No. 413PA21

SUPREME COURT OF NORTH CAROLINA

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

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LEGISLATIVE DEFENDANTS-APPELLANTS' REPLY BRIEF

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INDEX

TABLE OF CASES AND AUTHORITIES

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INTRODUCTION

Plaintiffs-Appellees cannot escape the simple fact that N.C. Sess. Law 2022-3 ("the Remedial Congressional Plan") falls within the ranges this Court recognized as presumptively constitutional under the metrics it identified and using the set of election data the Superior Court and this Court relied on most heavily at the liability phase. The Superior Court made no findings of how *it* believed the Remedial Congressional Plan scored and did not explain how the Remedial Legislative Plans pass constitutional muster but the Remedial Congressional Plan does not, even though the General Assembly constructed and evaluated all three plans in the same way. Legislative Defendants Appellants' brief established both legal and clear error and an undeniable basis for reversal.

Rather than address those errors head on, Plaintiffs-Appellees' Joint Brief attempts to bring their partisan-gerrymandering theory full circle to complete the task of disestablishing the General Assembly as the redistricting authority in North Carolina. In Plaintiffs-Appellees' view, there is no need to establish discriminatory intent to jettison the General Assembly's plan—even though the core finding of *Harper* was one of discriminatory intent—and there is also no need for this Court to commit to a clear method of measuring the supposed partisan effects of the General Assembly's plan. As Plaintiffs-Appellees would have it, this Court can conceal any manageable standard from the branch of government constitutionally assigned with the redistricting authority. Then, wait until it redistricts under a legal blindfold, and announce—in *post hoc* fashion—that the legislative branch got redistricting wrong

based on some new analysis or new set of data redistricting challengers, purportedly enlightened experts, or judges can devise with the benefit of hindsight. According to Plaintiffs-Appellants, it does not even matter that the General Assembly relied on a set of elections and measurements deemed sufficient to jettison the General Assembly's prior work. So long as there is some *different* way to do the analysis, and so long as that different way achieve their desired *result* of condemning what the General Assembly did—*whatever* it did—the plan must go. That is, Plaintiffs-Appellees propose one, and only one, legal test: whatever the General Assembly did, it was wrong.

To state Plaintiffs-Appellees' arguments is to refute them. If the presumption of constitutionality means anything, it demands judicial deference to the General Assembly's reasonable choice among competing ways to arrive at the relevant measurements of partisan bias. Because that analysis, as *Harper* held, occurs as a threshold *before* strict scrutiny can be applied, the Superior Court was duty bound to presume the General Assembly got it right and only reject its choices if established beyond doubt as inaccurate, arbitrary, or unreasonable. That was not found and could never be shown here. Plaintiffs-Appellees' arguments against this deference would, if accepted, assault the separation of powers, work a severe indignity on the branch of government closest to the People, and ultimately undermine the very democratic principles Plaintiffs-Appellees purport to advance in this case.

This Court, of course, need not even *entertain* these questions and need not issue a ruling for *either* side, as Legislative Defendants have moved to dismiss this

appeal and no good reason has been advanced to deny that request. When state constitutional officers—who stand on the same constitutional plane as the Justices of this Court—make such a commonsensical request, based on the undisputable fact that the Remedial Congressional Plan *will never be used in the 2022 election*, and the Special Masters' Plan *will never be used beyond the 2022 election*, the this Court owes it to them as a matter of constitutional dignity, let alone a matter of law, to grant that request. If this Court declines, it is duty bound to afford the General Assembly due deference and, under that standard, it must uphold the Remedial Congressional Plan and reverse the order below.

ARGUMENT

I. THE SUPERIOR COURT APPLIED THE WRONG STANDARDS IN REJECTING THE REMEDIAL CONGRESSIONAL PLAN.

A. The Superior Court erred in failing to employ a strong presumption of constitutionality.

As Legislative Defendants Appellants' Brief explained (pp 14–18), the Superior Court erred in reviewing the remedial record without the "great deference . . . paid to acts of the legislature." *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989). "In North Carolina, we presume the legislature has complied with the constitution." *Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, ¶ 172. The Superior Court therefore should have applied that deference to the Remedial Congressional Plan, which is duly enacted legislation. Plaintiffs-Appellees' contentions against that deference are foreclosed by precedent and denigrate the proper roles of the State's respective branches of government. And these contentions betray Plaintiffs-

Appellees' lack of confidence in their alternative argument that the Superior Court did defer to the General Assembly, which is not borne out by the record.

1. A deferential standard applies to all contested questions in this appeal.

Plaintiffs-Appellees first argue that the presumption of constitutionality does not apply because the Remedial Cognressional Plan "did not meet [the] standard" this Court announced in *Harper*. (Plaintiffs-Appellees' Joint Br. p 41). This flips the order of operations. Both *Harper* and this Court's broader body of constitutional decisions are clear that a party challenging an act of the General Assembly must first establish the predicates triggering strict scrutiny and then the presumption of constitutionality falls away. The *Harper* majority could not have been clearer that "we presume the legislature has complied with the constitution." *Harper*, 380 N.C. 317, 2022-NCSC-17, at ¶ 172. Plaintiffs-Appellees are correct that *Harper* did not construe this presumption to be impenetrable, but it did clarify when the presumption is overcome:

> To trigger strict scrutiny, a party alleging that a redistricting plan violates this fundamental right must demonstrate that the plan makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters, thus diminishing or diluting the power of that person's vote on the basis of his or her views.

Id. at ¶ 180.[1] Only *after* this showing is made does "strict scrutiny" become "the appropriate standard for reviewing [the] act." *Id.* at ¶ 181 (citation omitted).[2] In this

[1] Legislative Defendants continue in their disagreement with the *Harper* ruling for reasons stated in the *Harper* dissenting opinion but assume for the sake of argument that it is correct for purposes of this appeal only.

[2] This is consistent with the Supreme Court's opinion in *Abbott v. Perez,* 138 S. Ct. 2305, 2325 (2018), which criticized the lower court for failing to "hold[] the plaintiffs

regard, it is revealing that Plaintiffs-Appellees make all their arguments regarding the evidentiary record first (pp 20–40) and only address the standard governing those arguments after having made them (pp 40–51). Backwards ordering is indicative of backwards thinking.

The core issues presented in this appeal go to the threshold step of that analysis. Legislative Defendants contend that the Remedial Congressional Plan has neither the intent nor effect of making it systematically more difficult for any voter to aggregate his or her vote with other likeminded voters, including by recourse to the measures *Harper* identified as relevant. (Appellant Br. p 18–31). In response, Plaintiffs-Appellees rely on those same types of metrics to contend that the congressional plan does have that effect (though they ignore intent, *see* § I.B., *infra*). (Plaintiffs-Appellees' Joint Br. pp 20–40). As *Harper* made clear, the question of intent must be resolved before strict scrutiny applies, not after. Indeed, *Harper* found liability only after determining that the prior plans "violate . . . the North Carolina Constitution beyond a reasonable doubt." *Harper*, 380 N.C. 317, 2022-NCSC-17, at ¶ 94; *see also Harper v. Hall*, 380 N.C. 302, 304, 867 S.E.2d 554, 557 (2022) (Mem.) ("[W]e conclude that the congressional and legislative maps are . . . unconstitutional beyond a reasonable doubt.").

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to their burden of overcoming the presumption of good faith and proving discriminatory intent" and instead imposing the burden of proof on the Legislature to prove that it "experienced a true change of heart." Plaintiffs-Appellants ask that this Court commit the same error as the Texas lower court, and not hold Plaintiffs-Appellants to their burden. The Court should decline Plaintiffs-Appellants' invitation.

This Court's broader body of constitutional precedents confirms that *this* standard—requiring proof beyond a reasonable doubt—applies to constitutional inquiries unless and until the predicates of heightened scrutiny are established. *See, e.g.*, *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 111 (2018); *Cooper v. Berger*, 376 N.C. 22, 33, 852 S.E.2d 46, 56 (2020); *N.C. State Bd. of Educ. v. State*, 371 N.C. 170, 180, 814 S.E.2d 67, 74 (2018). Oddly, Plaintiffs-Appellees respond that these cases "do not involve redistricting." (Plaintiffs-Appellees Joint Br. p 44 n.3). But, *Harper* held that the general "role of the courts in conducting judicial review for constitutionality" supported the same review in redistricting cases. *Harper*, 380 N.C. 317, 2022-NCSC-17, at ¶ 172. And this Court's redistricting precedents apply the presumption of constitutionality without dilution. For example, in *Stephenson v. Bartlett,* 355 N.C. 354, 362, 378, 562 S.E.2d 377, 384, 393 (2002) ("*Stephenson I*"), this Court began with "a strong presumption that acts of the General Assembly are constitutional" and applied strict scrutiny only after determining that "[t]he classification of voters into both single-member and multi-member districts . . . necessarily implicates the fundamental right to vote on equal terms." If the law were otherwise, a challenger could obtain strict scrutiny merely by alleging, with no evidence at all, that a plan is unfair. Plaintiffs-Appellees make no effort to explain how that bizarre rule could be legally correct.

2. The presumption of constitutionality applies regardless of prior rulings on prior redistricting plans.

Plaintiffs-Appellees next argue that deference is improper because the General Assembly was "***already*** found to have engaged in intentional discrimination" and

that "the standard for assessing their proposed remedy should be ***more*** stringent than in the liability phrase." (Plaintiffs-Appellees' Joint Br. 42) (extreme emphases in original). No authority of this Court supports that view, and the decision Plaintiffs-Appellees cite rejects it.

In *Bartlett v. Stephenson,* 357 N.C. 301, 302, 582 S.E.2d 247, 248 (2003) ("*Stephenson II*"), this Court adjudicated whether the General Assembly's "revised redistricting plans," enacted in response to the *Stephenson I* ruling, satisfied the *Stephenson I* standard. The Court rejected the proposition that a different standard applied at that stage than during the first adjudication. It block quoted the legal holdings of *Stephenson I*, including the rule that "there is a strong presumption that acts of the General Assembly are constitutional," and then stated that it was analyzing the new plans "pursuant . . . to this standard," i.e., the same standard applied in *Stephenson I*. *Stephenson II*, 357 N.C. at 305, 309, 582 S.E.2d at 249–50, 252 (citation omitted). Likewise, the correct standard here is the standard of *Harper*, with its presumption of constitutionality. *Harper*, 380 N.C. 317, 2022-NCSC-17, at ¶ 172.

Resisting that clear statement of law, Plaintiffs-Appellees focus on findings in *Stephenson II* that the revised plans did not achieve "strict compliance" with the constitutional whole-county provisions. (Plaintiffs-Appellees' Joint Br. 42 (quoting *Stephenson* II, 357 N.C. at 314, 582 S.E.2d at 254)). But requiring "strict compliance" is not to presume non-compliance, and it is not any higher a standard than applied in *Stephenson I*, which requires strict compliance in all plans. The language of strict

compliance, in context, meant simply that the challengers in *Stephenson II* had shown a constitutional violation beyond doubt, which was not difficult given that *Stephenson I* imposed clear dictates and the revised plans clearly contravened them. *See Stephenson II*, 357 N.C. at 305, 582 S.E.2d at 249–50. Because "there is no magic number of Democratic or Republican districts that is required" under *Harper*, 380 N.C. 317, 2022-NCSC-17, at ¶ 169, Plaintiffs-Appellees have no cause to complain that the task of overcoming the threshold burden is more difficult here than in *Stephenson II*, especially given that the challenge plan complies with the standards *Harper* identified as relevant, *see* § I.C, *infra*.

3. Plaintiffs-Appellees' proposed approach violates separation of powers .

For these reasons, Plaintiffs-Appellees' arguments about separation of powers pay too little heed to the General Assembly's status as the "preponderant power" among the branches of government. (The mere need to defend that proposition signals that this case rides on troubled waters.) As Legislative Defendants Appellants' Brief explained (pp 16–17), overreach by this Court contravenes the separation of powers just as much as overreach by any other branch of government. And it is particularly problematic because it gives rise to the proverbial question of who will watch the watchman. *See Jenkins v. State Bd. of Elections*, 180 N.C. 169, 169, 104 S.E. 346, 348 (1920) ("[N]o tribunal has yet been devised to check the encroachments of the judicial power itself."). Applying deferential review mitigates the risk that this Court may come to "sit as a super legislature" and thereby end democratic rule in this State, *State v. Bryant*, 359 N.C. 554, 565, 614 S.E.2d 479, 486 (2005) (quotation omitted), as

some jurists on this body believe to be a real and present danger, *see, e.g.*, *N.C. NAACP v. Moore*, ___ N.C. ___, 2022-NCSC-99, ¶ 78 (Berger, J., dissenting).

Plaintiffs-Appellees have no real response. Instead, their Joint Brief (pp 44–51) seems intent on litigating in this Court questions raised in the U.S. Supreme Court. Plaintiffs-Appellees attempt to show that judicial review is proper but fail to explain why judicial review *without any deference* is proper—which is the question this Court is called upon to answer. In losing focus on this appeal, Plaintiffs-Appellees say little that is relevant to this Court. And that is particularly bizarre when two sets of Plaintiffs-Appellees insist that Legislative Defendants prosecute this appeal against their own wishes. Having made that choice, Plaintiffs-Appellees should be content to litigate this appeal according to the arguments actually raised here and now.

Plaintiffs-Appellees also contend that, "the Legislative Defendants propose a framework that would effectively prevent the judiciary from performing its core constitutional duty." (Plaintiffs-Appellees' Joint Br. 49). But Plaintiffs-Appellees fail to explain how conventional principles of deference, routinely applied by courts in cases of all types, could possibly prevent that very judicial review from even occurring. For one thing, the "framework" Legislative Defendants are alleged to have "propose[d]" is actually the framework of *Harper* itself, as shown above. For another, "the presumption of constitutionality does not insulate" a law "from judicial scrutiny." *Cooper*, 370 N.C. at 401, 809 S.E.2d at 103. Deference is a *tool* of judicial review, which provides appropriate guardrails to protect important constitutional or policy

objectives—including everything from the presumption of innocence to the separation of powers. But to say a standard of deference "prevents" judicial review in this case is every bit as nonsensical as to say the beyond a reasonable doubt standard prevents juries from delivering verdicts in criminal trials.

Next, Plaintiffs-Appellees argue that "it is the courts (and not legislators) that work to develop a body of doctrine on a case-by-case basis." (Plaintiffs-Appellees' Joint Br. 50)(*internal citation omitted*). But they fail to explain why a presumption of constitutionality, and the concomitant deference to policy choices entailed in that standard, cannot be part of that "body of doctrine" when it is part of the many bodies of doctrine applying constitutional scrutiny—a point Plaintiffs-Appellees concede except, apparently, in cases that "involve redistricting." (Plaintiffs-Appellees' Joint Br. 44 n.3). The body of doctrine this Court should adhere to recognizes that the "role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests." *Bryant*, 359 N.C. at 565, 614 S.E.2d at 486. To apply deference in adjudicating cases is not to abdicate judicial review, but rather to exercise that power in an appropriately calibrated way. There is nothing incompatible between this type of deference and judicial review over another department of State government. It is, in fact, the norm. *Cf. Lewis v. N.C. Dep't of Hum. Res.*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714–15 (1989) (discussing arbitrary and capricious review of executive determinations).

4. The Superior Court did not in fact afford deference.

Perhaps the most puzzling of Plaintiffs-Appellees' arguments is that the Superior Court "***afforded*** [the General Assembly] deference." (Plaintiffs-Appellees Joint Br. 41 (extreme emphasis in original)). Plaintiffs-Appellees do not even attempt to square that assertion with the bolded heading to that very section: "**The Trial Court Correctly Determined that the Remedial Congressional Plan Was Not Presumptively Constitutional**." *Id.* at 40. Clearly, the Superior Court did not afford the type of deference ordinarily seen in constitutional cases, when Plaintiffs-Appellees not only admit as much but declare this is a feature of their proposed approach to adjudicating these cases. Nor do Plaintiffs-Appellees show any confidence in this perfunctory paragraph, when all text above and below it, for pages, contends that no deference was appropriate. As shown below *see supra* section II.A., the Court afforded no deference to the Remedial Congressional Plan.

B. The Superior Court erred in not determining the intent of the General Assembly.

There is no evidence in this case that the Congressional Redistricting Plan is "the product of intentional, pro-Republican partisan redistricting," *Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, ¶ 184. Because Plaintiffs-Appellees cannot prove intent, they attempt to make it irrelevant. Plaintiffs' Joint Appellees Brief instead focuses on the alleged partisan skew of the districts under various tests that the Superior Court did not evaluate to see if they comported with this Court's order, and that were not considered by the General Assembly. As shown below (§ II.A), Plaintiffs-Appellees' arguments concerning partisan skew are incorrect, but the

Court need not even reach that question because the *Harper* decision renders any skew that could be shown legally insignificant absent a showing that it was the result of invidious purpose. Following Plaintiffs-Appellees erroneous lead, the Superior Court erred by looking only to effects tests to determine the constitutionality of the Remedial Congressional Plan without regard to General Assembly's intent. As discussed below, under Plaintiffs-Appellees' theory, any redistricting plan can be invalidated after a paid "expert" who can choose from an infinite number of elections and methodologies finds any evidence of disparate impact under their "test." But, that makes no sense, when this Court defined "partisan gerrymandering" as occurring when "the ruling party in the legislature manipulates the composition of the electorate to ensure that members of its party retain control." *Harper*, 380 N.C. 317, 2022-NCSC-17, at ¶ 141. Plaintiffs-Appellees fail to explain how the Remedial Congressional Plan can be illegal without a showing of discriminatory purpose.

Furthermore, this Court's *Harper* decision repeatedly cites discriminatory purpose as an essential predicate to the constitutional infringement it divined. Illegal partisan gerrymandering, it held, is discrimination "on the basis of partisan affiliation" that "also constitutes viewpoint discrimination and retaliation." *Id.* at ¶ 221. Plaintiffs' burden to prove discriminatory purpose is repeatedly confirmed in the *Harper* ruling.[3] *See, e.g., id.* at ¶¶ 27, 37, 39, 63, 64, 68, 69, 140, 141, 150, 157,

[3] Plaintiffs argued in the *Harper* appeal that their claims depended on a showing of intent and effect. *See Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *108–123 (N.C. Super. Ct. Sept. 3, 2019). (*See Harper* Pls' Br. 49, 57, 68, 70 (citing intent as critical to a manageable standard under the constitutional provisions at issue).

193, 197, 201, 203, 211. That is because Plaintiffs-Appellees must establish "intentional, purposeful discrimination" to assert a violation of the constitutional provisions *Harper* construed. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 662, 178 S.E.2d 382, 386 (1971); *accord Holmes v. Moore*, 270 N.C. App. 7, 16, 840 S.E.2d 244, 254 (2020); *Mobile v. Bolden*, 446 U.S. 55, 66–68, 100 S. Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality) (holding that only evidence of purposeful discrimination rises to the level of a gerrymandering claim).

Unlike the factual findings in the merit-phase Order, the Superior Court made no similar findings that the General Assembly intentionally manipulated the assignment of voters based on political party to the benefit of Republican political interests. Rather, the Superior Court made several findings that cut against a finding of discriminatory intent. For example, the Superior Court found that the General Assembly started all remedial plans from scratch. (R p 4875-82; FOF¶¶ 28, 36, 51). Thus, for all of Plaintiffs-Appellees' bluster about inferring intent from previous actions, the previous maps, declared unlawful by this Court were not even a factor in passing the Remedial Plans. *Id.* The Superior Court likewise found that the General Assembly's use of partisan data complied with the standards set forth in *Harper*. (R p 4873; FOF¶¶ 14-15). These are not findings of discriminatory intent.

The clear record in this case does not support a finding of discriminatory intent. The record shows no intent by the General Assembly to manipulate "the composition of the electorate to ensure that members of its party retain[ed] control." *Harper*, 380 N.C. 317, 2022-NCSC-17, at ¶ 221. Rather, the undisputed evidence reveals that the

General Assembly's purpose was to fashion a redistricting plan within the partisanship ranges this Court identified as presumptively valid and that the General Assembly's members sincerely and reasonably believed they achieved this goal, relying upon tests run by qualified, non-partisan central staff utilizing the industry-standard software (Maptitude). (9d R pp 15426; 15428). Purposefully composing districts to achieve measures identified in a court opinion as presumptively "fair" and using election data in a tailored fashion to that end, is the opposite of partisan gerrymandering as this Court defined it, regardless of whether those standards were achieved by all possible means of measurement. This evidence belies even an inference of intentional partisan gerrymandering. Moreover, no one has alleged the General Assembly's use of Maptitude to run the mean-median and efficiency gap analyses was improper in any way. Nor could they, as Caliper's Maptitude redistricting software is used by nearly every state in the country to draw district lines, by hundreds of demographers and experts, and is generally the gold standard of tools in the industry.

Likewise, there is also no evidence in the record whatsoever that map drawers intentionally targeted certain voters based on their partisan affiliation to the benefit of the Republican Party. If anything, there is evidence of purpose to benefit the Democratic Party and its voters to achieve mean-median and efficiency gap scores identified by this Court as presumptively fair, which requires some effort to overcome the natural geographic clustering of Democratic Party constituents in urban areas. To require more than that would extend the partisan-gerrymandering doctrine well

beyond forbidding gerrymandering in favor of some parties (here, the Republican Party) and construe it to *require* gerrymandering in favor of others (here, the Democratic Party). Only by cabining the doctrine *Harper* announced and demanding the proof of partisan intent *Harper* deemed essential can this Court avoid the unacceptable result of creating a constitutionally *favored* political party in North Carolina (which would, under present geographic conditions, be the party of the four Justices of the *Harper* majority).

Nothing in the record can arguably be construed to meet the *Harper* intent standard. Indeed, even setting aside the fact that metrics concerning supposed bias cannot arise to a showing of *purpose*, Plaintiffs-Appellees and the Superior Court focus on evidence not in front of the General Assembly at the time the Remedial Plans were passed, including additional reports from Dr. Mattingly, Dr. Duchin, and the SMA reports. Whatever that evidence *might* arguably say about effects (very little, as shown below, § II.A), it says *nothing* about intent. The Supreme Court of the United States made clear in *Shaw v. Hunt*, 517 U.S. 899, 910 (1996), that reports prepared during litigation and not before the General Assembly at the time of passage do not go to the intent of the legislature. *Id.* ("there is little evidence to suggest that the legislature considered the historical events and social science data that the reports recount, beyond what individual members may have recalled from personal experience."). And it would not matter whether individual legislators may have their own opinions about the political geography of the state, or a recollection of previous plans—which Plaintiffs-Appellees have not argued or attempted to show—because

these members alone would not have enough voting power to unilaterally pass a plan, making their individual recollections immaterial. *Id.* at 910. Again, there is no evidence in the record, or even an argument to the contrary.

Nor, as Plaintiffs-Appellees argue, can impact alone arise to a showing of invidious intent. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977), which was explicit that "impact alone is not determinative" and requires "other evidence" to arise to a showing of invidious intent. *Id.* at 266*; Holmes v. Moore,* 270 N.C. App. 7, 17, 840 S.E.2d 244, 255 (2020). Because Plaintiffs-Appellees have no *other* evidence *aside* from impact, they clearly fail this test (which they have not tried to satisfy). Nor, for that matter, does evidence of impact in this context move the needle in a meaningful way. Because constituents of political parties are not evenly distributed in any jurisdiction, it is unremarkable that a plan, drawn without partisan intent, would impact one party over others.

C. The Superior Court was required to compare apples to apples.

Setting aside Plaintiffs-Appellees' dispositive failure to show invidious intent, they could not satisfy an effects standard, even if that were sufficient. Under the *Harper* framework, the effects question was whether the plans scored above the standards identified in *Harper* as presumptively constitutional. Because the Remedial Congressional Plan satisfied that standard as the General Assembly measured it, the Superior Court could only enjoin the Plan *if* it found that the General Assembly was inaccurate, unreasonable, or arbitrary in arriving at its measures. *See supra* § IA. But the Superior Court not only failed to find this, it could not have found

this. Worse, it gave no justification for the measures *it* chose. To endorse this approach would put the General Assembly in the impossible position of guessing in advance which of the potentially unlimited inputs a court will eventually decide to adopt in measuring the General Assembly's work.

Plaintiffs-Appellees conveniently and repeatedly ignore this Court's opinion that—at a bare minimum—redistricting plans with a mean-median score at 1% or below and an efficiency gap score of 7% or below are "presumptively" constitutional. *See Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, ¶ 166–67. This omission is not surprising considering that all the Remedial Redistricting Plans passed by the General Assembly in February 2022, including the Remedial Congressional Plan, fell within that range. The Superior Court's order on the Remedial Plans contained findings on the criteria for drawing the Remedial Legislative and Congressional Plans. Particularly the Superior Court found that the General Assembly used a process to draw the Remedial Plans that was governed by "neutral and traditional redistricting criteria" (R p 4872; FOF ¶13) and that the General Assembly's use of 12 partisan elections to evaluate the Remedial Plans that "comported with the Supreme Court Remedial Order." (R p 4873*;* FOF ¶¶14-15). The Court also noted that the General Assembly started from scratch to draw each Remedial Plan and did not use the previously invalidated maps as a base map. (R p 4875-82; FOF ¶¶ 28, 36, 51). There is no evidence in the record to support an alternative finding, and these findings specifically have not been challenged by either party.

Relying upon the report of the Special Masters and the Special Master Assistants ("SMAs") the Superior Court held that the Remedial House Plan was "satisfactorily within" the statistical 1% mean median and 7% efficiency gap thresholds set by this Court (R p 4882; FOF ¶55) and concluded that the Remedial House Plan was presumptively constitutional (R p 4886; COL¶ 4-5).[4] The Court made identical findings and conclusions regarding the Remedial Senate Plan (R p 4886; COL ¶¶3,5; R p 4879; FOF¶ 42). These findings comported with evidence submitted to the Court showing that Legislative Defendants scored the Remedial Senate Plan as having a .63% mean-median and a 3.9% efficiency gap. (9d R pp 15420; 15423). Evidence also showed that the Remedial House Plan had a .71% mean-median and .84% efficiency gap. (9d R pp 15430; 15434). Again, these scores were calculated by non-partisan central staff using Maptitude, and the 12 elections that the Superior Court found comported with this Court's order. (9d R pp 11640-41; 15415-18; 11752:17-23). Thus, at the time of passage, Legislative Defendants believed these plans comported with this Court's order, and that belief was reasonable.

Testimony and evidence prepared by non-partisan central staff relying upon data from Maptitude conclusively show that Legislative Defendants scored the Remedial Congressional Plan with a mean-median of .61% and an efficiency gap of 5.3%. (9d R pp 15415-17; 15426; 15428; R p 4873 FOF ¶115). To score the plans,

[4] The Harper Plaintiffs did not challenge the Remedial House Plan. Only the NCLCV Plaintiffs challenged the Remedial House Plan alleging illegal partisan gerrymandering. That challenge was abandoned on appeal.

Legislative Defendants used the election composite that the Superior Court found complied with this Court's order. (R p 4873; FOF ¶15). Thus, at the time of passage, Legislative Defendants reasonably believed the Remedial Congressional Plan, like the Remedial House and Senate Plans, fully complied with this Court's order. In fact, at the time of passage, Legislative Defendants believed the mean-median score on the Remedial Congressional Plan was *lower* than that of either of the Remedial Legislative Plans. No Party or SMA submitted any evidence challenging the Maptitude scores. Apart from this clear showing belying any allegation of discriminatory intent, this evidence is also the evidence the Superior Court was required to analyze, and that the Plaintiffs were required to prove beyond a reasonable doubt was incorrect, arbitrary, or unreasonable. *Cooper v. Berger*, 370 N.C. 392, 414, 809 S.E.2d 98, 111 (2018).

No showing of that kind has been made or could ever be made. Instead, the Superior Court relied upon different evidence using different elections and different methods submitted by the SMAs. And, perhaps unsurprisingly, they reached a different result. Specifically, the Superior Court found that the Remedial Congressional Plan was "not satisfactorily within the statistical ranges set forth in the Supreme Court's Full opinion" (R p 4876; FOF ¶34); and that the associated partisan skew of the Remedial Congressional Plan was "not explained by the political geography of North Carolina") (R p 4877; FOF ¶35). Because of these findings, the Superior Court concluded that the Remedial Congressional plan was not

presumptively constitutional and did not pass strict scrutiny. (R p 4887; COL ¶¶9-10).

The Superior Court erred in relying upon the Special Masters' and the SMAs' analysis to invalidate the Remedial Congressional Plan. While the Court was correct to evaluate the mean-median and the efficiency gap scores to determine if the plans were presumptively constitutional, *See Harper*, 380 N.C. 317, 2022-NCSC-17, at ¶ 166–67, the Court erred by failing to give deference to the partisan elections and methodology used by the General Assembly that the Superior Court found comported with this Court's order. None of the SMAs used the General Assembly's method for calculation or the General Assembly's set of elections to calculate the mean-median or the efficiency gap.[5] And unlike the Superior Court's finding that the General Assembly's set of partisan elections and methods were appropriate, the Superior Court made *no* findings that the methods or alternative election sets used by the SMAs were proper.[6] All this evidence showed is that under *some* confluence of inputs,

[5] Dr. Grofman analyzed 6 elections using Dave's Redistricting, Dr. Jarvis analyzed 11 elections in a method similar to Dr. Mattingly's ensembles, Dr. Wang used several different composites depending on the scenario, and Dr. McGhee used the black box algorithm PlanScore to "predict" outcomes.

[6] There was also no finding by the Superior Court that the SMAs qualified as experts. Furthermore the Superior Court's decision to invalidate the remedial congressional plan based upon testimony by "experts" who have never been cross examined under oath is unprecedented. This assumed that: (1) all of the SMAs were experts, (2) new "experts" paid by the Plaintiffs with the goal of supporting Plaintiffs case, were also experts, (3) that all "experts" gave testimony that is 100% accurate and completely disclosed all of the data and formulas used by them, and (4) blindly assumes that none of these "experts" have any partisan bias or some other personal agenda. We are aware of no prior case where an act of the legislature has been held unconstitutional based upon the testimony of paid experts who have never been subject to cross

the plans *might* not satisfy the relevant metrics. Because a very large range of data may be input into the measures, this unremarkable showing cannot be afforded legal significance, if any patina of objectivity and manageability is to be maintained.

In fact, under controlling North Carolina law the Superior Court was bound to examine evidence looking at an apples to apples comparison. *See, e.g., Rorrer v. Cooke,* 313 N.C. 338, 356, 329 S.E.2d 355, 366 (1985); *Perfecting Serv. Co. v. Prod Dev. & Sales Co.,* 259 N.C. 400, 412, 131 S.E.2d 9, 19 (1963); *See also* Legislative Defendants Appellants' Brief at pp 29-31. Tellingly, Plaintiffs make no legal argument to the contrary in their Joint Appellees' Brief, nor do they attempt to distinguish any of the cases cited on this matter in Legislative Defendants Appellants' Brief. Nor could they, since the figures relied upon by the General Assembly in passing the Remedial Congressional plan were calculated correctly beyond dispute.

Instead, Plaintiffs-Appellees ask the Court to infer ill-intent when analyzing the General Assembly's choice of election composite, when none is supported by the record. Rather, the record supports that Legislative Leadership chose to analyze the Remedial Plans under the election composite used most frequently in the findings of fact and conclusions of law made by the Superior Court during the merits phase, which this Court expressly adopted. This twelve-election composite was created and utilized by *Harper* Plaintiffs' own expert, Dr. Mattingly. This choice was reasonable on several grounds. First, to choose the predominant measure the Superior Court

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examination with full disclosure of the facts and data relied upon by each expert. Rule 26(b)(4), N.C. R. Civ. P.

and Plaintiffs-Appellees both utilized is an obvious way to *avoid* disputes about the proper election composite. It is truly bizarre for the General Assembly to then be told that these measures, approved at the liability phase, are no longer approved.

Second, given the extreme time pressure, Dr. Mattingly's composite was an even more obvious choice, because it was already vetted, approved, and available. A different choice would have required laying more groundwork, both from a legal and data-collection standpoint, and it was reasonable for the General Assembly to streamline the process with a tried-and-true choice when it had no time to do anything else. Third, this choice also continued the General Assembly's practice of relying upon Dr. Mattingly's work, as the General Assembly used the county grouping configurations that both it and Dr. Mattingly agreed were proper under the *Stephenson* county grouping rules. (R pp 2898-2900; 3047-50). It contradicts reason that relying upon your opponents' expert analysis is evidence of nefarious conduct, much less evidence of a discriminatory intent. Because Plaintiffs-Appellees have no legal or factual support for their claim that the General Assembly's choice of elections was improper, or that the Superior Court's failure to conduct an apples to apples comparison was proper, Plaintiff-Appellees' arguments lack merit.

D. Plaintiffs-Appellees' "Feature" Theory Must be Rejected.

Since Plaintiffs-Appellees can't make an apples to apples comparison on the evidence as required by North Carolina jurisprudence, they attempt to shift the narrative. Plaintiffs-Appellees claim it is a good thing that the Superior Court looked to a variety of reports with different tests, none of which were available to the General

Assembly. Plaintiffs' claim this is a "feature" of the constitution, not "a bug" (Plaintiffs-Appellees Joint Br. p 38). While Plaintiffs-Appellees' are correct that this is not "a bug"; their theory is certainly not a "feature." Rather Plaintiffs-Appellees theory is more akin to playing a never-ending game, where there is no finality because the rules and targets are constantly shifting.

Starting with the mean-median and efficiency gap tests adopted by this Court in *Harper,* calculations for both tests will vary depending on several factors, including: (1) the partisan elections selected for analysis; and (2) the method of calculation. Given the number of elections in North Carolina and constantly shifting calculation methods, this means that there is nearly an infinite number of combinations of methodologies and elections that could be chosen. This is separate from determinations on whether certain elections with higher turnouts should be weighted in an analysis to account for a higher number of voters, or whether certain elections, like presidential elections, or more recent elections are more probative than other statewide elections.

Under Plaintiffs-Appellants "feature" theory, if a proposed plan, no matter who drafts it, fails even under one of those elections or methodologies, the plan loses the presumption of constitutionality. This cannot be the legal test set forth by the Court for several reasons. First, such a test would open Pandora's box, whereby any academic, or interest group, with virtually limitless resources can come up with a new methodology suddenly calling into question the constitutionality of a redistricting plan. Or any wealthy individual could employ mathematicians or

statisticians to find the one election under the one scenario that calls into question the constitutionality of any redistricting plan adopted by the General Assembly, even one where non-partisan staff certified that the plan complied with this Court's metrics. The practical reality of Plaintiffs-Appellees' "feature" theory is that it creates a constantly shifting target designed to make the General Assembly fail under all circumstances.[7] Under no separation of powers theory is one branch of the North Carolina government allowed to create a scheme whereby another cannot succeed. *Pers. v. Doughton*, 186 N.C. 723, 120 S.E. 481, 482–83 (1923); *News and Observer Pub. Co. v. Easley,* 182 N.C. App. 14, 21, 641 S.E.2d 698, 703 (2007).

Plaintiffs-Appellees' attempt to equate their feature theory to the one-person one-vote standard. This is misguided. The body of principles announced by the U.S. Supreme Court in one-person, one-vote cases does nothing to advance Plaintiffs-Appellees' position and much to undermine it. (Plaintiffs-Appellees' Joint Br. 50–51). As an initial matter, those cases command the very deference Plaintiffs-Appellees disparage, directing lower federal courts "to afford appropriate deference to [a state legislature's] reasonable exercise of its political judgment" in adjudicating one-person, one-vote claims. *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 759 (2012).

More importantly, Plaintiffs-Appellees do not actually want anything like "the 10% threshold for presumptively constitutional 'minor deviations' in state-legislative

[7] What Plaintiffs espouse is really no manageable standard at all. If there is no manageable standard to test when partisanship becomes "too much" then the matter is a political question reserved to the General Assembly to determine. *Common Cause v. Forest*, 269 N.C. App. 387, 395, 838 S.E.2d 668, 675, *review denied,* 376 N.C. 543, 851 S.E.2d 375 (2020).

apportionment plans." (Plaintiffs-Appellees' Joint Br. 50–51). That would involve clarity, which they strive to avoid. It might mean, for example, this Court's announcement that a certain metric be met based on a discrete body of elections—identified in advance. The General Assembly has tried to redistrict under that type of rubric, relying on thresholds identified in the *Harper* ruling using elections identified as probative in the Superior Court proceedings. *See, e.g.*, Appellant Br. p 19, 24–25. But Plaintiffs-Appellees demand (*e.g.*, p 25) that this Court purposefully create ambiguity, allowing them to engage with the General Assembly in a whack-a-mole game. If the General Assembly looks to metric A using election set Y, Plaintiffs-Appellees want leeway to argue that metric B and election set X should have been used, and they want this Court to accept their choices, not the General Assembly's.

The federal courts have rejected that approach in the line of cases Plaintiffs-Appellees cite. "[T]he easily administrable standard of population equality adopted by *Wesberry* and *Reynolds* enables judges to decide whether a violation has occurred (and to remedy it) essentially on the basis of three readily determined factors—where the plaintiff lives, how many voters are in his district, and how many voters are in other districts." *Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004) (plurality opinion)(internal citations omitted). That standard operates as much as a principle of judicial self-restraint as it does a principle of legislative restraint, ensuring that the federal courts have committed in advance to a reliable set of rules. Federal courts have not allowed themselves to decide whether they agree with the choices in a redistricting plan and then engineer a set of data and standards after the fact to

justify invalidating plans they dislike. Plaintiffs-Appellees transparently ask this Court to take the very approach rejected in the one-person, one-vote cases they cite. For this Court to capitulate could be explained by little other than "deeper partisan biases that have no place in a judiciary dedicated to the impartial administration of justice and the rule of law." *Harper v. Hall,* 874 S.E.2d 902, 904–05 (July 28, 2022) (Mem.) (Barringer, J., dissenting). It would, in all events, undermine the separation of powers doctrine.

II. THE SUPERIOR COURT ERRED IN ITS FINDINGS OF FACT PERTAINING TO THE REMEDIAL CONGRESSIONAL PLAN.

A Superior Court's findings of fact will be binding on appeal "unless there is no sufficient evidence to support them, or error has been committed in receiving or rejecting testimony upon which they are based…" *Biggs v. Lassiter*, 220 N.C. 761, 18 S.E.2d 419, 424 (1942). Here, the Superior Court erred in both of the scenario's contemplated by *Biggs*. First the Superior Court erred in receiving or rejecting testimony that shows that the Remedial Congressional Plan met the threshold for presumptive constitutionality. Second the Superior Court had no evidence before it to support the finding that any alleged partisan skew of the Remedial Congressional Plan is not the result of North Carolina's natural political geography.

A. The Superior Court erred in rejecting testimony proving the Remedial Congressional Plan was presumptively constitutional.

The Superior Court erred in rejecting testimony and evidence provided by the General Assembly, experts for the General Assembly, and the SMAs. Particularly, the Superior Court erred in rejecting evidence that showed that the Remedial

Congressional Plan was presumptively constitutional under elections and calculations utilized by the General Assembly. This evidence, presented in the form of testimony from non-partisan central staff who ran the Maptitude reports, and bolstered by findings by Legislative Defendants' expert, Dr. Michael Barber, definitively proves that the Remedial Congressional Plan fell within this Court's presumptively constitutional thresholds for mean-median and efficiency gap scores. As discussed above, the Court was required to consider the scores of the Remedial Congressional Plan using, at minimum, the elections chosen by the General Assembly. Only this appropriate apples to apples comparison makes sense. After all, in North Carolina we do not allow an oncologist to opine on a surgery completed by an orthopedist. This is because the methods and tools supporting one physician's decision will vary based on specialty and experience. Either the Superior Court, the Special Masters, or the SMAs could have chosen to test the veracity of the calculations on the 12 election set composite chosen by the General Assembly, reported by non-partisan central staff and verified by Dr. Barber. However, neither the Court, nor the Special Masters, nor the SMAs even attempted to do so. As such, the Court erred in rejecting testimony showing apples to apples comparisons.

Even assuming that the Court could consider additional evidence using different calculation methods or different election composites, which it cannot, the Superior Court erred in rejecting the analysis of the SMAs which tended to show that the Remedial Congressional Plan fell within the 1% and 7% thresholds of presumptive constitutionality. And the Superior Court rejected all this analysis

without explanation. The table below contains the efficiency gap and mean-median scores for the Remedial Congressional Plan as calculated by the General Assembly's non-partisan central staff, Dr. Barber, Plaintiffs' expert, Dr. Mattingly, and each of the SMAs.[8]

	Grofman 6 election composite	McGhee Planscore	Wang 2016-2020	Wang 10 Election	Jarvis	Mattingly 16 new Election Composite	Barber 12 Election Composite	Maptitude
MM	.66%	1.1%	.7%	1.2%	.9%	1.01%	.61%	.61%
EG	6.37%	6.4%	7.4%	6.8%	8.8%	7.31%	5.29%	5.3%

As the chart illustrates, of the five composites and methodologies considered by the SMAs for both the mean-median and the efficiency gap, the Remedial Congressional is within the range of presumptive constitutionality 60% of the time. When you expand the chart to include metrics before the Superior Court and Special Masters submitted by both Plaintiffs and Legislative Defendants, the Remedial Congressional Plan met the presumptive constitutional thresholds 62.5% of the time. Thus, more than a preponderance of the evidence in front of the Superior Court and the Special Masters determined that the Remedial Congressional Plan satisfied this Court's metrics.

A further examination of the reports and scores reveals even more probative evidence rejected by the Superior Court. For example, while Dr. Jarvis found the Remedial Congressional Plan had an efficiency gap higher than the 7% threshold, he

[8] This chart is simply a demonstrative to aid the Court. The underlying data for this chart can be found at R pp 5114-15; 5080; 5060; 5039; 4701; 4756; 9d R pp 15426; 15428.

concluded that the efficiency gap score was well within the range of his simulations. (R p 5109). This led Dr. Jarvis to affirmatively conclude that there was *no* evidence of partisan gerrymandering of the Remedial Congressional Plan. (R pp 5106; 5109). Conversely, Dr. Jarvis reported that the NCLCV plan was a partisan outlier on all metrics of his simulations, leading to his conclusion that the NCLCV plan was a partisan gerrymander. (R p 5109). Similarly, Dr. McGhee, using PlanScore to "predict" the expected partisan outcomes determined that the Remedial Congressional Plan scored high on mean-median and efficiency gap. But Dr. McGhee also found that *none* of his values produced an outcome more than 50% likely to favor the Republican Party throughout the decade. The opinions of these experts surely is not evidence of the General Assembly's attempt to manipulate "the electorate to ensure that members of its party retain control." *Harper*, 380 N.C. 317, 2022-NCSC-17, at ¶ 141. If Republican leadership were trying to engage in conduct prohibited by this Court, Dr. McGhee would have found the opposite—values producing an outcome more than 50% likely to favor Republicans throughout the decade. And lastly, Dr. Mattingly's mean-median score under his new election composite is a mere 1.01%. This means that it is one-hundredth of a percentage point away from being compliant. Therefore, the mean-median is within a rounding error of being "too high" even under an analysis that did not use the same elections as the General Assembly which the Superior Court found to be compliant with the law.

Why did the Superior Court reject Dr. Jarvis' conclusion that the Remedial Congressional Plan was not gerrymandered? There is no explanation. Why did the

Superior Court reject Dr. McGhee's findings that the Remedial Congressional Plan was not likely to favor Republicans throughout the decade? We are again left with no explanation. What we do know is that the Superior Court, without any basis, rejected this testimony, and the testimony of experts and the General Assembly which shows that the Remedial Congressional Plan was entitled to presumptive constitutionality.

Compare this to the evidence that the Superior Court ostensibly did not reject on the Remedial Senate Plan and the Remedial House Plan. The table below shows a compilation of the scores of the SMAs, Dr. Mattingly, the General Assembly, and Dr. Barber for the Remedial Senate Plan.[9]

	Grofman 6 election composite	McGhee Planscore	Wang 2016-2020	Jarvis	Mattingly 16 new Election Composite	Barber GA 12 Election Composite	Maptitude
MM	.77%	2.2%	.8%	1.4%	1.3%	.65%	.63%
EG	4.24%	4.8%	2.2%	4.0%	4.07%	3.97%	3.98%

The Table below shows a compilation of the Scores of the SMAs, Dr. Mattingly, the General Assembly, and Dr. Barber for the Remedial House Plan.[10]

	Grofman 6 election composite	McGhee Planscore	Wang[11]	Jarvis	Mattingly 16 new Election Composite	Barber GA 12 Election Composite	Maptitude
MM	.89%	1.4%	.9%	1.5%	1.45%	.70%	.71%
EG	2.72%	3.0%	3.1%	2.7%	3.23%	.84%	.84%

[9] R pp 5124-25, 5086, 5072, 5039, 4714, 4759; 9d R pp 15420, 15423.

[10] R pp 5134-35, 5091, 5066, 5039, 4719, 4854; 9d R pp 15430, 15434.

[11] Curiously, Dr. Wang did not define which election set he used to produce these scores.

These tables show that like the Remedial Congressional Plan, the majority, but not all of the SMAs, experts and Legislative Defendants found the Remedial House and Senate Plans to be within the preemptively constitutional thresholds. But ironically, while Dr. Jarvis concluded that the high scoring Remedial House and Congressional Plans were not partisan gerrymanders, he could not conclude the same with regard to the Remedial Senate Plan. (R pp 5129; 5119). There is no rational explanation for why the Superior Court would act differently with regard to the Remedial Congressional Plan in the face of the same evidence upholding the Remedial House and Senate Plans. The only conclusion is that the Superior Court erred in rejecting the same testimony and evidence showing that the Remedial Congressional Plan met the presumptively constitutional thresholds, which it credited in regard to the Remedial House and Senate Plans.

Plaintiffs-Appellees try to distract from this obvious conclusion by relying on a variety of symmetry analyses, which vary wildly in methodology and academic credibility. Dr. Barber, at the request of Legislative Defendants performed a symmetry analysis in addition to his work calculating the efficiency gap and mean-median scores on the Remedial Plans. In their Joint Appellee Brief, Plaintiffs badly misstate the findings of Dr. Barber's analysis. *See* pp 29-30.

Dr. Barber's partisan symmetry analysis cited by Plaintiffs in their Joint Appellee Brief shows three things. First, how much does each party have to win to get half of the seats (7/14)? Second, how much does each party have to win to get a

majority or more (> 8/14) of the seats? Third, is that number the same for both parties? Plaintiffs-Appellees entirely ignore the first point.

Then Plaintiffs boldly misconstrue the second point by conflating how much of the vote is needed for Democrats to likely achieve a majority of the Congressional seats. Specifically, Plaintiffs conflate the required percentages at eight and nine seats. While Plaintiffs-Appellees assert that Dr. Barber's analysis shows that Democrats are not likely to win eight seats until they receive 55% of the statewide vote, this is an incorrect reading of the chart. Dr. Barber's chart reveals that Democrats likely need 55% of the vote before they would receive **nine** (not eight) of the fourteen seats. Nine seats equates to 64% of the total seats. Thus, Dr. Barber's analysis shows that, at 55% of the state-wide vote, Democrats would receive an additional 9% of the seats relative to their statewide vote share. This is clearly not a showing of bias toward Democrats, or evidence of discriminatory intent.

On the third point, Plaintiffs-Appellees again misconstrue Dr. Barber's charts. This chart primarily predicts how the Remedial Congressional Plan will perform around 50% of the statewide vote. The chart shows that in order to get 50% of the Congressional seats under the Remedial Congressional Plan, seven Democrats would need to win 50.6% of the statewide vote. This is less than a percentage point different than perfect symmetry. And as discussed below *see infra* section II. B, Dr. Grofman concludes that this less than 1% difference can easily be attributed to North Carolina's political geography. (R pp 5033-35).

In sum, the record is clear that all three Remedial Plans are constitutional. Each Remedial Plan was scored by non-partisan central staff using Maptitude and a 12-election composite, twice relied upon by the Superior Court. No Plaintiff, Special Master, or SMA has alleged these calculations were done incorrectly, or that the General Assembly should not have utilized Maptitude to run the calculations. Likewise, no Plaintiff, Special Master, or SMA has called into question the qualifications of the non-partisan central staff, or the veracity of their testimony. Nor could they. The conduct of the General Assembly and the non-partisan staff in enacting the Remedial Plans is beyond reproach. Instead, the Plaintiffs and the Superior Court relied upon various other tests, or calculations utilizing different election sets. While the Superior Court erred in considering this evidence at all, the evidence itself reveals that all of the Remedial Plans met the thresholds for presumptive constitutionality more than 60% of the time. Because the Superior Court credited the exact same evidence and analysis in finding the Remedial House and Senate Plans constitutional, this Court must correct the Superior Court's error, and harmonize the Superior Court's opinion, by declaring the Congressional Remedial Plans constitutional.

B. No evidence supports the Superior Court's findings on political geography.

Dr. Grofman's report predicts that of North Carolina's 14 Congressional districts, six are safely Republican, three are safely Democratic, and five are competitive in the Remedial Congressional Plan. Of those five competitive districts, Dr. Grofman opines that two lean Republican and three lean Democratic. This is

similar to Dr. Wang's analysis. Dr. Wang classifies North Carolina's 14 Congressional districts as having six that lean Democratic, and eight that lean Republican in the Remedial Congressional Plan. Of those 14 seats, Dr. Wang classifies four as "competitive" which he defines as within seven points. Therefore based on the testimony of both Dr. Wang and Dr. Grofman, there is a likely one seat differential between the major political parties in the Remedial Congressional Plan.

The Superior Court determined that this "partisan skew" of one district was "not explained by the political geography of North Carolina." (R p 4877; FOF ¶35). This is an erroneous finding. Not only is this finding not supported by "sufficient evidence" *Biggs v. Lassiter*, 220 N.C. 761, 18 S.E.2d 419, 424 (1942), it is not supported by *any* evidence at all. The *only* SMA to mention natural geography or a natural bias in favor of one party or another is Dr. Grofman. (R pp 5033-5035). Dr. Grofman examined natural bias, and found that North Carolina has *some* level of natural partisan skew in the state's geography. (*Id.*). In support of this finding, Dr. Grofman, expressly rejects Dr. Duchin's previous theory that there is no natural partisan bias in North Carolina, relying upon Plaintiffs' expert Dr. Magleby's simulations presented at the merit phase of this litigation. (*Id.*). Dr. Magleby's simulations showed a natural bias of at least 1% in favor of Republicans for congressional and senate plans, which rises to 2% in house plans. (*Id.*). Dr. Grofman goes on to correctly report that with a 50.8% statewide Republican vote share, Plaintiffs-Appellees' experts Dr. Chen and Dr. Magleby predict that between eight and nine Republicans would win districts in their simulations. (*Id.*). Thus Dr.

Grofman's own findings of approximately eight Republican leaning districts in the Remedial Congressional Plan, bolstered by Dr. Wang's same findings are squarely within the range of neutral simulations produced by Drs. Chen and Magleby during the merit phase of this litigation.

Nowhere in his report does Dr. Grofman opine that the alleged impermissible partisan skew of the Remedial Congressional Plan cannot be attributed to the natural partisan skew of North Carolina's geography. Nor could he, when the range of Republican districts is within his own findings. As a result, not only is there no competent evidence to support the Superior Court's finding regarding political geography (R p 4877; FOF ¶35), there is no evidence at all to support the finding. Rather, based on Dr. Grofman's findings, bolstered by Plaintiffs-Appellees' own experts, there is ample testimony to support the opposite finding: that the one district differential between the two major political parties in the Remedial Congressional Plan *is* the result of the natural political geography of North Carolina. This Court cannot let such clear error on the part of the Superior Court stand.

III. THE SUPERIOR COURT ERRED IN FAILING TO DISQUALIFY SMAS WANG ANG JARVIS.

The conduct of SMAs Wang and Jarvis in communicating with three of Plaintiffs-Appellees' experts in this matter was clearly improper. In fact, the conduct was so improper that Plaintiffs raised the improper *ex parte* communications with the Superior Court. (R pp 4608-4609). Now Plaintiffs-Appellees argue that the Superior Court did not err in failing to disqualify SMAs Wang and Jarvis for their *ex parte* communications. In doing so, Plaintiffs-Appelles make two principle

arguments. First, Plaintiffs-Appellees argue that SMAs Wang and Jarvis simply sought information that was publicly available on various websites and through reports submitted in this case. However, if that information was so public and easily understandable, SMAs Wang and Jarvis, who are experts in this field in their own right, would not have needed to ask Plaintiffs-Appellees' experts about their work and for advice on how to apply their methodology.

Second, Plaintiffs-Appellees claim that Legislative Defendants have not shown how the *ex parte* communications "could prompt an 'informed observer' to 'reasonably ... question [the Special Masters'] impartiality' based on their assistants' conduct." (Joint Appellee Brief p. 54 (quoting *In re Brooks*, 383 F.3d 1036, 1046 (D.C. Cir. 2004)). This argument is absurd on its face. For starters, Legislative Defendants had several well-qualified experts in this matter, including one who works on the same campus as Dr. Jarvis, and yet Dr. Jarvis and Dr. Wang chose only to reach out to Plaintiffs-Appellees' experts. This is an obvious point of bias. If Dr. Wang and Dr. Jarvis were committed to being truly neutral, they would have sought information from both sides of the "v". Furthermore, the substance of the communications (R pp 5018-5026) reveal that Plaintiffs-Appellees' experts divulged which information they considered important for their analysis and likely contributed to selection bias of Drs. Wang and Jarvis.

In this same vein, Plaintiffs-Appellees next attempt to distinguish Legislative Defendants' use of *Point Intrepid, LLC v. Farley,* by claiming the case explains that establishing bias turns on the substance of the *ex parte* communications, not their

existence. 215 N.C. App 82, 83, 714 S.E.2d 797, 798 (2011). While that is partially true, the substance of the conversations reveal that the SMAs Wang and Jarvis were seeking expert information known only to Plaintiffs-Appellees' experts themselves. (R pp 5018-5026). Furthermore, Plaintiffs-Appellees conveniently leave out a key fact from *Point Intrepid* that makes their reliance unwarranted. In *Point Intrepid*, the North Carolina Court of Appeals found that the trial court's order "expressly permitted communications between the litigating parties and the court-appointed expert." *Id.* at 89–90; 714 S.E.2d at 802–03. Here, the opposite is true. The Superior Court expressly ordered that "Parties and non-parties may not engage in any *ex parte* communication with the Special Masters about the subject matter of this litigation." (R p 4181). SMAs Wang and Jarvis violated the Superior Court's express order, and disqualification was warranted.

IV. PLAINTIFFS-APPELLEES' ATTEMPT TO INJECT ISSUES PROPERLY BEFORE THE SUPREME COURT OF THE UNITED STATES SHOULD BE REJECTED.

The hornet's nest of issues raised in this appeal are easily avoided by dismissing the portion of this appeal pertaining to the Remedial Congressional Plan and the disqualification of SMAs Wang and Jarvis. Instead, Plaintiffs-Appellees oppose dismissal so that they can attempt to inject into this appeal issues that currently are pending before the United States Supreme Court relating to Elections Clause issues that were implicated by this Court's earlier decisions in this case. But those earlier decisions are final for purposes of federal law, and they cannot be made non-final or otherwise disturbed now after certiorari already has been granted. This

Court should reject Plaintiffs-Appellees' attempt to inject issues in this appeal that properly are before the United States Supreme Court.

Plaintiffs-Appellees' theory cannot disturb this Court's order invalidating Legislative Defendants' original congressional map. That order was not the result of an interlocutory appeal, but an appeal from a final judgment. *See* N.C. Sup. Ct. op., Jan. 11, 2022 (R pp3512-3771). This Court's February 4 decision was also a final judgment as to the original map, and the U.S. Supreme Court has now granted certiorari to review that final judgment, which presents a live controversy because, if the U.S. Supreme Court reverses this Court's judgment, Legislative Defendants original congressional map will be again implemented by virtue of North Carolina law. 2022 N.C. Sess. Laws 3, § 2. This Court cannot retroactively make these decisions non-final or moot the live controversy pending before the U.S. Supreme Court.

This Court's decision denying a temporary stay of the Special Masters' remedial congressional maps also is a final judgment for purposes of federal law. When Legislative Defendants filed their petition for certiorari in the U.S. Supreme Court, they explained as much, including that this Court's stay denial "is a final judgment of North Carolina's highest court with regard to the maps that will govern the 2022 election," the primary for which had "already taken place using those remedial maps," and so no further state court decision was possible on this issue. Reply ISO Pet. for Writ of Certiorari, *Moore v. Harper,* No. 21-1271, at 2 (U.S. May 27, 2022); *see also* Pet. for Writ of Certiorari, *Moore v. Harper*, No. 21-1271, at 5 (U.S.

Mar. 17, 2022). Plaintiffs-Appellees' disagreed and argued at length that all of the lower court "decisions are quintessentially interlocutory," Harper Br. in Opp'n, *Moore v. Harper*, No. 21-1271, at 12 (U.S. May 20, 2022), and that the Supreme Court lacked jurisdiction while proceedings remained pending in this Court, NCLCV Br. in Opp'n, *Moore v. Harper*, No. 21-1271, at 17 (U.S. May 20, 2022). *See also* State Resp'ts Br. in Opp'n, *Moore v. Harper*, No. 21-1271, at 37 (U.S. May 20, 2022). Yet, the U.S. Supreme Court granted certiorari to decide the Elections Clause issue, and in doing so, it implicitly rejected Plaintiffs-Appellees' jurisdictional arguments. *Moore v. Harper*, 142 S. Ct. 2901 (2022) (Mem.) (granting certiorari).

Plaintiffs-Appellees now try to resist the U.S. Supreme Court's jurisdiction in a new way, premised again on the idea that this Court's stay denial was non-final (the very idea the U.S. Supreme Court has implicitly rejected). Plaintiffs-Appellees urge this Court to enter final judgment *now* with new terms to give Plaintiffs-Appellees a fresh shot at arguing that the U.S. Supreme Court lacks jurisdiction. Of course, even if this Court were to apply Plaintiffs-Appellees' convoluted theory, it would not change the fact that the U.S. Supreme Court has already granted certiorari over Plaintiffs-Appellees' finality arguments. Moreover, Plaintiffs-Appellees' theory depends on the counterfactual idea that Legislative Defendants have "abandoned" their Elections Clause argument when in fact they have *pursued* that argument all the way to the U.S. Supreme Court at the earliest opportunity. None of the caselaw Plaintiffs-Appellees cite addresses a circumstance like this, where the allegedly

"abandoned" issue is the subject of an ongoing appeal in a higher court with jurisdiction to decide it.

With these principles understood, Plaintiffs-Appellees' arguments fall apart. First, the merger doctrine is irrelevant. While "North Carolina … takes the traditional view that interlocutory orders … are merged in any final judgment," *Yale v. Nat'l Indem. Co.*, 602 F.2d 642, 647 (4th Cir. 1979), that merger facilitates appeals from interlocutory orders of the same court that entered the final judgment, *see* Wright & Miller, 15A Fed. Prac. & Proc. Jurs. § 3905.1 (2d ed.) ("[O]nce appeal is taken from a truly final judgment that ends the litigation, earlier rulings generally can be reviewed."). This Court's decisions do not merge with the judgment of the Superior Court. Second, res judicata and collateral estoppel likewise are irrelevant because Legislative Defendants have not abandoned any arguments but rather have pursued them in the proper manner by seeking review in the United States Supreme Court. Legislative Defendants are not seeking to "relitigate" any Elections Clause issues but rather are simply continuing to litigate those issues in the context of review of the judgments in which they were addressed.

CONCLUSION

For the reasons stated herein, Legislative Defendants' Motion to Dismiss their portion of the appeal should be granted. In the alternative, the Superior Court's opinion striking down the Remedial Congressional Plan and replacing it with a congressional plan drawn by Dr. Grofman should be reversed. Likewise, the Superior Court's opinion denying Legislative Defendants' Motion to Disqualify Special Master Wang and Special Master Jarvis should be reversed.

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