

No. \_\_\_\_\_

TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; DAVID DWIGHT BROWN,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, IN HIS OFFICIAL CAPACITY AS CHAIR OF THE HOUSE STANDING COMMITTEE ON REDISTRICTING; SENATOR WARREN DANIEL, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR RALPH HISE, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SENATOR PAUL NEWTON, IN HIS OFFICIAL CAPACITY AS CO-CHAIR OF THE SENATE STANDING COMMITTEE ON REDISTRICTING AND ELECTIONS; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, IN HIS OFFICIAL CAPACITY

From Wake County  
No. 21 CVS 500085

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**PETITION FOR  
DISCRETIONARY REVIEW  
PRIOR TO DETERMINATION  
BY THE COURT OF APPEALS  
AND MOTION TO SUSPEND  
APPELLATE RULES**

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AS CHAIRMAN OF THE NORTH  
CAROLINA STATE BOARD OF  
ELECTIONS; STELLA ANDERSON, IN  
HER OFFICIAL CAPACITY AS  
SECRETARY OF THE NORTH CAROLINA  
STATE BOARD OF ELECTIONS; JEFF  
CARMON III, IN HIS OFFICIAL CAPACITY  
AS MEMBER OF THE NORTH CAROLINA  
STATE BOARD OF ELECTIONS; STACY  
EGGERS IV, IN HIS OFFICIAL CAPACITY  
AS MEMBER OF THE NORTH CAROLINA  
STATE BOARD OF ELECTIONS; TOMMY  
TUCKER, IN HIS OFFICIAL CAPACITY AS  
MEMBER OF THE NORTH CAROLINA  
STATE BOARD OF ELECTIONS,

Defendants.

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STATE BOARD OF ELECTIONS; TOMMY  
TUCKER, IN HIS OFFICIAL CAPACITY AS  
MEMBER OF THE NORTH CAROLINA  
STATE BOARD OF ELECTIONS,  
Defendants.

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Petitioners are North Carolina voters who respectfully petition this Court to certify for discretionary review, prior to determination by the Court of Appeals, the Order entered on 3 December 2021 in *Harper v. Hall*, No. 21 CVS 50085 (N.C. Super. Ct., Wake Cty.), as well as any related petitions or appellate motions relating to the Order. In the Order, a three-judge panel of the Superior Court denied Petitioners' Motion for a Preliminary Injunction to bar use of North Carolina's 2021 congressional map (the "2021 Plan") in the 2022 primary and general elections for Congress and to enact a remedial process for drawing a new congressional map that is consistent with the North Carolina Constitution.

The Executive Director of the State Board of Elections has attested that, absent intervention by the courts, the Board must receive final redistricting plans by 14 December 2022 for use in the 8 March 2022 primary election. This Court must therefore



grant review now to enable review in time to for the March primary election. If the Court is unable to review the decision below prior to 14 December 2022, the State Board has attested that it is feasible to move the primary date to 17 May 2022. That step would not eliminate the need for the Court to grant this petition and review this matter in the first instance now, because the State Board has stated that it would need final remedial plans before 18 February 2022 to enable a May 2022 primary. To that end, Plaintiffs have proposed a briefing schedule at the conclusion of this petition.

As the three-judge panel acknowledged, this matter is of extreme urgency due to the General Assembly's own actions. The U.S. Census Bureau informed states earlier this year that, because of the COVID-19 pandemic, there would be at least a five-month delay in the release of the demographic data needed to begin the redistricting process. Despite widespread recognition that this delay would necessitate postponing North Carolina's 8 March 2022 congressional primary election date (and the candidate filing window for that primary election, which begins at noon on 6 December 2021), the Republican-controlled General Assembly sat on its hands: It postponed certain municipal elections but refused to do the same for the congressional primary date in order to leave less time for legal challenges to the gerrymandered congressional districts. This Court should not countenance this obvious effort to evade judicial review of a redistricting plan that so flagrantly violates the rights of millions of North Carolina citizens.

## INTRODUCTION

North Carolina is perhaps the most gerrymandered state in the nation. In nearly every congressional and legislative election in the last decade, the people of this State were forced to vote in districts that were gerrymandered. After the State’s congressional and legislative maps were struck down as unconstitutional racial gerrymanders, the legislature replaced them with egregious partisan gerrymanders to entrench Republican majorities into power no matter how people voted. In 2019, a three-judge panel of the Superior Court recognized that extreme partisan gerrymandering is a scourge that has plagued this State for decades—a scourge for which both parties are responsible—and that North Carolina’s Constitution compels and indeed requires the judiciary to prevent legislatures from entrenching themselves in power and subverting the democratic will. *See* App. 133, Order Granting Mot. for Prelim. Inj. at 7, *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct. Oct. 28, 2019) (“*Harper I*”); *see also Common Cause v. Lewis*, 2019 WL 4569584, at \*18, 42 (N.C. Super. Ct. Sep. 3, 2019).

Legislative Defendants chose not to appeal *Common Cause* or *Harper I* to this Court because they wanted to be free to argue that no “binding” precedent prohibited partisan gerrymandering in the next redistricting cycle. And sure enough, when it came time to redistrict for 2022, they argued that those cases were not binding, and chose to once again to engage in extreme partisan gerrymandering by locking in 10 Republican seats in Congress regardless of the political environment.

This is the Court’s opportunity to finally end the scourge of extreme partisan gerrymandering in this State. If the Court does not accept this appeal—now—North

Carolinians will be forced to vote in egregiously gerrymandered maps in 2022. Declining review will signal to the General Assembly that its tactics here—delaying passage of the maps until the last possible moment, while simultaneously demanding one of the earliest primaries in the country—are surefire mechanisms for evading full judicial review. The legislature should not get one free gerrymandered election every redistricting cycle. Nor should the uncertainty about whether North Carolina’s Constitution permits partisan gerrymandering continue for even one more election cycle. The Court should grant discretionary review.

### **PETITION FOR DISCRETIONARY REVIEW**

Pursuant to N.C.G.S. § 7A-31(b) and Rules 2 and 15(a) of the North Carolina Rules of Appellate Procedure, Petitioners respectfully petition this Court to exercise its authority to grant discretionary review of the Order prior to determination by the Court of Appeals. As set forth below, this case satisfies all five of the statutory criteria under N.C.G.S. § 7A-31(b) for certification prior to determination by the Court of Appeals, any one of which is sufficient to justify this Court’s exercise of discretionary review.

### **STATEMENT OF THE CASE**

- A. The *Harper I* court preliminarily enjoins the Legislative Defendants’ 2016 congressional plan, finding it to be an extreme partisan gerrymander.**

In 2016, a three-judge federal court invalidated North Carolina’s 2011 congressional map as racially gerrymandered and ordered the General Assembly to redraw the districts. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 604-05 (M.D.N.C. 2016). The redrawn map (the “2016 Plan”) produced 10 safe Republican seats and 3 safe

Democratic seats. Legislative Defendants freely acknowledged that the 2016 Plan was a partisan gerrymander, and that it was the most extreme gerrymander possible in North Carolina. *See* App. 30-31 (Joint Select Committee on Redistricting Co-Chair David Lewis explaining that the Committee “dr[e]w the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it’s possible to draw a map with 11 Republicans and 2 Democrats”).

On September 27, 2019, the same Plaintiffs here filed *Harper I*, a lawsuit challenging the 2016 Plan as an extreme partisan gerrymander in violation of the Free Elections Clause, Equal Protection Clause, and Free Speech and Assembly Clauses of the North Carolina Constitution. App. 127. A three-judge panel was appointed days later, and the plaintiffs promptly moved for a preliminary injunction. App. 128. Plaintiffs cited the three-judge panel’s September 2019 opinion in *Common Cause v. Lewis*, striking down North Carolina’s gerrymandered legislative districts and concluding that extreme partisan gerrymandering violated the North Carolina constitution.

On October 28, 2019, the court granted a preliminary injunction barring use of the 2016 Plan in the 2020 elections. App. 144. The court held that the plaintiffs were likely to succeed on the merits of their claims that the 2016 Plan, designed to “give a partisan advantage to 10 Republicans and 3 Democrats,” violated the Free Elections Clause, the Equal Protection Clause, and the Freedom of Speech and Assembly Clauses. App. 139-40. It further held that “[t]he loss to Plaintiffs’ fundamental rights guaranteed by the North Carolina Constitution will undoubtedly be irreparable if congressional districts are allowed to proceed under the 2016 congressional districts.” App. 140. And the court

explained that this harm to North Carolina voters outweighed potential concerns about “disruption, confusion, and uncertainty in the electoral process.” App. 141.

In mid-November 2019, the General Assembly enacted a remedial plan that produced 8 safe Republican seats and 5 safe Democratic seats. The court *sua sponte* enjoined the candidate filing period pending its review of that remedial map. App. 148-49. At a hearing on December 2, 2019, the court declined to resolve whether the 2019 Plan was constitutional. App. 158-59. In doing so, the court expressed its “fervent hope that the past 90 days” since the decisions in *Common Cause* and *Harper I* would become “a foundation for future redistricting in North Carolina and that future maps are crafted through a process worthy of public confidence and a process that yields elections that are conducted freely and honestly to ascertain fairly and truthfully the will of the people.” App. 160.

**B. Legislative Defendants enact another extreme gerrymander following the 2020 decennial census.**

North Carolina gained a fourteenth congressional seat following the 2020 census after seeing its population grow by 9.5% over the previous decade. *See* North Carolina: 2020 Census, U.S. Census Bureau (Aug. 25, 2021).<sup>1</sup> Overall, more than 78% of North Carolina’s population growth came from the Triangle area and the Charlotte metro area. App. 265. But even though North Carolina gained a congressional seat due to population growth in overwhelmingly Democratic areas—and little had changed in terms of voter

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<sup>1</sup> Available at <https://www.census.gov/library/stories/state-by-state/north-carolina-population-change-between-census-decade.html>.

behavior since the enactment of the 2019 remedial map—Legislative Defendants enacted a map that once again produces at least 10 Republican seats.

Legislative Defendants enacted an extreme gerrymander by manipulating the redistricting process itself. While the General Assembly’s prior redistricting criteria provided that “[r]easonable efforts shall be made not to divide a county into more than two districts,” App. 163, Legislative Defendants eliminated that requirement from the criteria governing the enactment of the 2021 Plan. App. 166-67. Legislative Defendants then proceeded to divide each of the three largest Democratic Counties in North Carolina—Wake, Guilford, and Mecklenburg—into three districts, thereby dramatically diluting Democratic voting power in the state. App. 260. No other county is divided three ways.

To be sure, the 2021 Adopted Criteria provide that “[p]artisan considerations and election results data *shall not* be used in the drawing of districts in the 2021 Congressional, House, and Senate plans.” App. 166. Although Legislative Defendants repeatedly stated that *Common Cause* and *Harper I* were not binding on them, unlike in 2016, they were no longer willing to openly admit their intent to gerrymander a map guaranteeing 10 safe Republican seats. App. 138-39. But the prohibition on partisan considerations was a farce. While legislators drew and submitted maps using software on computer terminals in the redistricting committee hearing rooms, Legislative Defendants chose not to prohibit legislators from simply bringing political data—or maps drawn by political consultants using political data—with them into the map-drawing room, even after they were specifically asked to ban this practice. App. 73-74. Instead, Legislative

Defendants interpreted the 2021 Adopted Criteria to allow the use of political data in the drawing of maps so long as the data were not loaded onto the computer terminals. *Id.*

This process achieved its intended goal. The Republican-controlled Redistricting Committees exploited the loopholes they built into this process to produce a map that guarantees—once again—10 safe Republican seats. *See* App. 260. As described in greater detail herein and in Petitioners’ preliminary injunction submissions below, the 2021 Plan meticulously packs and cracks Democratic voters in every district and has been unanimously panned as an extreme gerrymander by neutral third-party observers and by the same statistical and demographic experts who have been repeatedly credited by courts in North Carolina and across the country. App. 76-91. Both the House and Senate passed the 2021 Plan on strict party-line votes on November 2 and November 4, respectively. *See* Charles Duncan, *Redistricting in NC: New Maps Approved, Favoring GOP*, Spectrum News 1 (Nov. 4, 2021).<sup>2</sup>

**C. Legislative Defendants refuse to postpone candidate filing deadlines despite a six-month delay in the redistricting process due to the COVID-19 pandemic.**

The urgency of this litigation is directly attributable to the Republican-controlled General Assembly. For decades, North Carolina has generally held its primary elections in May. The General Assembly moved the State’s primary election date from May to

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<sup>2</sup> Available at <https://spectrumlocalnews.com/nc/charlotte/politics/2021/11/04/redistricting-in-n-c---new-maps-approved--favoring-gop>.

March in 2016. *See* Dallas Woodhouse, *Upcoming North Carolina Election Dates in Jeopardy*, *Carolina J.* (Feb. 12, 2021).<sup>3</sup>

The General Assembly chose to adhere to the March primary date this year even though delays in the release of redistricting data from the U.S. Census Bureau rendered such a date impracticable. On February 12, 2021, the U.S. Census Bureau announced that the release of demographic data for redistricting, initially planned for March 31, would be delayed by roughly five months, until August 2021.<sup>4</sup> Because of this extraordinary delay in receiving census data, the General Assembly chose to postpone certain municipal elections in roughly a third of North Carolina's counties. *See* N.C. Sess. Law 2021-56; App. 484-85. But it chose *not* to delay the December candidate filing window for the 2022 congressional primary (or the primary date itself—despite being urged to do so by the State Board of Elections—in an effort to derail any legal challenges to the gerrymandered congressional districts.<sup>5</sup> The choice left only 32 days between the enactment of the plan and the opening of the candidate filing window. App. 484-85.

**D. Plaintiffs file this lawsuit and move for preliminary injunctive relief.**

Plaintiffs in this action are North Carolina voters who reside in congressional districts gerrymandered under the 2021 Plan. Plaintiffs brought this action in Wake

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<sup>3</sup> Available at <https://www.carolinajournal.com/news-article/upcoming-north-carolina-election-dates-in-jeopardy/>.

<sup>4</sup> Available at <https://www.census.gov/newsroom/press-releases/2021/statement-redistricting-data-timeline.html>.

<sup>5</sup> Lucille Sherman, *Delay This Year's Local Elections and NC's 2022 Primary*, *State Official Says*, *News & Observer* (Feb. 23, 2021), <https://bit.ly/3ly4IWb>.



County Superior Court on November 11, 2021. The Complaint alleges that the 2021 Plan violates the Free Elections Clause, the Equal Protection Clause, and the Free Speech and Assembly Clauses of the North Carolina Constitution.

A three-judge panel was named on November 22, 2021, and plaintiffs moved for a preliminary injunction on November 30, 2021. The same panel was assigned to preside over *NCLCV v. Hall*, No. 21 CVS 015426 (N.C. Super. Ct.), a lawsuit challenging the congressional and state legislative maps as unlawful gerrymanders. The *NCLCV* plaintiffs also moved for a preliminary injunction.

The panel heard argument on both preliminary injunction motions on December 2. At the hearing, the court explained that the need for a compressed litigation schedule was fully attributable to the General Assembly, which failed to move the deadlines for the 2022 primary congressional election despite doing the same for municipal elections:

JUDGE SHIRLEY: But let's be honest, we are on this compressed schedule, being required to make a determination [five days] from the date that filings begin because the legislature wouldn't move back the filing period or the primaries for the congressional and legislative districts while they were – did that or at least gave that possibility to municipal [elections] . . . . [W]e're all here because there is apparently a sense of urgency in part created by the legislature.

App. 582.

The court ultimately denied both preliminary injunction motions. It concluded that Plaintiffs' claims were not justiciable because the "state constitution left the decision on . . . redistricting to a political [branch]." App. 620. The court further observed that "partisan advantage can be taken into account in redistricting," and concluded that plaintiffs therefore "failed to demonstrate a substantial likelihood of success on the

merits.” *Id.* The court acknowledged the urgency of the litigation and asserted that it would “enter an order as expeditiously as possible and [would] certify the same for immediate appeal should the parties choose to do so.” *Id.*

A written order issued later that day. The panel stated that Plaintiffs’ claims were not justiciable and added that all plaintiffs lacked standing. App. 7-8. Although expert evidence showed that 8 of the *Harper* plaintiffs would be in less packed or less cracked districts nearly 100% of the time in a non-gerrymandered map, and 2 of the plaintiffs in guaranteed Republican districts would be in Democratic districts nearly 100% of the time, the court concluded that no plaintiff in a partisan gerrymandering case could *ever* have standing because “Plaintiffs are presumed to be represented by their designated representatives.” App. 8. It further held that Plaintiffs were unlikely to prevail on the merits of their constitutional claims even if they were justiciable. App. 10-12. The panel stated that “some evidence of intent is required to prove [a] claim of extreme partisan gerrymandering.” App. 11. The panel then incorrectly stated that “Plaintiffs have not claimed intent,” *Id.*, even though Plaintiffs repeatedly argued below—in both their Complaint and in their preliminary injunction submissions—that “[t]he 2021 Plan is an intentional extreme gerrymander.” App. 91; *see* App. 95, 104, 105, 111. Plaintiffs further offered extensive expert evidence of intentional partisan gerrymandering. App 91.

The *Harper* Plaintiffs promptly filed a notice of appeal on December 3, 2021. App. 623.

**E. The deadline to finalize remedial plans for the 2022 primary elections.**

North Carolina's 2022 statewide primary election is currently scheduled for 8 March 2022. App. 484. On 2 December 2021, the Executive Director of the State Board of Elections submitted an affidavit to the Superior Court asserting that remedial plans must be finalized for use in the March 8 primaries by "December 3-7, 2021." App. 488. The Board's Executive Director explained that it would be feasible to move the primary contest to a later date, but no later than 17 May 2022. App. 492. The Board would likely need final remedial plans "no later than February 14 to February 18, 2022" for use in a May 2022 primary. *Id.*

**REASONS WHY CERTIFICATION SHOULD ISSUE  
PRIOR TO DETERMINATION BY THE COURT OF APPEALS**

Under N.C.G.S. § 7A-31(b), this Court may certify a cause for discretionary review before determination by the Court of Appeals if, in this Court's opinion, any of five conditions are met. This case satisfies all five of those conditions.

**I. This appeal is of enormous public interest.**

This appeal warrants this Court's immediate discretionary review because "[t]he subject matter of the appeal has significant public interest." N.C.G.S. § 7A-31(b)(1). This appeal easily satisfies this condition because it will decide whether millions of North Carolinians will be forced to vote in congressional districts that violate the North Carolina Constitution by entrenching politicians in power against the popular will. And it will determine whether North Carolina courts can redress the state's persistent and extreme gerrymandering.

The 2021 Plan is inarguably an extreme partisan gerrymander. Just five years ago, Legislative Defendants enacted a congressional map that guaranteed Republicans would win at least 10 of the state’s 13 districts in nearly every plausible political environment. It was, in their own words, the most extreme gerrymander possible in North Carolina. *See* App. 30-31 (Joint Select Committee on Redistricting Co-Chair David Lewis explaining that the Committee “dr[e]w the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it’s possible to draw a map with 11 Republicans and 2 Democrats”). After the *Harper I* court preliminarily enjoined that map as an extreme partisan gerrymander, Legislative Defendants enacted a remedial plan that produced 8 Republican seats and 5 Democratic seats. And now, after North Carolina gained a fourteenth seat because of population growth in predominantly Democratic-leaning areas, the Legislative Defendants passed the 2021 Plan—a map that once again guarantees at least 10 seats to the Republicans. Just like in 2016, that is the most extreme gerrymander possible in this state.

The 2021 Plan is a textbook partisan gerrymander. Legislative Defendants took the three largest bastions of Democratic votes in North Carolina—Wake, Mecklenburg, and Guilford Counties—and divided each of them among three congressional districts. There was no population-based reason to do this and no other counties are split three times in the 2021 Plan. App. 260. The 2021 Plan destroyed Representative Manning’s Piedmont Triad district, dividing High Point, Greensboro, and Winston-Salem among three districts so that none of these predominantly Democratic cities will have a Democratic representative in Congress. To achieve its partisan ends, the 2021 Plan likewise unites

far-flung portions of the state with little in common. This manipulation of district boundaries, which occurs to varying degrees in every congressional district under the 2021 Plan, *see* App. 76-91, cannot be explained as anything other than the intentional and illegal efforts by the Legislative Defendants to entrench Republicans in power.

That conclusion is reinforced by the expert statistical analyses of Dr. Wesley Pegden and Dr. Jowei Chen, both of whom presented expert analysis that was accepted by a three-judge Superior Court in *Common Cause v. Lewis* after rigorous cross-examination. *See* No. 18 CVS 014001, 2019 WL 4569584, at \*18, 42 (N.C. Super. Ct. Sep. 3, 2019). Dr. Pegden concluded that the enacted map is more carefully crafted to favor Republicans than more than 99.99% of billions of comparison maps that he generated by making tiny random changes to the district lines, while respecting the General Assembly's non-partisan redistricting criteria. The theory behind Dr. Pegden's work is that if a map was not intentionally crafted to maximize partisan advantage, making tiny random changes around the edges should not significantly decrease the plan's partisan bias. App. 94-95.

Dr. Chen's analysis is in accord. Dr. Chen produced a set of 1,000 random simulated plans using the General Assembly's redistricting criteria and found that "[b]y subordinating traditional districting criteria, the General Assembly's Enacted Plan was able to achieve partisan goals that could not otherwise have been achieved under a partisan-neutral districting process that follows the Adopted Criteria." App. 339. The goal of a partisan gerrymander is to (1) spread the favored party's voters across as many districts as possible while still retaining enough of a margin to win in all of them and (2)

concentrate the disfavored party's remaining voters in as few districts as possible. In other words, partisan gerrymanders produce as many districts as possible that safely favor one party but not by large margins and a small number of districts that heavily favor the other party. Dr. Chen's analysis reveals that this is precisely what the General Assembly did here. Dr. Chen analyzed the ten most Republican districts in the 2021 Plan and found that they each have Republican vote shares in the narrow range of 52.9 to 61.2 percent, which is the product of packing Democrats in a handful of safe districts while efficiently distributing Republican voters across the remaining districts. *Not one* of Dr. Chen's simulated plans came close to creating ten Republican districts that fall in that narrow range. App. 92-94. In contrast, Democratic voters are packed into three districts that each have a Democratic vote share between approximately 63 and 73 percent. App. 318. Dr. Chen also found that seven of the districts in the 2021 Plan have a more extreme partisan distribution than was observed in 100% of their corollary districts in the simulated maps, and three additional districts have a more extreme partisan distribution than was observed in at least 95% of the simulated maps. *Id.* Dr. Chen found that 2021 Plan ensures 10 seats for Republicans regardless of the electoral environment, even where the Democrats win most of the votes and where the Republican candidates would win only 6, 7, or 8 seats under any of his 1,000 random nonpartisan maps.

Neutral third-party observers also are unanimous in their view that the 2021 Plan is an extreme gerrymander. The Princeton Gerrymandering Project gave the map a Partisan Fairness grade of "F" while describing North Carolina as "one of the most

extremely gerrymandered states in the nation.”<sup>6</sup> FiveThirtyEight described the 2021 Plan as “one of the most Republican-biased maps [the General Assembly] could have chosen.”<sup>7</sup> And Dave Wasserman of the nonpartisan Cook Political Report described the enactment of the 2021 Plan as “NC Republicans going for the jugular.”<sup>8</sup>

There is no doubt that the 2021 Plan is an extreme gerrymander that, absent this Court’s immediate intervention, will violate the constitutional rights of millions of North Carolinians next year and beyond. As multiple North Carolina courts have held, partisan gerrymandering violates the Free Elections Clause’s guarantee that elections shall be “conducted freely and honestly to ascertain, fairly and truthfully, the will of the people.” App. 133, *Harper I*, slip op. at 7; *Common Cause*, 2019 WL 4569584, at \*109-110. It “runs afoul of the North Carolina Constitution’s guarantee that no person shall be denied the equal protection of the laws.” App. 134, *Harper I*, slip op. at 8; *Common Cause*, 2019 WL 4569584, at \*113. And it is irreconcilable with the “important guarantees in the North Carolina Constitution of the freedom of speech and the right of the people in our

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<sup>6</sup> See North Carolina 2021 CST-13 Final Congressional Map, Princeton Gerrymandering Project (last accessed Dec. 4, 2021), <https://gerrymander.princeton.edu/redistricting-report-card?planId=rec1jFkj1lne3m1RS>; North Carolina, Princeton Gerrymandering Project (last accessed Dec. 4, 2021), <https://gerrymander.princeton.edu/reforms/NC>.

<sup>7</sup> Mackenzie Wilkes, *North Carolina Republicans Passed a Heavily Skewed Map. How Will the Court Respond?*, FiveThirtyEight (Nov. 10, 2021), <https://fivethirtyeight.com/features/north-carolina-republicans-passed-a-heavily-skewed-congressional-map-how-will-the-courts-respond/>.

<sup>8</sup> Dave Wasserman, Twitter (Nov. 4, 2021), <https://twitter.com/redistrict/status/1456285548058927106?lang=en>.

State to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances.” App. 136-37, *Harper I*, slip op. at 10-11; *Common Cause*, 2019 WL 4569584, at \*118-19. Discretionary review from this Court now is necessary to prevent these constitutional violations from occurring during next year’s primary and general elections for Congress.

Finally, this appeal is of enormous public interest because it will resolve the question of whether North Carolina courts have the power to redress these constitutional injuries at all. The Superior Court incorrectly held that these claims are not justiciable. App. 7. That holding presents enormous consequences for the public because the North Carolina judiciary is the only institution realistically capable of redressing partisan gerrymandering in this state. Federal courts are powerless to adjudicate partisan gerrymandering claims under the federal constitution after the U.S. Supreme Court’s decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). The Governor lacks authority to veto redistricting legislation. N.C. Const. art. II, § 22(5). And the General Assembly has proven itself unable to reform the redistricting process. That is no surprise given that “[t]he politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering,” and “because those politicians maintain themselves in office through partisan gerrymandering, the chances for reform are slight.” *Rucho*, 139 S. Ct. at 2524 (Kagan, J., dissenting).



**II. This appeal involves legal principles of utmost significance to the state’s jurisprudence.**

This Court’s discretionary review is also warranted because this appeal “involves legal principles of major significance to the jurisprudence of the State.” N.C.G.S. § 7A-31(b)(2). This appeal presents the following critically important questions:

1. Do North Carolina courts have authority to review challenges to gerrymandered redistricting plans under the North Carolina Constitution?
2. Does partisan gerrymandering, where district lines are drawn to entrench partisan advantage in intent and effect, violate the Free Elections Clause, Equal Protection Clause, or Free Speech and Association Clauses of the North Carolina Constitution?
3. Have Petitioners likely established that the 2021 congressional plan is a partisan gerrymander in violation of the Free Elections Clause, Equal Protection Clause, or Free Speech and Association Clauses?

Each of these questions has deep jurisprudential significance. The first, regarding whether partisan gerrymandering claims are reviewable by North Carolina courts, has profound implications for the democratic process and the separation of powers. Although the North Carolina Constitution directs the General Assembly to revise and reapportion districts after each census, this Court has long recognized that “[t]he people of North Carolina chose to place several explicit limitations upon the General Assembly’s execution of the legislative reapportionment process.” *Stephenson v. Bartlett*, 355 N.C. 354, 370, 562 S.E.2d 377, 389 (2002). This Court has not hesitated to enforce these

constitutional protections: It has adjudicated claims that redistricting plans violate multiple provisions of the North Carolina Constitution, including its Equal Protection Clause, on which Petitioners here rely. *See Stephenson*, 355 N.C. at 376, 380-81, 562 S.E.2d at 392, 395; *Blankenship v. Bartlett*, 363 N.C. 518, 522-28, 681 S.E.2d 759, 763-66 (2009); *State ex rel. Martin v. Preston*, 325 N.C. 438, 385 S.E.2d 473 (1989). And just two years ago, a three-judge panel of the Superior Court properly adjudicated challenges to gerrymandered congressional and state legislative plans under each of the constitutional provisions on which Petitioners rely. *See* App. 132, *Harper I*, slip op. at 6; *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Sep. 3, 2019).

These cases from the redistricting context—as well as this Court’s decisions expounding the political question doctrine—establish that partisan gerrymandering claims are reviewable under the State’s broad constitutional protections for individual voting rights. “This case bears no resemblance to cases in which North Carolina courts have applied the political question doctrine,” which have involved constitutional provisions that “expressly commit[] the substance of the [challenged] power to the *sole discretion*” of a political branch. *Common Cause*, 2019 WL 4569584, at \*127 (quoting *Bacon v. Lee*, 353 N.C. at 698, 549 S.E.2d at 854). And the constitutional provisions Petitioners invoke supply “satisfactory, manageable standards” for determining whether, for example, “the partisan will of the mapmaker predominates over the ascertainment of the fair and truthful will of the voters.” *Id.* Yet this Court, in contrast to other state supreme courts, has never expressly resolved whether partisan gerrymandering claims are

justiciable. *Cf., e.g., League of Women Voters v. Commonwealth*, 645 Pa. 1, 132 (2018); *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 416 (Fla. 2015) (“there can hardly be a more compelling interest than the public interest in ensuring that the Legislature does not engage in unconstitutional partisan political gerrymandering.”); *Terrazas v. Ramirez*, 829 S.W.2d 712, 717 (Tex. 1991) (“A judicial determination that an apportionment statute violates a constitutional provision is no more an encroachment on the prerogative of the Legislature than the same determination with respect to some other statute.”). There is pressing need for guidance on this fundamental jurisdictional question, which will otherwise recur every decade.

The separation of powers—which is expressly guaranteed by the North Carolina Constitution, art. I, § 6—underscores the deeper significance of the justiciability question here. When this Court first recognized the power to declare state statutes unconstitutional, it observed that without judicial review, members of the General Assembly could “render themselves the Legislators of the State for life, without any further election of the people.” *Bayard v. Singleton*, 1 N.C. 5, 7 (1787). Those legislators could even “from thence transmit the dignity and authority of legislation down to their heirs male forever.” *Id.* If extreme and unconstitutional partisan gerrymandering cannot be checked by judicial oversight, legislators elected under one partisan gerrymander will enact new gerrymanders after each decennial census, entrenching themselves and their party’s members of Congress in power anew decade after decade.

The United States Supreme Court recently made clear that because “state constitutions can provide standards and guidance for state courts to apply,” claims

seeking to halt this antidemocratic practice are not “condemn[ed] ... to echo into a void.” *Rucho*, 139 S. Ct. at 2507. But without this Court’s immediate review of the decision below, Petitioners’ claims and others like them will do just that.

The second question presented, regarding the scope of the Free Elections, Equal Protection, and Free Speech and Assembly Clauses of the North Carolina Constitution, has similarly profound importance. As the United States Supreme Court recognized, “excessive partisanship in districting leads to results that reasonably seem unjust,” and is “incompatible with democratic principles.” *Rucho*, 139 S. Ct. at 2506. The court held that “the solution [does not] lie[] with the federal judiciary.” *Id.* It is thus hard to imagine a question of greater jurisprudential significance than the question whether North Carolina’s Constitution bars extreme partisan gerrymandering—whether any provision in North Carolina’s constitution allows a solution to this anti-democratic menace.

North Carolina courts have construed the free elections, equal protection, and free speech and assembly protections broadly, consistent with their text and history. *Supra* pp. ##. But this Court has had limited occasion to apply them—especially the Free Elections Clause, which has no parallel in the U.S. Constitution. *See Common Cause*, 2019 WL 4569584, at \*109 (“The broad language of the Free Elections Clause has not heretofore been extensively interpreted by our appellate courts.”). Likewise, this Court has construed the State’s guarantees of equal protection and free speech and assembly to extend more broadly than their federal counterparts, but it has never determined how to apply them in challenges to extreme partisan gerrymandering. *Stephenson*, 355 N.C. at 381 n.6, 562 S.E.2d at 395 n.6 (invalidating districting practice that was lawful under

federal equal protection clause); *Blankenship*, 363 N.C. at 522-28, 681 S.E.2d at 763-66 (2009) (same); *Corum v. Univ. of N.C. ex rel. Bd. of Gov'rs*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) (state free-speech protection affords a direct cause of action for damages against government officers for speech violations, even though federal law does not). This Court should grant immediate review to vindicate these important individual rights and to confirm that they forbid systematically manipulating district boundaries to maximize partisan advantage.

In addition to these broader jurisprudential questions about the constitutionality of partisan gerrymandering, this Court's evaluation of the 2021 Plan in particular will provide much-needed guidance to lower courts and to the General Assembly. As explained, overwhelming evidence establishes that the 2021 Plan is an extreme partisan gerrymander, including expert analysis showing its districts to be extreme partisan outliers explicable only by an intent to maximize partisan advantage. *Supra* pp. 17-21. Although the three-judge panel below found that Petitioners were unlikely to succeed on the merits, it took no issue with their evidence or their experts' analysis. This Court's assessment of whether Petitioners have established violations of one or more provisions of the North Carolina Constitution will be invaluable to both courts and mapmakers going forward.

Continued division over these significant jurisprudential questions is untenable. Two three-judge panels of the Wake County Superior Court—the court that by statute must hear all redistricting challenges—have recently faced materially identical constitutional challenges to legislative and congressional redistricting plans and have

come to opposite conclusions. The courts have divided not just on the merits, but on the critically important question of whether partisan gerrymandering claims are justiciable at all, and whether anyone can have standing to challenge them. The three-judge panel in *Common Cause* and in *Harper I* held that claims challenging partisan gerrymandering under the North Carolina Constitution are justiciable; that an individual whose district is packed or cracked has standing to challenge their county cluster (for the legislature) or the entire map (for the congressional districts); that extreme partisan gerrymandering violates several provisions of the North Carolina Constitution; and (in *Harper I*) that a congressional map drawn to entrench a 10-3 Republican majority violated those constitutional provisions. *Common Cause*, 2019 WL 4569584, at \*105-134; App. 131-42, *Harper I*, at 3-14. In sharp contrast, the panel in this case openly disagreed, holding that even plaintiffs whose district alignment would *flip* under a non-gerrymandered map lack standing because “Plaintiffs are presumed to be represented by their designated representatives”; North Carolina courts lack jurisdiction to hear partisan gerrymandering claims at all; and even if the panel had jurisdiction, no provision of the North Carolina Constitution prohibits partisan gerrymandering, no matter how extreme. Order at 7-12. Only this Court can conclusively resolve the conflict. And without swift resolution, millions of North Carolina voters will be forced to vote in 2022 in congressional districts that are flatly unconstitutional under the holdings of *Common Cause* and *Harper I*.

Finally, the rationale of the decision below confirms the paramount need for this Court’s immediate review. The three-judge panel’s sole reason for holding Petitioners’ claims nonjusticiable was that the “State Constitution delegates to the General Assembly

the power to create congressional districts”; in the court’s view, “a delegation of a political task to a political branch of government implies a delegation of political discretion.” App. 7 (citing *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2011)). That conclusion is not just wrong as a matter of political question doctrine, but flouts decisions of this Court adjudicating the constitutionality of redistricting plans despite the Constitution’s “delegation” to the General Assembly. In fact, the lower court’s reasoning is indistinguishable from the Legislative Defendants’ primary argument in *Stephenson*, which this Court rejected. The legislators there argued that the adjudication of a constitutional challenge to the composition of legislative districts “usurped the authority that the Constitution of this State unambiguously confers on the legislature”; that “redistricting ... involves inherently legislative judgments”; and that questions about the constitutionality of legislative districts thus “are nonjusticiable ‘political questions’ that are beyond the authority of the judiciary.” App. 424-25, *Stephenson*, 2002 WL 34451548 (Mar. 21, 2002) (citing *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001)). This Court disagreed. Not only did the Court resolve the plaintiffs’ constitutional challenge, but it held that the General Assembly’s districts violated the State Constitution’s Equal Protection Clause because it restricted the “fundamental right under the State Constitution” to “substantially equal voting power and substantially equal legislative representation”—one of the constitutional rights likewise invoked in this case. 355 N.C. at 378, 562 S.E.2d at 393.

Like in *Stephenson*, this Court should grant review to confirm that a constitutional “delegation” of authority does not give the General Assembly carte blanche to run

roughshod over other constitutional rights. By authorizing the General Assembly to draw districts, the North Carolina Constitution confers “discretion to establish its own redistricting criteria and craft maps.” *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at \*128 (N.C. Super. Sep. 03, 2019). What the Constitution does *not* delegate is the power to “systematically pack[] and crack[] voters to the extent that their votes are subordinated and devalued for no legitimate governmental purpose, but rather the purposes of entrenching a political party in power.” *Id.* This Court’s immediate review is necessary to ensure the continued vitality of this State’s constitutional protections, and to ensure that North Carolina voters are not yet again forced to vote in unconstitutional districts.

**III. Failure to certify will cause enormous harm by preventing appellate review of the 2021 Plan before the 2022 elections.**

This Court independently should grant discretionary review because “[d]elay in final adjudication is likely to result from failure to certify and thereby cause substantial harm.” N.C.G.S. § 7A-31(b)(3). If this Court does not grant review now, it is highly unlikely that the Court will be able to adjudicate the constitutionality of the 2021 Plan in time for the 2022 elections.

Key deadlines for the 2022 congressional elections are imminent. Primary elections are currently scheduled to be held on 8 March 2022—the second-earliest primary date in the country—due to the General Assembly’s 2018 legislation that moved primaries from May to March. *See* N.C.G.S. § 163A-700(b); 2017 N.C. Sess. Laws S.L. 2018-21 (S.B. 655). And as the court below noted, “we are on this compressed schedule”



because the General Assembly “wouldn't move back the filing period or the primaries for the congressional and legislative districts while they ... gave that possibility to municipal[]” elections. App. 582. The window for candidates to file for party primary nominations is set to open at noon today, and to close on 17 December 2022. *See* N.C.G.S. § 974(b). Most importantly, the Executive Director of the State Board of Elections has attested that, absent intervention by the courts, the Board likely must receive final plans by 14 December 2022 for use in the March 2022 primaries. App. 488. There is no doubt that, to enable review in time to go forward with the March 2022 primaries, this Court must grant review now.

If, as seems likely, the Court will need to delay the primary election to 17 May 2022—the date currently scheduled for second primaries, *see* N.C.G.S. § 163-111(e)—that would not eliminate the need for the Court to grant this petition and review this matter in the first instance. The State Board has stated that it would need final remedial plans before 18 February 2022 to enable a May 2022 primary. App. 492.

In these circumstances, there is no time for intermediate appellate proceedings in the Court of Appeals. Absent certification by this Court now, the gerrymandered 2021 Plan will go into effect for the 2022 primaries without this Court's review of the three-judge panel's decision and without resolution of the enormously consequential legal questions presented in this case.

#### **IV. The expeditious administration of justice requires certification.**

Immediate discretionary review also is appropriate where “[t]he work load of the courts of the appellate division is such that the expeditious administration of justice

requires certification.” N.C.G.S. § 7A-31(b)(4). As explained, the expeditious administration of justice simply does not allow time for two levels of appellate review, and it should be this Court that resolves these issues of substantial public importance.

**V. The question of whether the remedial plans cure the constitutional violations found is critical to the jurisdiction and integrity of the court system.**

Finally, this Court should grant immediate discretionary review because “[t]he subject matter of the appeal is important in overseeing the jurisdiction and integrity of the court system.” N.C.G.S. § 7A-31(b)(5). Ensuring that state officials cure constitutional violations that the courts of this State have found is of the utmost importance to the jurisdiction and integrity of the court system. Respectfully, the order on appeal does not do so for the 2021 Plan.

**ISSUES FOR WHICH REVIEW IS SOUGHT**

Petitioners respectfully request that the Court allow discretionary review on the following issues:

1. Whether North Carolina courts have authority to review challenges to gerrymandered redistricting plans under the North Carolina Constitution.
2. Whether partisan gerrymandering, where district lines are drawn to entrench partisan advantage in intent and effect, violate the Free Elections Clause, Equal Protection Clause, or Free Speech and Association Clauses of the North Carolina Constitution.
3. Whether Petitioners likely established that the 2021 congressional plan is a partisan gerrymander in violation of the Free Elections Clause, Equal Protection Clause, or Free Speech and Association Clauses.
4. Whether Petitioners likely established standing to challenge the 2021 congressional plan.

**MOTION TO SUSPEND APPELLATE RULES**

In addition to petitioning for discretionary review prior to determination by the Court of Appeals under Rule 15(a), Petitioners also respectfully move under Rules 2 and 37(a) to suspend the appellate rules as necessary to facilitate a prompt decision on this filing and appeal.

Rule 2 authorizes this Court to “suspend or vary the requirements or provisions” of the North Carolina Rules of Appellate Procedure in order “[t]o prevent manifest injustice to a party, or to expedite decision in the public interest.” This Rule “relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court.” *State v. Hart*, 361 N.C. 309, 315-16, 644 S.E.2d 201, 205 (2007) (quotation marks omitted). Appellate courts exercise this discretionary residual power “with a view towards the greater object of the rules.” 361 N.C. at 316, 644 S.E.2d at 205. This Court also possesses general supervisory authority under article IV, § 12(1) of the North Carolina Constitution, which the Court “will not hesitate to exercise ... when necessary to promote the expeditious administration of justice.” *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975).

This is the paradigmatic case for exercising this Court’s supervisory authority and residual power under Rule 2. In light of the exceptionally important and singularly urgent questions at stake, suspending the appellate rules here is not only appropriate, but necessary.

Petitioners thus respectfully request that this Court grant this petition and set an expedited schedule that will allow for sufficient time for a decision by this Court, and, if Petitioners prevail on appeal, for the Superior Court to adopt a remedial congressional map on remand before the 17 December deadline.

If, as is likely, the Court must move the 8 March 22 primary date to 17 May 2022, Petitioners request that the Court set an expedited schedule that will allow for sufficient time for a decision by this Court, and, if Petitioners prevail on appeal, for the Superior Court to adopt a remedial congressional map before the 18 February 2022 deadline.

Pursuant to the above, Plaintiffs propose the following briefing schedule:

- Opening Brief and Record on Appeal: Noon on December 10, 2021
- Response Brief: Noon on December 17, 2021
- Reply Brief: Noon on December 21, 2021
- Argument: As soon as possible

### **CONCLUSION**

For the foregoing reasons, Petitioners respectfully request that this Court allow discretionary review of the Superior Court's 2 December 2021 order prior to determination by the Court of Appeals, assume immediately jurisdiction over this appeal and any related petitions or appellate motions relating to the Order, and suspend the appellate rules to expedite a decision on these matters in the public interest.

Respectfully submitted this 6th day of December, 2021.

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N.C. R. App. P. 33(b) Certification:  
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**CERTIFICATE OF SERVICE**

Pursuant to North Carolina Rule of Appellate Procedure 26, I hereby certify that I have this day served a copy of the foregoing by email, addressed to the following counsel for defendants:

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This the 6th day of December, 2021.

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