No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., et al., Plaintiffs-Appellants, REBECCA HARPER, et al., Plaintiffs-Appellants, and COMMON CAUSE, Plaintiff-Intervenor-Appellant, v. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al., Defendants-Appellees.	)	From Wake County 21 CVS 015426 21 CVS 500085

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LEGISLATIVE DEFENDANTS' PETITION FOR REHEARING

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

NOW COME President *Pro Tempore* Philip E. Berger, Senator Warren Daniel, Senator Ralph Hise, Senator Paul Newton, Representative Destin Hall, and Speaker Timothy K. Moore, in their official capacities (collectively, "Legislative Defendants") and, pursuant to Rule 31 of the North Carolina Rules of Appellate Procedure, respectfully request that this Court grant this Petition for Rehearing. In support of this Petition for Rehearing, Legislative Defendants show this Court as follows:

INTRODUCTION AND BACKGROUND

The Constitution of North Carolina vests redistricting authority with "the General Assembly." N.C. Const. art. II, §§ 3 and 5. That power is subject to textually explicit limitations, including that electoral districts be of substantially equal population and that county lines not be crossed except where necessary to achieve that voting equality. *Id.* art. II, § 3(1) and (3); *id.* art. II, § 5(1) and (3). But, "[b]ecause redistricting is quintessentially a political process[,]" *Shapiro v. McManus*, 203 F. Supp. 3d 579, 590 (D. Md. 2016), these provisions can only be read to delegate the many political choices inherent in redistricting to the General Assembly. Accordingly, this Court in 2015 concluded that so-called "political" or "partisan" gerrymandering claims are "not based upon a justiciable standard[.]" *Dickson v. Rucho*, 368 N.C. 481, 534, 781 S.E.2d 404, 440 (2015) ("*Dickson II*"), *vacated on other grounds*, 137 S. Ct. 2186 (2017). The U.S. Supreme Court reached the same conclusion under the federal Constitution four years later. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).

In *Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, 868 S.E.2d 499 ("*Harper I*"), *cert. granted*, *Moore v. Harper*, 142 S. Ct. 2901 (2022), a majority of this Court changed course, holding that political redistricting "violate[s] every individual voter's fundamental right to vote on equal terms." 2022-NCSC-17, ¶ 142. This was the least plausible case in State history to announce that rule. "[B]etween 1870 and 2010, the Democratic Party at all times controlled one or both houses of the General Assembly," *Harper I*, 2022-NCSC-17, ¶ 290 n. 14 (Newby, C.J., dissenting) (citation omitted), and "Democrats engaged in gerrymandering when they controlled our General Assembly," *N.C. State Conf. of NAACP v. Moore*, 273 N.C. App. 452, 457, 849 S.E.2d 87, 91 (2020), *rev'd on other grounds by* 382 N.C. 129, 2022-NCSC-99, 876 S.E.2d 513 (2022). By contrast, the General Assembly in 2021 adopted criteria that excluded the use of political data in line-drawing, no partisan data was loaded into the redistricting software, two members of the General Assembly testified that partisan considerations did not enter the line-drawing, and the trial record contains no contrary direct evidence of partisan intent.

Undeterred, *Harper I* invalidated all three 2021 plans (House, Senate and congressional) as unconstitutionally political. Its opinion, though long in idealistic verbiage, fell short in concrete guidance. *Harper I* declined to disclose what standard applies to these cases, proposed that "bright-line standards" would follow in "future cases," and was content to identify some tests—based on what it called "reliable" political-science metrics—that it deemed "entirely workable." 2022-NCSC-17, ¶¶ 163, 165, 167–68. Three justices had a different view. They criticized the majority for

failing to identify judicially manageable standards and predicted that *Harper I* "ensures that the majority now has and indefinitely retains the redistricting authority, thereby enforcing its policy preferences." 2022-NCSC-17, ¶ 229 (Newby, C.J., dissenting).

In the remedial phase appeal, *Harper v. Hall*, ___ N.C. ___, 2022-NCSC-121, 881 S.E.2d 156 ("*Harper II*"), that second shoe has fallen where the *Harper I* dissent predicted. The General Assembly enacted remedial House, Senate, and congressional plans (respectively, the RHP, RSP, and RCP), and each one met the standards *Harper I* called "entirely workable." But the same majority invalidated two plans (the RCP and RSP) even as it upheld the third (the RHP). That result is simply perplexing. Only the four members of the *Harper II* majority can or will know a gerrymander when they see it; everyone else must await their Delphic pronouncement.

The *Harper* experiment has failed, and it is time for this Court to recognize that, correct its errors, and return to the Constitution and this State's traditional modes of interpretation. This rehearing Petition gives this Court a much needed opportunity to address the root of the problem: *Harper I* was based on profoundly flawed legal principles. This Court should withdraw its *Harper II* opinion, and it should overrule *Harper I*. This Court should also declare that the General Assembly is now able to exercise its redistricting power unencumbered by the *Harper* Court's shortsighted judicial takeover.

GROUNDS FOR REHEARING

I. This Court Should Grant Rehearing in *Harper II*.

This Court should grant rehearing in *Harper II* and withdraw its opinion and judgment. Rule 31 broadly authorizes this Court to rehear a civil action if it "has overlooked or misapprehended" any "points of fact or law." N.C. R. App. P. 31(a). "That [Rule] is the appropriate method of obtaining redress from errors committed by this Court." *Nowell v. Neal*, 249 N.C. 516, 521, 107 S.E.2d 107, 111 (1959). This Court has previously withdrawn opinions and issued new ones resulting in different case outcomes, see, e.g., *Bailey v. Meadows Co.*, 152 N.C. 603, 603, 68 S.E. 11, 12, *modified on reh'g*, 154 N.C. 71, 71, 69 S.E. 746, 747 (1910); *Clary v. Alexander Cnty. Bd. of Educ.*, 285 N.C. 188, 195, 203 S.E.2d 820, 825 (1974), *withdrawn,* 286 N.C. 525, 533, 212 S.E.2d 160, 165 (1975); *Branch Banking & Tr. Co. v. Gill*, 286 N.C. 342, 352, 211 S.E.2d 327, 335 (1975), *on reconsideration*, 293 N.C. 164, 190, 237 S.E.2d 21, 37 (1977), including following turnover on the Court, *see Alford v. Shaw*, 318 N.C. 289, 349 S.E.2d 41 (1986) *on reh'g*, 320 N.C. 465, 358 S.E.2d 323 (1987). *Harper II* is error-laden and warrants rehearing.

A. *Harper II* Confirms That *Harper I* Was Wrongly Decided.

Harper II failed to fulfill the promise of *Harper I* that "bright-line standards" would emerge in "future cases," 2022-NCSC-17, ¶¶ 165, 168, and instead determined that gerrymandering claims must be governed by a "broad[] constellation of principles," 2022-NCSC-121, ¶ 3, which are vague and unascertainable.

Harper I held that so-called partisan gerrymandering claims are justiciable, even as it recognized its obligation to adjudicate cases "using . . . judicially manageable standards." 2022-NCSC-17, ¶ 6. In tension with that obligation, *Harper I* declined to "identify an exhaustive set of metrics or precise mathematical thresholds" to apply. *Id.* ¶ 163.[1] The *Harper I* majority cited the U.S. Supreme Court's early one-person, one-vote cases, which initially announced a principle of voting equality and only later "arriv[ed] at detailed constitutional requirements." *Harper I*, 2022-NCSC-17, ¶ 168 (quoting *Reynolds v. Sims*, 377 U.S. 533, 578 (1964)). The *Harper I* majority predicted that similar rules would emerge in the gerrymandering context, twice using the phrase "bright-line standards" to describe what was forthcoming, *id.* ¶¶ 164–65. In addition, *Harper I* identified specific standards that it already deemed "entirely workable," including (1) setting a "seven percent efficiency gap threshold as a presumption of constitutionality," or (2) establishing "that any plan with a mean-median difference of 1% or less . . . is presumptively constitutional." *Id.* ¶ 165.

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[1] In contrast to the ambiguous and flexible *Harper I* holding, there is a clear, justiciable standard for the provisions of the North Carolina Constitution that actually apply to redistricting. In *Stephenson v. Bartlett*, 355 N.C. 354, 383–84, 562 S.E.2d 377, 396–97 (2002) ("*Stephenson I*"), the Court "provided a roadmap to compliance with the Whole County Provision" that set forth "nine criteria for ensuring that House and Senate districts satisfy both the Whole County Provision and the Voting Rights Act." *Dickson II*, 368 N.C. at 529–30, 781 S.E.2d at 438; *Harper I*, 2022-NCSC-17, ¶ 256 (Newby, C.J., dissenting). The standards were not left to the discretion of "future courts." Instead, the *Stephenson I* Court created clear guidelines for equal population of districts, the requirement for grouping counties to satisfy the equal population standard, and rules for drawing districts in multi-county groups. *See Dickson II*, 368 N.C. at 529–31, 781 S.E.2d at 438–39. In doing so, the Court articulated judicially manageable criteria for the General Assembly to follow in drawing districts that satisfy those provisions of the North Carolina Constitution that expressly govern redistricting of legislative districts.

Harper II now announces that no clarity will ever come and withdraws the glimmer of clarity *Harper I* afforded. *Harper II* discloses that it was "neither accident nor oversight" that *Harper I* failed to identify a "statistical measure" or "one datapoint" as a standard "of constitutional compliance," *Harper II*, 2022-NCSC-121 ¶ 3, and faults the Superior Court for relying on the very thresholds *Harper I* called "entirely workable," *Harper I*, 2022-NCSC-17, ¶ 168; *Harper II*, 2022-NCSC-121, ¶¶ 74–79. *Harper II* now reasons that "our constitution speaks in broad foundational principles, not narrow statistical calculations." *Harper II*, 2022-NCSC-121, ¶ 78; *see id.* at ¶ 76 ("Constitutional compliance has no magic number"). But the U.S. Constitution speaks in equally broad foundational principles, yet the one-person, one-vote decisions reduced those principles to an "easily administrable standard," *Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004) (plurality opinion), treating a 10% total-population deviation as the bright line between a presumptively constitutional and presumptively unconstitutional plan. *Harris v. Arizona Indep. Redistricting Comm'n*, 578 U.S. 253, 259 (2016); *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983). *Harper I* stated that the identification of specific "metrics" in "future cases" is "*precisely* the kind of reasoned elaboration of increasingly precise standards the United States Supreme Court utilized in the one-person, one-vote context." 2022-NCSC-17, ¶ 168 (emphasis added). Now the Court says it never intended anything like that. In rejecting that entire project as unduly dependent on "narrow statistical calculations," *Harper II*, 2022-NCSC-121, ¶ 78, *Harper II* repudiates a central and necessary

premise of *Harper I*. *See Harper II*, 2022-NCSC-121, ¶ 123 (Newby, C.J., dissenting) ("The majority has effectively overturned its own decision in *Harper I*.").

At best, this approach renders *Harper I* an exercise in circular reasoning. *Harper I* could only deem gerrymandering claims justiciable by finding "satisfactory and manageable criteria or standards" to apply, *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004) (internal citation omitted); *see Harper I*, 2022-NCSC-17, ¶ 100. To now disclaim any intent of fashioning manageable standards, as *Harper II* does, is to admit *Harper I* was wrongly decided.

B. The Standards of *Harper II* Are Unmanageable and Unconstitutional.

With the promise of "reasoned elaboration of increasingly precise standards" repudiated, *Harper I*, 2022-NCSC-17, ¶ 168, *Harper II* failed to identify any substitute source of "satisfactory and manageable criteria," *Hoke Cnty.*, 358 N.C. at 639, 599 S.E.2d at 391.

North Carolina courts seeking manageable standards have always begun with the bedrock principles "that a statute enacted by the General Assembly is presumed to be constitutional[;]" that "[a]ll doubts must be resolved in favor of the Act[;]" and that "the wisdom and expediency of the enactment is a legislative, not a judicial, decision." *Wayne Cnty. Citizens Ass'n for Better Tax Control v. Wayne Cnty. Bd. of Comm'rs*, 328 N.C. 24, 29, 399 S.E.2d 311, 314–15 (1991) (quoting *In re Housing Bonds*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982)). While *Harper I* at least mentioned these principles, *see* 2022-NCSC-17, ¶ 7, *Harper II* ignored them and did not even purport to apply them. This was the first decision of its kind in North

Carolina history. *See Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6 (1787) (taking "every reasonable endeavor . . . for avoiding a disagreeable difference between the Legislature and the Judicial powers of the State").

As the *Harper II* dissent explained, the only plausible way to begin addressing whether a redistricting plan is "fair"—assuming that could ever be judicially determined—is "to exercise the presumption that the General Assembly's policy choices are constitutional." 2022-NCSC-121, ¶ 178 (Newby, C.J., dissenting). *Harper II*, however, disregarded the General Assembly's partisan-fairness calculations and, in fact, treated the General Assembly's plans as presumptively unconstitutional in the absence of "findings that the[y] . . . satisfie[d] constitutional standards." 2022-NCSC-121, ¶ 102 (striking down the RSP on this basis).

Harper II compounded these errors by failing to demand proof of "intentional, purposeful discrimination," as settled precedent requires in cases alleging violations equal-protection and free-speech and -assembly guarantees. *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 662, 178 S.E.2d 382, 386 (1971); *Holmes v. Moore*, 270 N.C. App. 7, 16, 840 S.E.2d 244, 254 (2020). *Harper I* itself turned on the finding that the challenged plans were "the product of intentional, pro-Republican partisan redistricting," *Harper I*, 2022-NCSC-17, ¶ 184; *see also id.* ¶¶ 27, 37, 39, 63, 64, 68, 69, 140, 141, 150, 157, 193, 197, 201, 203, 211. Yet *Harper II* makes no finding of discriminatory intent.

The *Harper II* majority's novel disparate-impact standard is completely unmanageable. As an initial matter, the remedial phase demonstrates partisan-fairness metrics to be of little use, as different methods and data inputs yield

disparate results, including efficiency gaps of 2.2% and 4.8% and mean-median differences of .77% and 2.2% for the same plan, *Harper II*, 2022-NCSC-121, ¶ 186 (Newby, C.J., dissenting).

Additionally, the *Harper II* majority's treatment of these metrics was inconsistent. *Harper II* looked to average scores in analyzing the RHP and RSP, but not the RCP. "If it had it would see that both scores for the RCP are within the 'presumptively constitutional ranges' identified in *Harper I*." *Id.* ¶ 215 (Newby, C.J., dissenting). Then, in rejecting the Superior Court's findings concerning the RSP, *Harper II* gave no credence to the fact that the highest efficiency gap score reported by the special masters' advisors was just over 3.0%, *id.* ¶ 186 (Newby, C.J., dissenting), and it inaccurately reported their findings under the mean-median difference, *Id.* ¶ 188 (Newby, C.J., dissenting).

Then, the *Harper II* majority (inaccurately) confused matters further by faulting the Superior Court for allegedly relying on a "single calculation" for this finding. 2022-NCSC-121, ¶ 99. But the *Harper II* decision itself entirely ignored the efficiency gap in analyzing the RSP, *see id.* ¶¶ 95–101, even as it afforded that measure great weight in analyzing RCP, *id.* ¶ 82, and the RHP, *id.* ¶ 93. Apparently, a majority of this Court can pick and choose the data points without justification or consistency. In other words, "[o]nly four justices on this Court know" when "a legislative redistricting plan is constitutional[.]" *Id.* ¶ 231 (Newby, C.J., dissenting).

The only difference of any significance between the RHP (which *Harper II* upheld) and the RSP and RCP (which it invalidated) is that "the RCP was passed on

a strict party-line vote," *id.* ¶ 82, as was the RSP, *id.* ¶ 97, whereas the RHP "passed the House and Senate with sweeping bipartisan approval," *id.* ¶ 92. *Harper II* was not shy in relying on this difference: these were its *first* findings in reviewing each respective plan. *See id.*¶¶ 82, 92, 97. The functional effect of this doctrine is to amend a mechanism into the North Carolina Constitution by which a minority legislative group and their allies in the judiciary can veto redistricting legislation. A group of legislators lacking the votes to pass or block legislation can vote against it, that vote becomes overriding evidence that the legislation is unfair, and the remaining "datapoints"—vulnerable to manipulation as they are—can be molded to round out an adverse constitutional finding. But the judicial power cannot extend so far as to "prevent another branch from performing its core functions." *State v. Berger*, 368 N.C. 633, 636, 781 S.E.2d 248, 250 (2016).

This new mechanism is particularly repugnant to the State Constitution because it cannot be overridden legislatively, even while the Constitution otherwise empowers supermajorities to override vetoes, *see* N.C. Const. art. II, § 22(1). Moreover, it applies to redistricting legislation, even while the Constitution rejects any traditional gubernatorial veto over redistricting legislation. *Id.* art. II, § 22(5)(b)-(d).

C. *Harper II* Confirms That the Promise of *Harper I* Could Never Be Delivered.

Harper II failed in these ways because *Harper I* set this Court up to fail. *See Harper II*, 2022-NCSC-121, ¶¶ 116–125 (Newby, C.J., dissenting). *Harper I* believed it possible for courts to reliably determine when a plan "creates a level playing field

for all voters." *Harper I*, 2022-NCSC-17, ¶ 164. As shown, *Harper II* demonstrates that this cannot be done. The problem is political geography, and no branch of government can fix it. Supporters of political parties are not evenly dispersed in any jurisdiction, so it is not to be expected that any given set of districts will provide "the voters of all political parties substantially equal opportunity to translate votes into seats across the plan." *Harper I*, 2022-NCSC-17, ¶ 163. Furthermore, "[e]xperience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time." *Id.* ¶ 241 (Newby, C.J., dissenting) (quoting *Rucho v. Common Cause*, 139 S. Ct. at 2503–04 (describing instances where "predictions of durability" in partisan gerrymandering cases "proved to be dramatically wrong")). It was and remains impossible for the General Assembly to know how it should draw districts in order to satisfy the constantly moving target intentionally adopted by the *Harper* majority.

Harper I admitted that the judiciary has no constitutional license to "seek . . . proportional representation for members of any political party" or "to guarantee representation to any particular group." *Harper I*, 2022-NCSC-17, ¶ 10. But "partisan gerrymandering claims invariably sound in a desire for proportional representation[,]" *Rucho*, 139 S. Ct. at 2499, and, more precisely, from "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." *Davis v. Bandemer*, 478 U.S. 109, 159 (1986)

(O'Connor, J., concurring in the judgment); *see Rucho*, 139 S. Ct. at 2499 (approving of this observation).

The *Harper I* majority attempted to overcome this problem by substituting "symmetry" for "proportionality," proposing that supporters of a major party "are entitled to have substantially the same opportunity to electing a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised [the same] percent of the statewide vote share in that same election." 2022-NCSC-17, ¶¶ 167, 169. This is nothing more than proportional representation in sheep's clothing. Because there is no dependable way to know who will vote for candidates of what party in legislative races, and because parties' constituents are not evenly distributed in any jurisdiction, symmetry is not a realistic or manageable standard. *See League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 420 (2006) (*LULAC*) (rejecting this test because "[t]he existence or degree of asymmetry may in large part depend on conjecture about where possible vote-switchers will reside").

II. This Court Must Also Overrule *Harper I.*

Because it is not sufficient for this Court to correct the errors of *Harper II* in isolation, this Court must also overrule *Harper I*. This Court retains the prerogative to overrule its own precedent, and this Petition presents the optimal vehicle. *Harper II* reaffirms the non-justiciable and unprecedented standard set forth in *Harper I*; therefore, a necessary consequence of correcting the errors in *Harper II* is to overrule *Harper I*.

Harper I "does not call the rule of stare decisis in its true sense into play," because "no series of decisions exists" finding partisan gerrymandering claims justiciable, and this "single case . . . is much weakened as an authoritative precedent by a dissenting opinion 'of acknowledged power and force of reason.'" *State v. Ballance*, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949) (citations omitted). Further, stare decisis has "no application" where "there are conflicting decisions," *State v. Mobley*, 240 N.C. 476, 487, 83 S.E.2d 100, 108 (1954), which is the case here, *see Dickson II*, 368 at 534, 781 S.E.2d at 440; *Howell v. Howell*, 151 NC 575, 66 S.E. 571, 573 (1911). In any event, "the doctrine of stare decisis should never be applied to perpetuate palpable error." *Mobley*, 240 N.C. at 487, 83 S.E.2d at 108 (internal citation omitted); *see, e.g.*, *Bulova Watch Co. v. Brand Distributors of N. Wilkesboro, Inc.*, 285 N.C. 467, 473, 206 S.E.2d 141, 145 (1974); *Rabon v. Rowan Mem'l Hosp., Inc.*, 269 N.C. 1, 15, 152 S.E.2d 485, 495 (1967).

A. Partisan Gerrymandering Claims Are Non-Justiciable.

Harper I fails as a matter of justiciability doctrine, which "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to" the political branches of government. *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001) (citation omitted). A question is non-justiciable "when either of the following circumstances are evident: (1) when the Constitution commits an issue, as here, to one branch of government; or (2) when satisfactory and manageable criteria or standards do not

exist for judicial determination of the issue." *Hoke Cnty. Bd. of Educ.*, 358 N.C. at 639, 599 S.E.2d at 391.

The State Constitution empowers the General Assembly to decide what political composition is appropriate for electoral districts. This is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (quotation omitted). "The reality is that districting inevitably has and is intended to have substantial political consequences." *Bandemer*, 478 U.S. at 129 (plurality opinion). The justiciability question, then, is what body of government is vested with power to decide those political consequences. The textual answer is clear: "The General Assembly." N.C. Const. art. II, §§ 3, 5. Thus, this Court was correct to hold partisan-gerrymandering claims non-justiciable in *Dickson*. *See Dickson v. Rucho*, 367 N.C. 542, 574–75, 766 S.E.2d 238, 260 (2014) ("*Dickson I*"), *vacated on other grounds,* 575 U.S. 959 (2015).

Those holdings belonged to North Carolina's historical line of cases holding that a constitutional delegation of power to draw political boundaries established a "plenary" and unreviewable "authority." *Town of Boone v. State*, 369 N.C. 126, 136, 794 S.E.2d 710, 718 (2016); *see also id.* at 152, 794 S.E.2d at 728 (Ervin, J., concurring). Indeed, this Court rejected a gerrymandering claim in this very context, *Howell v. Howell*, 151 N.C. at 575, 66 S.E. at 573, and for much of North Carolina history, legislative district boundaries *were* county boundaries and hence plainly beyond the judiciary's control, *Harper I*, 2022-NCSC-17, ¶¶ 264–64 (Newby, C.J., dissenting).

This express grant of discretionary power forecloses the judiciary from interpreting individual-rights guarantees as eliminating that very discretion. *In re Peoples*, 296 N.C. 109, 159, 250 S.E.2d 890, 919 (1978) ("In order to ascertain the meaning of this amendment to the Constitution, it is appropriate to consider it *[i]n pari materia* with the other sections of our Constitution which it was intended to supplement."). *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002), therefore explained that "[t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, . . . but it must do so in conformity with the State Constitution." *Id.* at 371, 562 S.E.2d at 390 (internal citation omitted).

Harper I was not only wrong, but amounted to "palpable error." *Mobley*, 240 N.C. at 487, 83 S.E.2d at 108. First, the reasoning of *Harper I* contains no limiting principle and represents "an unrestricted license to amend our constitution." *Harper I*, 2022-NCSC-17, ¶ 244 (Newby, C.J., dissenting). As shown, the Court's core reasoning was that, because some redistricting claims are justiciable, all claims that might be alleged are equally justiciable. To apply that rationale across constitutional doctrines would subsume the powers of all other branches of government into the sole power of "a super legislature." *State v. Bryant*, 359 N.C. 554, 565, 614 S.E.2d 479, 486 (2005) (quotation omitted).

Second, the *Harper I* majority more or less declared that its powers are just that broad, basing its arrogation of redistricting power on the proposition that "the people . . . are represented by legislators who are able to entrench themselves by

manipulating the very democratic process from which they derive their constitutional authority." 2022-NCSC-17, ¶ 4. But, before *Harper I*, this Court never claimed the power to correct what it might perceive to be structural errors in the State's constitutional design. Its responsibility is to "interpret our constitution," *Silver v. Halifax Cnty. Bd. of Comm'rs*, 371 N.C. 855, 862, 821 S.E.2d 755, 760 (2018), rather than to change it through judicial amendment.

Third, *Harper I* was unduly dismissive of the U.S. Supreme Court's resolution of the justiciability doctrine, where this Court's precedent had previously looked to federal justiciability standards for guidance. *See, e.g.*, *Hoke Cnty.*, 358 N.C. at 639, 599 S.E.2d at 391; *Cooper v. Berger*, 370 N.C. 392, 408, 809 S.E.2d 98, 107 (2018); *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854. It is one thing to recognize that Supreme Court justiciability precedents do not bind this Court, *Harper I*, 2022-NCSC-17, ¶ 110, but quite another to take the opposite approach from the Supreme Court, in knee-jerk fashion. This Court ordinarily finds "guidance" from U.S. Supreme Court decisions addressing a topic on which federal and state principles are similar. *E.g.*, *N.C. Dep't of Correction v. Gibson*, 308 N.C. 131, 136, 301 S.E.2d 78, 82 (1983).

Harper I's reasons for parting with federal justiciability doctrine do not hold water. It represented that "our state constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens," *Harper I*, 2022-NCSC-17, ¶ 110 (citation and quotation marks omitted), but that is not so in any respect relevant here. The U.S. Supreme Court could not fashion standards on that subject because "there is no 'Fair Districts Amendment' to the Federal Constitution,"

as there is in the Florida Constitution. *Rucho*, 139 S. Ct. at 2507. The same is true of the North Carolina Constitution.

B. Politics in Redistricting Do Not Violate the State Constitution.

Justiciability doctrine aside, *Harper I* fails as a matter of basic constitutional interpretation. The provisions of the State Constitution's Declaration of Rights the *Harper I* majority cited "protect only 'individual and personal rights' rather than a group's right to have a party's preferred candidate placed in office." *Harper I*, 2022-NCSC-17, ¶ 267 (Newby, C.J., dissenting).

First, *Harper I* relied on the Free Elections Clause, which requires that "[a]ll elections shall be free." N.C. Const. art. I, § 10. *Harper I*, 2022-NCSC-17, ¶¶ 133–41. But nothing in the guarantee that elections "shall be free" promises partisan groups an equal opportunity to elect their preferred candidates. "The meaning [of North Carolina's Free Elections Clause] is plain: free from interference or intimidation." John Orth & Paul Newby, *The North Carolina State Constitution* 56 (2d ed. 2013) (hereinafter "Orth"). "Based upon this Court's precedent with respect to the free elections clause, a voter is deprived of a 'free' election if (1) the election is subject to a fraudulent vote count, or (2) a law prevents a voter from voting according to one's judgment." *Harper I*, 2022-NCSC-17, ¶ 288 (Newby, C.J., dissenting) (first citing *Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746, 747 (1937); and then citing *Clark v. Meyland*, 261 N.C. 140, 143, 134 S.E.2d 168, 170 (1964)).

Nothing like that is implicated in partisan-gerrymandering cases, and there is no reason to believe the Free Elections Clause speaks to that topic. That is especially

clear given that (1) elections were conducted from counties created in the General Assembly's sole discretion as of the time the Free Elections Clause was first adopted, *Harper I*, 2022-NCSC-17, ¶¶ 282–285 (Newby, C.J., dissenting); (2) the English Bill of Rights predecessor to the Free Elections Clause was crafted to protect the legislative branch *from* other branches of government—not to authorize other branches to *attack* the legislative branch as *Harper I* did, *id.* ¶ 284; and (3) the English Bill of rights predecessor to the Free Elections Clause did not end the use of so-called rotten boroughs in England, *Harper I*, Legislative Defendants-Appellees Br. 72–73. "To believe that the framers of this provision in 1776 or the people who ultimately adopted it in subsequent constitutions had even a vague notion that the clause had this unbounded meaning is absurd." *Harper I*, 2022-NCSC-17, ¶ 287 (Newby, C.J., dissenting).

Second, *Harper I* relied on the Equal Protection Clause, which provides that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. art. I, § 19. Nothing in this State's ordinary interpretative methods supports the notion that the equal protection of laws includes the right to elect one's preferred candidates. The equal-protection principle "requires that all persons similarly situated be treated alike." *Richardson v. N.C. Dep't of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996) (internal citation omitted). The threshold question is whether a statute draws a distinction based "upon a suspect class or a fundamental right." *Id.* A partisan-gerrymandering claim does not even

allege cognizable differential treatment: in this case, every voter receives a district, and all districts are of approximately equal population.

And even if there were differential treatment, "[c]lassification based upon affiliation with one of the two major political parties in the United States . . . does not trigger heightened scrutiny because neither party has historically been relegated to a position of political powerlessness." *Harper I*, 2022-NCSC-17, ¶ 290 (Newby, C.J. dissenting). Further, there is no classification based on exercise of a fundamental right, because all voters, as individuals, have the same voting power. *Id.* ¶¶ 290–95. This provision is satisfied in the redistricting context "so long as voters are permitted to (1) vote for the same number of representatives as voters in other districts and (2) vote as part of a constituency that is similar in size to that of the other districts." *Id.* ¶ 295 (Newby, C.J., dissenting).

Third, *Harper I* relied on the Freedom of Assembly and Free Speech Clauses. 2022-NCSC-17, ¶¶ 151–74. These guarantees are impinged when "restrictions are placed on the espousal of a particular viewpoint," *State v. Petersilie*, 334 N.C. 169, 183, 432 S.E.2d 832, 840 (1993), or where retaliation motivated by speech would deter a person of reasonable firmness from engaging in speech or association, *Toomer v. Garrett*, 155 N.C. App. 462, 574 S.E.2d 76, 89 (2002); *Harper I*, 2022-NCSC-17, ¶ 297 (Newby, C.J., dissenting). A partisan gerrymandering claim does not implicate these principles because politics in redistricting "plainly does not place any restriction upon the espousal of a particular viewpoint," and "a person of ordinary firmness would not refrain from expressing a political view out of fear that the General Assembly will

place his residence in a district that will likely elect a member of the opposing party." *Harper I*, 2022-NCSC-17, ¶¶ 298–99 (Newby, C.J., dissenting).

C. *Harper I* is Contrary to the U.S. Constitution's Elections Clause.

Harper I's decision invalidating the congressional map enacted by the General Assembly also conflicts with the U.S. Constitution's Elections Clause. *See* U.S. Const. art. I, § 4, cl. 1. The provisions of the North Carolina constitution invoked by *Harper I* to invalidate the congressional map are either inapplicable or insufficiently definite to justify striking down the General Assembly's regulation of congressional elections, and their application to the General Assembly's congressional map violates the Elections Clause. *Harper I* was wrong to hold otherwise. Moreover, *Harper I* was such a sharp departure from the state's ordinary modes of constitutional interpretation that it lacks any fair and substantial basis in North Carolina law, for reasons stated above, and can only be deemed improper judicial usurpation of a federal legislative function. The U.S. Supreme Court has granted certiorari and held oral argument in December 2022 on that aspect of *Harper I* in a case that may definitively resolve the Elections Clause issue by the end of the Court's Term in June. *See Moore v. Harper*, No. 21-1271 (U.S.). This Court, if it decides to grant this Petition, should consider the impact and timing of *Moore* in any decision it renders in this case.[2]

[2] The timing of this Petition, controlled by Rule 31 of the North Carolina Rules of Appellate Procedure (requiring any petition to be filed 15 days following the issuance of the Court's mandate), is informed by context. After the trial panel issued its remedial decision on 23 February 2022, all parties appealed various parts of that decision and petitioned this Court to stay the trial court's ruling the same day. (R pp 4866-5159). This Court denied those petitions that night, allowing all three remedial plans to be used in the 2022 Election. *See Harper v. Hall*, 868 S.E.2d 100 (2022) (Mem.); *Harper v. Hall*, 868 S.E.2d 90 (2022) (Mem.); *Harper v. Hall*, 868 S.E.2d 95 (2022) (Mem). Months later in July, by a bare majority this

III. This Court Should Direct the General Assembly To Fulfill Its Constitutional Redistricting Obligation Without Unfounded Judicial Interference.

As "the appropriate method of obtaining redress from errors committed by this Court," *Nowell*, 249 N.C. at 521, 107 S.E.2d at 111, the rehearing procedure affords this Court ample power to afford the General Assembly effective relief from a novel redistricting regime that palpably violates the State Constitution.

This Court should grant rehearing in *Harper II*, withdraw its opinion, issue a new opinion overruling *Harper I* by holding that partisan-gerrymandering claims present non-justiciable political questions, vacate the Superior Court's judgment, and remand the case with directions to dismiss this action with prejudice. As part of that order, this Court should make clear that the Superior Court's decision and its own *Harper II* decision is nullified. Moreover, there is no basis to lock the State into redistricting plans configured under an erroneous standard. Thus, the proper remedy is to command that this action be dismissed and afford the General Assembly the opportunity to fulfill its redistricting obligations free from erroneous judicial interference.

Court allowed Common Cause's motion, supported by all Plaintiffs, to expedite consideration of the remedial legislative appeal, which set oral argument for October. *Harper v. Hall*, 382 N.C. 314, 315–16, 874 S.E.2d 902, 904 (2022) (Mem.). Three justices dissented from that Order. *Id.* at 317–24, 874 S.E.2d at 904–09 (Barringer, J., dissenting) ("[D]espite the lack of any credible argument or reason supporting this decision, the majority inexplicably has allowed the motion to expedite the legislative maps appeal. . . . The majority's decision . . . lacks any jurisprudential support. It reeks of judicial activism and should deeply trouble every citizen of this state."). The Court then issued *Harper II* in mid-December.

Because *Harper I* was such a sharp departure from the state's ordinary modes of constitutional interpretation that it lacks any fair and substantial basis in North Carolina law, it should be overruled. As a result, the General Assembly should be declared responsible and free to redistrict the state House, Senate, and congressional plans without the encumbrances invented in *Harper I*. By overruling *Harper I*, this Court would correctly clarify that the principles that may be judicially enforceable against the General Assembly are those expressly identified in the Constitution, not supposed partisan-fairness standards legislated from the judiciary.

Although the North Carolina Constitution requires that state House and Senate plans, "[w]hen established," "shall remain unaltered until the return of another decennial census," N.C. Const. art. II, § 3(4); *id.* art. II, § 5(4), the General Assembly's passage of plans in 2021 does not qualify under this provision because those plans were never established within the meaning of these provisions. The law of this State is clear that a redistricting plan does not become "established" if any portion of it is established by a court of proper jurisdiction. *See Stephenson v. Bartlett*, 357 N.C. 301, 314, 582 S.E.2d 247, 254 (2003). Otherwise, the once-per-decade-redistricting rule would defeat judicial review itself. In this case, because *Harper I* "struck down" the 2021 plans, 2022-NCSC-17, ¶ 222, they have not become established under Article II, Sections 3 and 5. Overruling *Harper I* would not change that result for at least two reasons.

First, the term "established" connotes a continuity that the 2021 plans never achieved, either as a matter of fact or law, through no fault of the General Assembly's.

The term "establish" means "to make firm or stable," "to place, install, or set up in a permanent or relatively enduring position," and "to bring into existence . . . as permanent." Webster's Third New International Dictionary 778 (1993); *see also* 5 Oxford English Dictionary 404 ("establish" means "[t]o set up on a secure or permanent basis," and "established" means "in permanent employ"). Accordingly, in Article II, Sections 3 and 5, the term "established" directs the use of the same plan (for each respective body) over the course of the decade in a continuous manner. That makes sense because there are many practical problems with erratic changes in redistricting plans, which may undermine legitimate state interests "in avoiding contests between incumbent Representatives," *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *see also Tennant v. Jefferson Cnty. Comm'n,* 567 U.S. 758, 762 (2012), and "keep[ing] the constituenc[ies] intact so the officeholder is accountable for promises made or broken," *LULAC*, 548 U.S. at 441 (plurality opinion).

In this case, the 2021 plans do not satisfy the continuity element of the single-redistricting-per-decade rule. To revert to the 2021 plans would not return to "established" plans because they were not permanent in the essential sense. Although *Harper I* was wrong as a legal matter, overruling it would not change the fact of history that the 2021 plans obtained no permanent status. The State did not use them in the 2022 elections, representatives were not elected from them, and to impose them now would double-bunk numerous incumbents of both political parties. The 2021 plans were never "established" for purposes of Article II, Sections 3 and 5.[3]

[3] It is equally clear that the legislative plans utilized in 2022 were not established because they were remedial plans conducted under court supervision and a legal framework that

Second, overruling *Harper I* will not negate the force of its order striking down the 2021 plans. That was the precise relief this Court delivered in *Harper I*, and its ruling continues to "bind[] the parties" in that respect, even if ultimately found to be delivered on "erroneous" grounds. *E. Carolina Lumber Co. v. West*, 247 N.C. 699, 701, 102 S.E.2d 248, 249 (1958). To overrule a decision revokes its claim of authority under the "doctrine of stare decisis," which dictates that "a principal of law . . . settled by a series of decisions . . . is binding . . . in similar cases." *State v. Ballance*, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949). Overruling a decision announces its error and dictates that a new rule be followed "in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the] announcement of the rule." *Harper v. Virginia Dep't of Tax'n*, 509 U.S. 86, 97 (1993). That the overruled decision itself was found to be issued on "erroneous" grounds does not override the relief actually afforded in *that* case. *See E. Carolina Lumber*, 247 N.C. at 701, 102 S.E.2d at 249.

Thus, overruling *Harper I* would announce its error and dictate that a new constitutional principle be applied in all pending cases, including this one (*Harper II*). Accordingly, the 2021 plans are not "established" under Article II, Sections 3 and 5, and, as a result, Legislative Defendants do not view themselves as entitled to the

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never should have been applied. *Harper II* itself recognized that a remedial plan enacted by the General Assembly can only become established after the issuance of an "order approving the" plan. 2022-NCSC-121, ¶ 94. Here, no order of approval is legally available because the remedial phase was founded on error, which this Court now has the opportunity to correct. Moreover, language in the enactments themselves made it clear that they existed by virtue of their "approval or adoption by the Wake County Superior Court." N.C. Sess. Law 2022-4, Sec. 3; N.C. Sess. Law 2022-2, Sec. 3.

2021 plans. The General Assembly should be regarded as responsible to exercise its constitutional duties to establish districts at this time free from overzealous judicial interference not based in law or fact.

REQUESTED RELIEF

This Court should grant rehearing in *Harper II* and withdraw its opinion, overrule *Harper I*, and permit the General Assembly to exercise its constitutional duties free from unfounded judicial interference.

Respectfully submitted, this the 20th day of January, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date the foregoing **Legislative Defendants' Petition for Rehearing** was served upon the following by electronic email addressed as set forth below:

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This the 20th day of January, 2023.

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Exhibit A

No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., et al., Plaintiffs-Appellants,	)	
REBECCA HARPER, et al., Plaintiffs-Appellants, and	)	
COMMON CAUSE, Plaintiff-Intervenor-Appellant,	)	
v.	)	From Wake County 21 CVS 015426 21 CVS 500085
REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.,	)	
Defendants-Appellees.	)	

****

CERTIFICATE OF THE HONORABLE FRANK W. BULLOCK, JR. (RET.) IN SUPPORT OF LEGISLATIVE DEFENDANTS' PETITION FOR REHEARING PURSUANT TO RULE 31(A) OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE **********

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rule 31(a) of the North Carolina Rules of Appellate Procedure, the undersigned respectfully submits this Certificate in Support of Legislative Defendants' Petition for Rehearing.

1. I have been licensed to practice law in the State of North Carolina and have been a member of the North Carolina Bar at all times since 16 August 1963.

2. I served as the Assistant Director of the Administrative Office of the Courts and as Administrative Assistant to Chief Justices R. Hunt Parker and William H. Bobbitt from 1968 through 1973.

3. I also served as a United States District Judge for the Middle District of North Carolina from 1982 to 2006, with a seven-year stint as Chief U.S. District Judge from 1992 to 1999.

4. I am presently a partner at Frank Bullock Law LLP where my practice is concentrated in providing arbitration and mediation services.

5. I have no legal interest in this action and have not at any time represented any party to the action now before this Court.

6. I have carefully examined the appeal in this case, including the majority and dissenting opinions in this Court's 4 and 14 February 2022 orders on the merits and 16 December 2022 remedial decision.

7. I consider the Court's decisions to be in error with respect to the following holdings of the majority opinions in this matter:

   a. That there is a judicially manageable standard, rooted in the North Carolina Constitution's text, structure, and meaning, for partisan

gerrymandering claims. *Harper v. Hall*, 380 N.C. 317, 868 S.E.2d 499 (2022) ("*Harper I*").

b. The reaffirmance of the "constitutional standard" recognized in *Harper I*. *Harper v. Hall*, ___ N.C. ___, 881 S.E.2d 156 (2022) ("*Harper II*").

8. In my opinion, the above holdings are in error for the reasons stated in Legislative Defendants' Petition for Rehearing, which I have reviewed in detail.

Therefore, it is respectfully submitted that the Court should grant rehearing in this appeal, withdraw its judgment in *Harper II*, and overrule *Harper I*.

Respectfully submitted, this the 17 day of January, 2023.

Frank W. Bullock, Jr.

Judge Frank W. Bullock, Jr. (Ret.)
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SWORN TO AND SUBSCRIBED BEFORE ME
This the 17th day of January, 2023.

Notary Public
My Commission Expires: March 12th, 2024

SHANE BALDOROSSI
NOTARY PUBLIC
Guilford County
North Carolina
My Commission Expires March 12th 2024

Exhibit B

No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., et al., Plaintiffs-Appellants, REBECCA HARPER, et al., Plaintiffs-Appellants, and COMMON CAUSE, Plaintiff-Intervenor-Appellant, v. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al., Defendants-Appellees.	)	From Wake County 21 CVS 015426 21 CVS 500085

****

CERTIFICATE OF PAUL B. "SKIP" STAM, JR. IN SUPPORT OF LEGISLATIVE DEFENDANTS' PETITION FOR REHEARING PURSUANT TO RULE 31(A) OF THE NORTH CAROLINA RULES OF APPELLATE PROCEDURE

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rule 31(a) of the North Carolina Rules of Appellate Procedure, the undersigned respectfully submits this Certificate in Support of Legislative Defendants' Petition for Rehearing.

1. I have been licensed to practice law in the State of North Carolina and have been a member of the North Carolina Bar at all times since 24 August 1975.

2. I have generally practiced law since 1976 with Stam Law Firm, PLLC and its predecessors, after clerking for Justice James G. Exum, Jr. at the North Carolina Supreme Court.

3. I also served sixteen years in the North Carolina House of Representatives (1989-1990, 2003-2016), including service as the House Republican Leader (2007-2010), the House Majority Leader (2011-2012), and the House Speaker Pro Tem (2013-2016).

4. I am presently owner and managing partner at Stam Law Firm, PLLC. My practice is concentrated in real estate litigation, titles, municipal, and state constitutional law.

5. I have recently been appointed to the North Carolina Innocence Inquiry Commission for a three-year term (2023-2025).

6. I have no legal interest in this action and have not at any time represented any party to the action now before this Court.

7. I have carefully examined the appeal in this case, including the majority and dissenting opinions in this Court's 4 and 14 February 2022 orders on the merits and 16 December 2022 remedial decision.

8. I consider the Court's decisions to be in error with respect to the following holdings of the majority opinions in this matter:

a. That there is a judicially manageable standard, rooted in the North Carolina Constitution's text, structure, and meaning, for partisan gerrymandering claims. *Harper v. Hall*, 380 N.C. 317, 868 S.E.2d 499 (2022) ("*Harper I*").

b. The reaffirmance of the "constitutional standard" recognized in *Harper I*. *Harper v. Hall*, ___ N.C. ___, 881 S.E.2d 156 (2022) ("*Harper II*").

9. In my opinion, the above holdings are in error for the reasons stated in Legislative Defendants' Petition for Rehearing, which I have reviewed in detail.

Therefore, it is respectfully submitted that the Court should grant rehearing in this appeal, reverse and withdraw its judgment in *Harper II*, and overrule *Harper I*.

Respectfully submitted, this the 17th day of January, 2023.

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SWORN TO AND SUBSCRIBED BEFORE ME
This the 17 day of January, 2023.

Darlene S. Keith
Notary Public
My Commission Expires: 8.5.2027