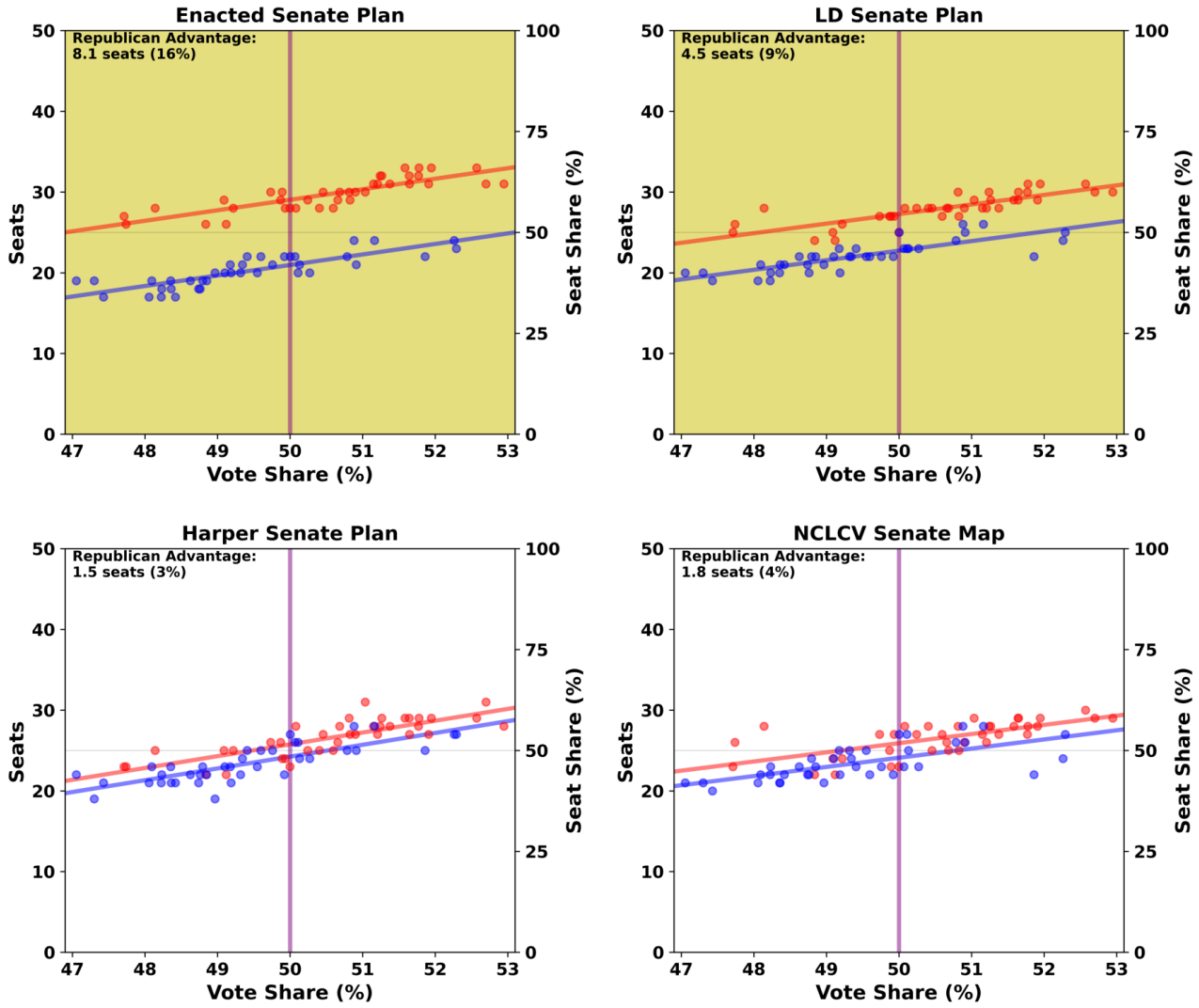
		Leg. Senate Plan	Harper Senate Plan	NCLCV Senate Map
Within 1 pp	Avg. R Seats	27.2	25.3	25.9
	Avg. D Seats	22.8	24.7	24.1
1–3 pp R Wins	Avg. R Seats	28.3	27.8	26.8
	# R Supermajorities	2	1	0
1–3 pp D Wins	Avg. D Seats	25.2	26.8	26.6
	# D Supermajorities	0	0	0

Source: Data derived from R p 4808. Supermajority outcomes are defined as any election in which a party wins 60% or more of the seats (*i.e.*, at least 30 of the 50 seats).

Figure 1 further illustrates this lack of symmetry and again shows that the Legislative Senate Plan contains a persistent partisan skew, giving Republicans a 4- or 5-seat advantage. By contrast, the Plaintiffs' proposed maps avoid that partisan bias, providing Republicans with an advantage of 1 to 2 seats. The residual partisan skew in the Plaintiffs' maps is likely due to the interaction of political geography and the Whole County Provisions, as

interpreted by this Court. (Mustard-yellow shading in the below figures reflect plans with an especially large partisan bias.)

Figure 1: Republican and Democratic Seat Shares for Elections Within 6 Points in the Enacted Senate Plan and Proposed Remedial Plans



Source: R pp 4790, 4808. The "LD Senate Plan" in this figure is referred to as the Legislative Senate Plan in this brief.

The NCLCV Senate Map again underscores that, while the Whole County Provisions may tend to produce some modest partisan bias favoring

Republicans, the Legislative Senate Plan's bias vastly exceeds what political geography "necessarily" yields. *Harper*, 2022-NCSC-17, ¶ 163.

On all the metrics just described, the NCLCV Senate Map's scores improve dramatically on those of the Legislative Senate Plan: Compared to the Legislative Senate Plan, the NCLCV Senate Map would have reduced partisan bias from 4.4% to only 1.5%, would have reduced the mean-median difference from 2.0% to only 0.9%, and would have reduced the efficiency gap from 4.5% to only 2.0%.[3] (R p 4814) Moreover, in the nine nearly tied elections decided by less than 1%, Democratic candidates average between 24 and 25 seats in the NCLCV Senate Map—just about what one would expect. (R p 4808) When Republican statewide candidates prevail by 1% to 3%, Republican candidates win an average of 27 Senate seats—and when Democratic statewide candidates prevail by 1% to 3%, they receive the same 27 seats on average. (R p 4808) And so on. That is the type of fair, symmetric plan the Legislative Defendants could have drawn, but chose not to draw.

[3] The experts often followed a convention of using negative symbols to indicate a partisan bias favoring Republicans. The signs are omitted here for clarity, given that all cited figures illustrate bias favoring Republicans. While the experts used different methodologies and source materials that in some cases generated differing numbers, all expert assistants' calculations agreed that the Legislative Senate Plan is biased in favor of Republicans, and substantially more biased than the Plaintiffs' remedial maps. (R pp 5042–43, 5072–75, 5085, 5119)

A stark illustration of the skew comes from the results the Legislative Senate Plan yields across all 33 statewide elections decided by 4 points or less. As Dr. Duchin explained, in an evenhanded map, close elections will generally translate into close seat shares for the two political parties, and any departures will not systematically advantage one party. *See Harper*, 2022-NCSC-17, ¶ 165 ("Under th[e] [close votes, close seats] method, … a plan which persistently resulted in the same level of partisan advantage to one party when the vote was closer than 52%, could be considered presumptively unconstitutional."); R pp 2719, 4807.

In those close elections, one would expect a fair map to yield something like 23 to 27 seats for each party and to minimize the extent to which departures favor one party or another. (R pp 2719, 4808; T3 p 430:4–18) While the Whole County Provisions produce some departures from that standard in both the NCLCV Senate Map and the Legislative Senate Plan, the Legislative Senate Plan does so in ***seven additional elections***. All those departures favor Republicans, producing a total of ***23 additional Republican seats*** (*i.e.*, seats above 27). (R p 4808) More than that, the NCLCV Senate Map ***never*** translates a close election within 4 points into a Republican supermajority; the Legislative Senate Plan does so five times (that is, in 22% of the 23 elections that Republican statewide candidates won by less than 4 points). (R p 4808)

The Legislative Senate Plan yields these skewed results, moreover, while also traversing county lines seven times more than does the NCLCV Senate Map (96 county traversals versus 89). *Compare* Ex. 12270, 12330–37, *with* R p 4571. The two plans' Polsby-Popper geographic-compactness scores are nearly identical (0.38 for the Legislative Senate Plan and 0.37 for the NCLCV Map), *compare* Ex. 12273, *with* Ex. 15598; and the NCLCV Senate Map splits fewer municipalities (with the Legislative Senate Plan splitting 65 municipalities, of which 52 involve population, and the NCLCV Senate Map splitting 51 and 41, respectively). *Compare* Ex. 12353, *with* Ex. 15531–47.

So again, the Legislative Senate Plan's poor results on partisan-fairness metrics are not driven by political geography. They are due to partisan gerrymandering. And again, these results violate this Court's mandate that plans must give all voters "substantially equal opportunity to translate votes into seats." *Harper*, 2022-NCSC-17, ¶ 163.

C. The Trial Court Erred in Approving a Senate Plan that Failed to Comply with this Court's Standard.

The trial court made two types of errors in its decision. The court first misunderstood the standard this Court set. It then misapplied its own incorrect legal standards to the facts.

1. The Trial Court Applied Legal Standards that Contradict this Court's Decision.

In affirming the Legislative Senate Plan, the trial court committed three legal errors that misapprehend this Court's Opinion.

First, and most fundamentally, the trial court erred in grounding its decision on the view that this Court's Opinion established dispositive "statistical ranges" for constitutional redistricting plans. (R p 4879) This Court specifically said it was ***not*** "identify[ing] … precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Harper*, 2022-NCSC-17, ¶ 163. The trial court simply overlooked all the exhaustive analysis the NCLCV Plaintiffs (and other Plaintiffs) provided—summarized above—showing that the Legislative Senate Plan failed the Constitution's core command to give voters of all political parties substantially equal opportunity to translate votes into seats. *Id.*; *see supra* pp. 13–22.

Indeed, the reports from the Special Masters' expert assistants underscore why this Court wisely eschewed reliance on specific numerical thresholds. As to the mean-median metric, for example, Dr. Grofman explained that, while it "is a very useful and easy to calculate tool," it "may be easier to manipulate by mapmakers than some other measures." (R p 5030) In the Legislative Senate Plan in particular, Dr. Grofman explained that

"while the median district again looks a lot like the statewide average, but again with a slight Republican edge, the median is only one district and we must look at the overall map." (R p 5042) Dr. Grofman emphasized that the "4.07% seats bias still suggests a ***substantial*** pro-Republican bias in terms of the likelihood that a majority of the voters will be able to win a majority of the seats, even though it is one percentage point or so lower than the comparable statistic in the congressional map, while the 2.00% vote bias suggests that only a win by considerably more than 50% of the statewide vote can yield the Democrats a majority of the seats."[4] (R p 5042 (emphasis in original))

Second, the trial court dismissed Plaintiffs' arguments—showing that the Legislative Senate Plan fails to provide all voters substantially equal opportunity to translate votes into seats—on the ground that these arguments urged "proportional representation." (R p 4886) But as this Court has already explained, ensuring that voters have the same opportunity to elect a majority or supermajority of representatives "is not a strict proportionality requirement." *Harper*, 2022-NCSC-17, ¶ 169.

Thus, NCLCV Plaintiffs do not argue that if Democratic candidates earn (say) 53% of the statewide vote, Democratic candidates should win 53% of the

[4] Seats bias refers to the seat share less than 50% that a party will obtain if it wins 50% of the votes. (R pp 5037, 5042) Votes bias refers to the fraction of the votes more than 50% that a party must win to obtain 50% of the seats. (R pp 5037, 5042)

seats. Instead, they argue for symmetry: If Democratic candidates in one election year get ***the same*** vote share as Republican candidates in the next election year, they should receive roughly the same seat share. For example, if the General Assembly draws a Senate map that usually gives Republican candidates a veto-proof supermajority in the Senate when they win only 51.5% to 53% of the statewide vote, then the same plan should not condemn Democratic candidates that win the same share of the vote to ***minority*** status, as the Legislative Senate Plan often does (as shown above).

What Plaintiffs have urged thus is not proportional representation. *Harper*, 2022-NCSC-17, ¶ 169. It faithfully applies the core principle this Court announced—that lawful plans must "give … voters of all political parties substantially equal opportunity to translate votes into seats." *Id.* ¶ 163.

Third, the trial court improperly accorded the Legislative Senate Plan a presumption of constitutionality owed to ***evenhanded*** districting maps and neglected its duty to fully remedy the legislature's constitutional violations. The Special Masters recommended approving the Legislative Senate Plan largely because they "recommend[ed] to the trial court that it give appropriate deference to the General Assembly." (R p 4900) The trial court then approved the Special Masters' recommendations. (R pp 4874–75, 4879, 4888)

The proceeding below, however, was a remedial proceeding in which the General Assembly's 2021 redistricting plans had ***already*** been invalidated as

extreme partisan gerrymanders. And this Court had expressly identified what facts would entitle the General Assembly to a presumption of constitutionality: If "there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats …, then the plan is presumptively constitutional." *Harper*, 2022-NCSC-17, ¶ 163. Because the Legislative Senate Plan failed to satisfy that standard—as shown above—no presumption of constitutionality applies.

To the contrary, Plaintiffs are entitled to a remedial plan "that will fully correct past wrongs" and provide all voters genuinely equal opportunity. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 239 (4th Cir. 2016). As the Fourth Circuit explained in its 2016 invalidation of the General Assembly's voter-identification law, "the remedy for an unconstitutional law must completely cure the harm wrought by the prior law." *Id.* at 240. It was not enough that the General Assembly had amended the voter-identification law, following a successful lawsuit, to institute a partial cure—in the form of an exception for voters who declared they faced a reasonable impediment to obtaining identification—because the record did not show that the exception "fully cure[d]" the constitutional harm. *Id.* The trial court was obligated to "ensure that [the challenged] provisions do not impose any lingering burden on … voters." *Id.* And because the exception "f[ell] short of the remedy that the Supreme Court has consistently applied in cases of this nature," it was

inadequate. *Id.*; *see also Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 423–24 (1977) (Brennan, J., concurring in the judgment) (reinforcing the court's "duty to remedy ***fully*** those constitutional violations it finds" in the context of school-desegregation cases, in light of the "paramount importance of the constitutional rights being enforced" (emphasis added)); *Covington v. North Carolina*, No. 15CV399, 2017 WL 44840, at *2 (M.D.N.C. Jan. 4, 2017) ("[C]ourts must 'provid[e] remedies ***fully*** adequate to redress the constitutional violations which have been adjudicated and must be rectified.'" (quoting *White v. Weiser*, 412 U.S. 783, 797 (1973))).

The same is true here. North Carolina voters are entitled to a full cure for the violations of their voting rights.

2. The Trial Court Made Factual Findings that Were Clearly Erroneous and Were Unsupported by Evidence.

The trial court compounded its misapplication of this Court's Opinion by making three clear factual errors that were unsupported by evidence.

First, even accepting the trial court's incorrect holding that this Court had established presumptive thresholds based on specific quantitative metrics, the trial court clearly erred in concluding that the Legislative Senate Plan satisfied those metrics. The trial court adopted the finding that "a majority" of the Special Masters' expert assistants found that the Legislative Senate Plan had a mean-median difference of less than 1%. (R p 4892) But in fact,

two of the four expert assistants to the Special Masters—Dr. Jarvis and Dr. McGhee—calculated mean-median differences for the Legislative Senate Plan that exceeded the trial court's 1% threshold. (R pp 5072, 5124)[5] And averaging the Special Masters' scores produces a mean-median difference of 1.29%. (R pp 5039, 5072, 5086, 5124) So even if this Court had actually attached controlling significance to such thresholds, this analysis would show that the Legislative Senate Plan falls on the wrong side of it. *Cf. Harper*, 2022-NCSC-17, ¶ 166.

Second*,** the trial court clearly erred when it concluded that, "to the extent there remains a partisan skew in the [Legislative] Senate Plan, that skew is explained by the political geography of North Carolina." (R p 4879) Undisputed record evidence established that the NCLCV Senate Map (and the *Harper* Plaintiffs' remedial plan) treated voters of both parties fairly while also respecting traditional districting principles. (R pp 4814, 5075, 5097, 5116; *supra* pp. 13–22) Hence, the Legislative Senate Plan does not satisfy the standard this Court set—namely, that "meaningful" partisan bias is permissible only if it "necessarily*** results from North Carolina's unique political geography." *Harper*, 2022-NCSC-17, ¶ 163 (emphasis added). That

[5] In her report, Dr. Duchin evaluated all 52 of the most recent statewide contested partisan elections and showed that the average mean-median score is 2.0%—a robust partisan skew that holds even when examining only non-judicial or up-ballot statewide elections. (R p 4814)

is, as the Governor's and Attorney General's amicus brief explained, akin to a narrow-tailoring standard. *Supra* p. 13. And North Carolina's political geography cannot ***necessarily*** have yielded the skew in the Legislative Senate Plan when multiple alternative plans exhibited far less skew while being as respectful or more respectful than the Legislative Senate Plan to traditional districting principles such as compactness and county integrity.

Indeed, this point again underscores why this Court correctly eschewed the bright-line metrics that the trial court adopted: Even if a map falls within particular statistical ranges calculated using "useful and easy to calculate tools," the map can still create—and intentionally create—"substantial … bias" that fairer maps can readily avoid. (R pp 5030, 5042)

Third, the trial court erred because even if (counterfactually) the Legislative Defendants were entitled to a presumption of constitutionality, Plaintiffs overcame any such presumption. That is so for reasons already explained: The Legislative Senate Plan systematically awards Republican candidates more seats than Democratic candidates for the same vote shares. *Supra* pp. 13–19. Without any justification based on political geography, the Plan makes it far easier for Republican candidates to turn votes into governing majorities. *Supra* pp. 13–22. And it translates modest Republican wins statewide into Republican Senate supermajorities—while all but precluding

Democrats from obtaining supermajorities. *Supra* p. 18. Those facts overcome any presumption of constitutionality that might apply.

II. The Court Should Ensure that Lawful Maps Endure.

In ordering a lawful Senate map, the Court should clarify that such a map will stay in effect for the remainder of the decade pursuant to the dictates of Article II, Sections 3 and 5 of the North Carolina Constitution. The Constitution provides that "[w]hen established, the [House and] [S]enate districts and the apportionment of [Representatives and] Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress." N.C. CONST. art. II, §§ 3(4), 5(4). That plain and unambiguous language prohibits the General Assembly from engaging in mid-decade redistricting to change legislative district boundaries once established. *See Granville Cnty. Comm'rs v. Ballard*, 69 N.C. 18, 20–21 (1873).

Because the NCLCV Plaintiffs have not contested the validity of the Remedial House Plan (S.L. 2022-4, also known as House Bill 980, enacted 17 February 2022) and the trial court approved the Remedial House Plan in its 23 February Order, this Court should decree that under Article II, Section 5(4) of the North Carolina Constitution, the representative districts for the House are established and shall remain unaltered until the return of another federal decennial census.

This Court should enter the same decree as to the Senate districts under Article II, Section 3(4) once this appeal is resolved and a constitutionally compliant Senate map is adopted. While N.C.G.S. § 120-2.4(a1) purports to make any court-drawn remedial map effective "for … the next general election only," that statute violates the Constitution's bans on legislative mid-decade redistricting, *see* N.C. CONST. art. II, §§ 3(4), 5(4), and is void. As the Governor and the Attorney General explain, *see* Gov./AG Br. 19–23, the General Assembly cannot limit the scope of judicial remedies for constitutional violations, *see Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 330 N.C. 761, 785–86, 413 S.E.2d 276, 291 (1992); *Midgett v. N.C. State Highway Comm'n*, 260 N.C. 241, 249–50, 132 S.E.2d 599, 607–08 (1963), *overruled on other grounds by Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 304 S.E.2d 164 (1983). Nor can judicial remedies in redistricting cases violate the State Constitution. *See Stephenson v. Bartlett*, 355 N.C. 354, 376, 562 S.E.2d 377, 392–93 (2002). Thus, neither the legislature nor the judiciary may limit the duration of any court-mandated remedial Senate plan prior to the next census.

CONCLUSION

The decision below should be reversed and the case remanded for the adoption of the NCLCV Senate Map or some other remedial Senate map that complies with the standard this Court set.

Respectfully submitted this 27th day of June, 2022.

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CERTIFICATE OF SERVICE

Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I hereby certify that the foregoing document has been filed with the Clerk of the North Carolina Supreme Court by electronic submission. I further certify that a copy of this document has been duly served upon the following counsel of record by email:

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This the 27th day of June, 2022.

Electronically Submitted
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No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR., et al., Plaintiffs, REBECCA HARPER, et al., Plaintiffs, COMMON CAUSE, Plaintiff-Intervenor, v. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al., Defendants.	From Wake County

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ADDENDUM OF PLAINTIFFS-APPELLANTS
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., ET AL.

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CONTENTS OF ADDENDUM

Covington v. North Carolina, No. 15CV399,
2017 WL 44840 (M.D.N.C. Jan. 4, 2017).....Add. 1

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United States District Court, M.D. North Carolina.

Sandra Little COVINGTON, et al., Plaintiffs,

v.

The State of NORTH CAROLINA, et al., Defendants.

1:15CV399
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OPINION and ORDER

James A. Wynn, Jr., District Judge

***1** Plaintiffs, individual North Carolina citizens, challenged the constitutionality of nine state Senate districts and nineteen state House of Representatives districts (the "Challenged Districts") "as racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." First Amended Complaint ¶ 1, ECF no. 11. In an opinion filed on August 11, 2016, this Court held that the Challenged Districts, as drawn by the General Assembly in 2011, violated the Equal Protection Clause and, in an accompanying Order and Judgment, directed the legislature to draw new districts. Memorandum Opinion, ECF no. 123; Order and Judgment, ECF no. 125.

While recognizing that the Supreme Court has counseled that "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan," Reynolds v. Sims, 377 U.S. 533, 585 (1964), this Court granted Defendants' request to allow the 2016 election to proceed under the unconstitutional districts because the finding of racial gerrymandering was made on the eve of that election. ECF no. 123, at 160–63. But in doing so, this Court enjoined Defendants from conducting any elections using the unconstitutional districts after the November 2016 election and requested briefing from the parties regarding the appropriate remedy for the constitutional violations. Memorandum Opinion, ECF no. 123, at 163–64; Order and Judgment, ECF no. 125.

After careful consideration of the briefs submitted by the partieson the appropriate remedy for the constitutional violations, on November 29, 2016, this Court ordered, among other things, that (1) no later than 5 p.m. on March 15, 2017, the State of North Carolina draw new district plans for the Challenged Districts; and (2) in the fall of 2017, the State of North Carolina hold special primary and general elections for the purpose of electing new legislators in the Challenged Districts and any other districts redrawn in order to cure the constitutional defects of the Challenged Districts (the "November 29 Order"). Order, ECF no. 140.

On December 2, 2016, Defendants filed the instant motion to stay the November 29 Order. Defendants' Emergency Motion to Stay Remedial Order Pending Disposition of Jurisdictional Statement, ECF no. 141 (the "Motion").

" '[A] stay is considered extraordinary relief for which the moving party bears a heavy burden,' and '[t]here is no authority to suggest that this type of relief is any less extraordinary or the burden any less exacting in the redistricting context.' " Personhuballah v. Alcorn, 155 F. Supp. 3d 552, 558–59 (E.D. Va. 2016) (quoting Larios v. Cox, 305 F. Supp. 2d 1335, 1336 (N.D. Ga. 2004) (internal quotations omitted)). In determining whether to stay a remedial order, like the November 29 Order, pending appeal the Court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Id. at 558 (quoting Hilton v. Branskill, 481 U.S. 770, 776 (1987)). "The movant must establish each of these four elements in order to prevail." Larios, 305 F. Supp. 2d at 1336.

***2** Defendants fail to meet their "heavy burden" under this exacting test. First, regarding likelihood of success on the merits, Defendants principally argue that two decisions cited in our November 29 Order in which courts ordered special elections as a remedy for racial gerrymandering—Smith v. Beasley, 946 F. Supp. 1174, 1212–13 (D.S.C. 1996), and Butterworth v. Dempsey, 237 F. Supp. 302, 306 (D. Conn. 1965) (per curiam)—provide an insufficient basis for this Court to order special elections. But, as Plaintiffs correctly note, numerous other courts have ordered special elections to remedy voting rights violations or recognized their authority to do so. See, e.g., Cousins v. City Council of City of Chi., 503 F.2d 912, 914 (7th Cir. 1974); Bell v. Southwell, 376 F.2d 659, 662, 665 (5th Cir. 1967); Tucker v. Burford, 603 F. Supp. 276, 279 (N.D. Miss. 1985); Cosner v. Dalton, 522 F. Supp. 350, 364 (E.D. Va. 1981). Accordingly, there is ample legal support establishing that ordering special elections is one of the equitable remedies available to district courts to cure voting rights violations, and racial gerrymandering in particular. Indeed, given courts' obligation to remedy unconstitutional apportionment schemes as soon as possible, Reynolds, 377 U.S. at 585, a special election is particularly appropriate in the instant case given that this Court allowed—at Defendants' request—the November 2016 elections to proceed under the unconstitutional districts, Smith, 946 F. Supp. at 1211–12 (ordering special election after allowing elections to proceed in unconstitutional districts due to close proximity between finding of constitutional violation and election day).

Defendants nonetheless argue that this Court abused its discretion in ordering a special election because previous cases in which courts ordered special elections involved far fewer districts. This amounts to little more than a claim that Defendants' racial gerrymandering is "too big to remedy." But courts must "provid[e] remedies fully adequate to redress the constitutional violations which have been adjudicated and must be rectified." White v. Weiser, 412 U.S. 783, 797 (1973) (emphasis added). Accordingly, the expansive scope of Defendants' racial gerrymandering dictates the scope of the remedy this Court imposed. Personhuballah, 155 F. Supp. 3d at 563 (explaining that the scope of a remedial plan "depends on the scope and effect of the constitutional violation"). Indeed, the large number of racially gerrymandered districts weighs in favor of—rather than against-awarding relief as quickly as possible, and therefore requiring special elections. Absent such relief, a large swath of North Carolina citizens will lack a constitutionally adequate voice in the State's legislature, even as that unconstitutionally constituted legislature continues to pass laws that materially affect those citizens' lives. "Those citizens are entitled to have their rights vindicated as soon as possible so that they can vote for their representatives under a constitutional apportionment plan." Smith, 946 F. Supp. at 1212.

Additionally, the authority to craft a remedy for racial gerrymandering, like other forms of race discrimination, lies within this Court's "sound discretion." United States v. Paradise, 480 U.S. 149, 184 (1987); Large v. Fremont Cty., 670 F.3d 1133, 1139 (10th Cir. 2012). And the Supreme Court will review for clear error our holding that racial factors unconstitutionally predominated in the drawing of the Challenged Districts. Personhuballah, 155 F. Supp. 3d at 559. That the Supreme Court will subject both decisions to deferential review further suggests that Defendants are unlikely to succeed on the merits. Id. (concluding deferential standard of appellate review weighed against finding movants were likely to succeed on merits).[1]

1 Defendants' suggestion that the possibility of forthcoming Supreme Court review of other North Carolina redistricting decisions militates in favor of their requested stay is similarly misguided. One of these cases—Harris v. McCrory, 159 F. Supp. 3d 600 (2016)—is pending before the Supreme Court following the defendants' direct appeal pursuant to 28 U.S.C. § 1253 of an order holding that two of North Carolina's Congressional districts constitute racial gerrymanders. As such, ongoing proceedings before the Court provide little insight into Defendants likelihood of success on appeal in the present action. Accord Personhuballah, 155 F. Supp. 3d at 559 (explaining that, in the context of a direct appeal, the "Court's decision to hear oral argument indicates only that there is some doubt as to how the case will be decided," and is therefore insufficient to demonstrate a likelihood of success in a separate appeal). The second of these decisions—Dickson v. Rucho, 368 N.C. 481 (2016)—addresses allegations of racial gerrymandering related to those at issue here. However, because the defendants in that case prevailed below, any further action by the Supreme Court would serve only to lessen the likelihood that Defendants' will prevail in their own appeal. Bethley v. Louisiana, 520 U.S. 1259 (1997) ("It is well settled that our decision to deny a petition for writ of certiorari does not in any sense constitute a ruling on the merits of the case in which the writ is sought.").

***3** Defendants also fail to show an irreparable injury that outweighs any such injury to Plaintiffs and the public. Defendants principally argue that they will be irreparably injured because the General Assembly will have to spend

the first six weeks of its new session drawing new district maps and because the State will have to devote resources to preparing for the special primary and general elections. But, as this Court explained previously, the General Assembly already has had months to "hold[ ] hearings, commission[ ] studies, develop[ ] evidence, and ask[ ] experts to draw proposed new districts" and has refused to do so. ECF no. 140, at 3; see also Johnson v. Mortham, 926 F. Supp. 1540, 1542 (N.D. Fla. 1996) ("[T]he mere administrative inconvenience the Florida Legislature and Florida elections officials will face in redistricting simply cannot justify denial of Plaintiffs' fundamental rights."). Accordingly, it is the General Assembly's inaction—not this Court's remedial order—that will force the General Assembly to "spend the first six weeks of its already-shortened term drawing new districting maps." Defendants' Reply, ECF no. 144, at 2. Likewise, this Court has previously explained that "[w]hile special elections have costs, those costs pale in comparison to the injury caused by allowing citizens to continue to be represented by legislators elected pursuant to a racial gerrymander." ECF no. 140, at 2–3.

Defendants also fail to acknowledge the considerable irreparable harm that staying the November 29 Order would impose on Plaintiffs and the public at large. It is axiomatic that "[d]eprivation of a fundamental right, such as limiting the right to vote in a manner that violates the Equal Protection Clause, constitutes irreparable harm." Personhuballah, 155 F. Supp. 3d at 560 (internal quotation marks omitted); Johnson, 926 F. Supp. at 1543. Staying implementation of the November 29 Order and thereby prolonging the time during which Plaintiffs and other citizens are represented by legislators elected in racially gerrymandered districts would serve only to exacerbate the irreparable harm the voters have already suffered by allowing an unconstitutionally constituted legislature to continue to act. Accordingly, "the irreparable harm to the plaintiffs, and to all voters in [North Carolina] who have [been represented by legislators elected in racially gerrymandered districts], outweighs the harm the state may encounter by being unable to resolve an appeal of this decision" before drawing new districts and holding a new election. Larios, 305 F. Supp. 2d at 1343.

Finally, the public interest aligns with requiring the State to hold a special election in 2017. The Supreme Court has long-recognized the democratic and dignitary harms resulting from racial gerrymandering. Shaw v. Reno, 509 U.S. 630, 647 (1993). When a legislature relies on race as the predominant factor in drawing district lines—even when based on a flawed understanding of the law, as the General Assembly did here—it "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls." Id. at 647. Likewise, it sends a "pernicious ... message" to elected representatives that they should represent the interests only of the racial group from which they obtained support, not their constituency as a whole. Id. at 648. To allow such constitutional violations to persist for any longer than necessary would not only harm Plaintiffs, but also the public at large, which has "an interest in having ... representatives elected in accordance with the Constitution." Personhuballah, 155 F. Supp. 3d at 560–61.

For the foregoing reasons, this Court declines to stay implementation of the November 29 Order. Accordingly, Defendants' Motion is DENIED.

All Citations

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