No. COA 24-1109

IN THE

North Carolina Court of Appeals

BEVERLY BARD, *et al.*,
Plaintiffs-Appellants,
v.
NORTH CAROLINA STATE BOARD OF ELECTIONS, *et al.*,
Defendants-Appellees.

On Appeal

BRIEF OF CHARLES THELEN PLAMBECK, HON. ROBIN E. HUDSON, AND JONI L. WALSER AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

FEBRUARY 28, 2025

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INTEREST OF THE AMICI CURIAE[1]

Amici are citizens of North Carolina attentive to the fundamental principles of the constitution of their home state. *Amici* wish to bring to the attention of the Court the ancient birthrights of the people of North Carolina and the protections of liberty chartered in the North Carolina Constitution. The issue of representation in the legislature is not remote or hypothetical to North Carolinians. The present welfare of its people depends directly on the responsiveness of its representatives.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than *amici curiae* made any monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The people are the source of all political power in North Carolina.[2] Through periodic elections, they appoint or remove their servants in the legislature, executive, and judiciary. Under the North Carolina Constitution, this right is supreme. The Declaration of Rights guarantees to the people that the government cannot subvert elections by any means, direct or indirect. If the legislature violates the right of election, the judiciary is obligated to remedy the wrong.

In 2024, the General Assembly denied Plaintiffs the right to vote because of how they likely would cast it. The Assembly nullified their votes by deliberately grouping them with an insurmountable number of supporters of the Assembly's own preferred candidates. The effect on the Plaintiffs was the same as if, because of their dissenting beliefs, they were denied access to the polls, or their vote set aside uncounted.

The Assembly has the prerogative to enact elections regulations, but not to contrive them so that the votes of their

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[2] N.C. CONST. art. I, § 2.

critics are ineffective. In 2024 the Assembly did not adhere to the constitutional limitations on the exercise of their districting prerogative. They did not faithfully follow the whole county, contiguous territory, and other objective requirements.[3] They did not respect the powers reserved to the people in the Declaration of Rights. The Assembly violated Plaintiffs' constitutional rights which in aggregate, and in plain language, is the right to a fair election.

The result was that Plaintiffs and nearly a million other voters whose beliefs did not conform to the Assembly's were disenfranchised.

But the Constitution does not leave such violations of fundamental liberties unremedied. The Constitution obligates the judiciary to vindicate the rights of the individual when the legislature denies them. Plaintiffs petition the court to invalidate acts which—in contravention of constitutional text, history, structure, and precedent—discriminate against them because of their convictions.

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[3] N.C. CONST. art. II, §§ 3 and 5.

Plaintiffs' petition does not present a political question. The textual commitment of districting power to the Assembly is subject to constitutional limitations which only the judiciary is competent to judge. The petition is not for proportional representation. Plaintiffs merely ask that the court defend their free exercise of conscience.

As Hamilton put it:

> It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.[4]

This brief focuses on the constitutional violation of Plaintiffs' right to a fair election and this court's obligation to vindicate it. Because the petition before the court is to vindicate a fundamental constitutionally protected liberty, dismissal under Rule 12(b)(6) is not appropriate.

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[4] Federalist 78 (Hamilton).

ARGUMENT

In a secretive process, the General Assembly amassed data about the Plaintiffs—their residence, income, age, religion, race, ethnicity, gender, occupation, level of education, political affiliation, and other personal information—to determine whether Plaintiffs were likely to support the Assembly's favored candidates. Concluding they were not, the Assembly grouped them in electoral districts with supporters of the Assembly's candidates in sufficient numbers to nullify their vote.

These are Plaintiffs' allegations. If true—and for purposes of Rule 12(b)(6) they must be viewed as admitted—they violate the Constitution. They represent an unmistakable threat to representative government and liberty of conscience in North Carolina that the judiciary is obligated to address.

I. The North Carolina Constitution guarantees a fundamental right to vote in a fair election which the General Assembly may not violate.

A. The North Carolina Declaration of Rights protects the right to vote from government actions that purposefully debase it.

Assaults on the integrity of elections have been a cancer in the bloodstream of representative government for as long as history records. In the Roman Republic, elections became artifices when the magistrates responsible for assigning citizens to electoral tribes "decanted" the votes of rivals by grouping them with countervailing votes, much like the Assembly did in 2024. Loss of electoral integrity paved the way to the Republic's descent into chaos and despotic rule, marking the collapse of a governing system that had endured for almost 500 years.[5]

The North Carolina Constitution guards against a similar fate by prohibiting anyone in authority, including the legislature, from subverting the fundamental democratic power

[5] APPIAN, ROMAN HISTORY: THE CIVIL WARS bk. I, ¶ 99, at 185 (Jeffrey Henderson ed., Horace White trans., Harvard Univ. Press 1912).

of the right to vote. These textual guarantees, described below, are collectively referred to and indelibly understood as the right to a fair election.

1. The Free Elections Clause

N.C. CONST. art. I, § 10 provides that "All elections shall be free." This provision has a 750-year pedigree. The phrase was first used in 1275 to create the civil stability of true representation.[6] It was reasserted in 1688, after a contest in which religious toleration and representative government were undermined through the strategic alteration of electoral districts. The phrase extinguished the idea that the most powerful political actors, the monarch and Parliament, were vested with a prerogative to disenfranchise segments of the electorate.[7]

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[6] Statute of Westminster, the First (1275), 3 Edw. 1 c. 5.

[7] Bill of Rights Act 1688, 1 W. & M. (Eng. & Wales). *See also* Judgment of Chief Justice Holt in *Ashby v. White*, 1704, reprinted in 8 ENGLISH HISTORICAL DOCUMENTS 172 (D. Douglas & A. Browning eds., 1953) (affirming that the right applies against the legislature and has a judicial remedy).

This understanding carried to pre-Independence North Carolina.[8] Thus, when the architects of the North Carolina Constitution of 1776 entrusted power to the legislature on the precondition that "elections . . . ought to be free,"[9] the words did not materialize from the ether. The founders—in writing and using the ancient words—incapacitated the legislature from subverting the power of an individual's vote by any means.

Since 1776, North Carolina has only strengthened this right. In 1868, the state extended the guarantee to *all* elections. And in 1971, "ought" was replaced with the more commanding "shall."

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[8] *See* Daniel Defoe, Party-Tyranny as now Practiced in Carolina (1705) (2 THE COLONIAL RECORDS OF NORTH CAROLINA 891, 903 (William L. Saunders ed., 1886) [hereinafter COLONIAL RECORDS] (applying the right against the Assembly). James Wilson, Considerations of Nature and Extent of the Legislative Authority, N.C. GAZETTE, Dec. 16, 1774, at 1 (legislatures will destroy the very purpose for which they were created—the happiness of society—unless held to account by free elections).

Ashby v. White, supra, held that "by the common law of England, every commoner hath a right not be subjected to laws, made without their consent . . . [their] power is lodged in their representatives, elected by them for that purpose . . . and the grievance here is, that the party not being allowed his vote, is not represented." N.C.G.S § 4-1 carries this common law right in full force within this North Carolina.

[9] N.C. Const. of 1776, Declaration of Rights, § 6 (free elections right).

Recent decisions of the Supreme Court of North Carolina confirm the breadth of the injunction of the Free Elections Clause. *Harper III* correctly held that, while the right does not require a proportional outcome, it requires an accurate count and respect for liberty of conscience.[10] An accurate count is conceived broadly as an election free of distortions caused by the effective disenfranchisement of segments of the electorate.[11] An interference with a vote is an interference with conscience—a vote is a prayer.[12]

By intentionally grouping the Plaintiffs to cancel their vote, the Assembly violated the Free Elections Clause.

2. Fundamental Principles

The North Carolina Constitution is premised on the sovereignty of the people. "All political power is vested in and derived from the people; all government of right . . . *is founded upon their will only*." N.C. CONST. art. I, § 2 (emphasis added).

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[10] Harper v. Hall, 384 N.C. 292, 886 S.E.2d 393 (2023) (*Harper III*).

[11] Kennedy v Board of Elections, __ N.C.__, 905 SE 2d 55 (2024); Griffin v. Board of Election, Order (January 22, 2025).

[12] Bouvier v. Porter, 86 N.C. at 3, 900 S.E.2d at 842 (2024).

The right to vote in an election structured to render the "will of the people" is an unenumerated fundamental right.[13]

The Supreme Court in *Van Bokkelen v. Canaday*[14] invalidated discriminatory voting legislation on the fundamental principle that "[o]ur government is founded on the will of the people."[15] Regardless of the *intent* of the legislature, any act that has a meaningful discriminatory effect on the *voting power* of an individual is unconstitutional.[16] This landmark case has never been overturned.

In *Stephenson v. Bartlett*,[17] the Supreme Court declared that the right to vote on equal terms is a fundamental right." The exercise of the Assembly's districting prerogative in a way that intentionally weakens the ability of the individuals to choose

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[13] N.C. CONST. art. I, § 36 ("The enumeration of rights in this Article shall not be construed to impair or deny others retained by the people."). Libertarian Party v. State, 365 N.C. 41, 47, 707 S.E.2d 199 (2011) (Newby, J., dissent) (vote integrity is a fundamental right requiring strict scrutiny). N.C. CONST. art. I, § 35 ("A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.").

[14] 73 N.C. 198 (1875).

[15] *Id.* at 222.

[16] *Id.* at 225–26; *see also* Reynolds v. Sims, 377 U.S. 533, 555 (1964). ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.").

[17] 355 N.C. 354, 377 (2002).

their representatives violates the "fundamental right of each North Carolinian to substantially equally voting power."[18] Again in 2009 the Court held that the unenumerated right to equal voting power is "one of the most cherished." *Blankenship v. Bartlett,* 363 N.C. 513, 522 (2009).

The Assembly violated Plaintiffs' fundamental right to vote with equal power.

3. Interlocking Liberties

The Declaration of Rights is laced with interlocking protections of an individual's right to vote without interference from the Assembly.

N.C. CONST. art. I, § 19 (the "Law of the Land Clause") protects against the government diminishing the value of property through interference. The Court has established that: "The right to vote is property, and no man can be deprived of it

[18] Id.

'but by the law of the land.'"[19] The Assembly wrongfully debased the value of Plaintiffs' votes.[20]

N.C. CONST. art. I, § 13 guarantees that the government will not "interfere with the rights of conscience." In the context of elections, the Court has declared that "the Legislature is without power to shackle a voter's conscience."[21] This deeply rooted principle drives the ban on all forms of interference with elections.[22] Conscience and political choice are inseparable. To deny a vote is to deny the conversion of conscience into action.

N.C. CONST. art. I, §§ 19, 32, 33, and 34 prohibit legislative acts that establish a superior political class.[23] On the basis that Plaintiffs likely would cast their vote in disagreement with their

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[19] Van Bokkelen at, 229 (1875) (Rodman, J., concurring).

[20] See e.g. Kirby v. N. C. Dep't of Transp., 368 N.C. 847, 786 S.E.2d 919 (2016) (opinion by Newby, J. discussing takings of property by substantial interference).

[21] Clark v. Meyland, 261 N.C. 140, 134 S.E.2d 168 (1964).

[22] At the core of medieval law was the belief that human conscience is divinely inspired. In elections, *vox populi, vox dei*—the voice of the people is the voice of God—expressed the notion.

[23] See generally John V. Orth, Unconstitutional Emoluments: The Emoluments Clauses of the North Carolina Constitution, 97 N.C. L. REV. 1727, 1738 (2019) (noting the clause's connection with the fundamental democratic principle of equal rights and opportunities for all, and special privileges for none).

performance, the Assembly consigned Plaintiffs to an inferior status.

B. The General Assembly's power to district is merely administrative and not a license to disempower opposing sections of the electorate.

1. The Declaration of Rights is superordinated to the districting powers of the Assembly.

A primary goal of the drafters of the 1776 North Carolina Constitution was to disarm the Assembly of the ability to wield discriminatory power as before.

To make the guarantees of liberty more effective, they incorporated election rights in a written constitution which could not be altered by the legislature, but only by the electors themselves. Those rights were expressed in the Declaration of Rights as a broad reservation of power retained by the people, never granted to the legislature in the first place, held in trust by an independent judiciary.

The Declaration of Rights is structurally superior to all other constitutional provisions and acts of the Assembly. Thus, Plaintiffs' right to a fair election (the Free Elections Clause, the "will of the people" mandate, and the interlocking liberties) is

superior to every other article of the Constitution, including the Assembly's districting power.

Defendants can be expected to argue that *Harper III* reverses this constitutional order, raising the Assembly's districting prerogative above the individual's right to select their own representatives. Such a profound revision is impossible because it is in effect a constitutional amendment without a convention.[24] *Harper III* must be understood for the narrow proposition that the right of free elections is not an affirmative mandate for proportional representation.

The Assembly's districting powers are granted by Article II, which is subordinate to the Declaration of Rights. As *Stephenson I* explained, the requirements of "Article II are not affirmative constitutional mandates and do not authorize . . . districts in a manner violative of the fundamental right of each North Carolinian to substantially equal voting power."[25]

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[24] N.C. CONST. art. XIII, § 2 (reserving to the people the right to revise or amend the Constitution).

[25] *Stephenson,* at 378–79.

In simple terms, although districting is "textually committed" to the Assembly, it is subject to the condition that it be done evenhandedly. The Assembly has no power to carry out this task in a manner that impairs Plaintiffs' constitutionally superior voting rights.

2. The authority to district must be used to effectuate representation, not as a tool to deprive it.

The Assembly is assigned the districting task to give effect to the representation rights of the electorate, not to subvert them. It is a ministerial responsibility that does not confer on the agent the authority to allocate power to serve its own interests.[26]

The Supreme Court in *Van Bokkelen* characterized districting as an administrative task "to facilitate the exercise of the right of the ballot; and not to defeat it."[27] "The Legislature must prescribe necessary regulations as to the plans made, manner and whatever else may be required to

[26] Cloud v. Wilson, 72 N.C. 155 (1875).
[27] 73 N.C. at 215.

insure its full and free exercise. But these regulations must be subordinate to the right the exercise of which is regulated. The right must not be impaired by the regulation. It must be regulation purely, not destructive."[28]

C. The General Assembly did not faithfully follow the supplementary voter protections of Article II.

The Supreme Court requires that Article II restrictions[29] be applied in a way that does not selectively diminish voting power. *Stephenson I* required that "an application of the WCP that abrogates the equal right to vote, a fundamental right under the State Constitution, must be avoided in order to uphold the principles of substantially equal voting power and substantially equal legislative representation arising from that same Constitution."[30] In other words, in deciding which counties to

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[28] *Id* at 215-16. The Court held that the grant to the Legislature the power to establish voting districts did not also convey the power to abridge the right to vote, or for that matter "carry with it authority to reverse the whole order of things as established by the Constitution." *Id.* at 204.

[29] N.C. CONST. art. II, §§ 3, 5. These are housed in the Form of Government and textually subordinated to the Declaration of Rights. There is no suggestion that they function to limit or describe the extent of election rights.

[30] *Stephenson*, at 382.

group and how to split counties, the legislature must not selectively diminish the voting power or representation of any group.

In 2024 the Assembly violated this requirement.

In sum, by degrading Plaintiffs' voting power, the Assembly violated Plaintiffs' right to a fair election textually expressed in the Declaration of Rights and in Article II.

II. The North Carolina Constitution obligates the Judiciary to vindicate Plaintiffs' rights against the Assembly.

A. The Constitution arrays of the powers of government such that the Judiciary acts as trustee for the individual's liberties.

The North Carolina judiciary has the responsibility to vindicate violations of Plaintiffs' rights through its power of judicial review. This obligation traces to the arrayment of the separate powers in the Form of Government of the Constitution of 1776. That section established a body independent of the Assembly, the North Carolina judiciary, to vindicate the Declaration of Rights. N.C. CONST. of 1776, § 13. *Bayard v. Singleton,* 1 N.C. 5 (Super. Ct. L. & Eq. 1787), incorporated the

principle of judicial review in the jurisprudence of North Carolina. *Id.* at 7. Judge Samuel Ashe (a drafter of the Declaration of Rights and Constitution) pointed out the absurdity of judicial inaction enabling the Assembly to entrench themselves in perpetuity.

Courts throughout North Carolina's history have performed their duty to vindicate the constitutional rights of the electorate. As the Supreme Court stated in 1833, "the preservation of the integrity of the Constitution is confided by the people, as a sacred deposit, to the Judiciary."[31]

And in 1992 the Court held: "The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the state. . . . It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens."[32]

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[31] *Hoke v. Henderson*, 15 N.C. 1, 10 (1833), *overruled on other grounds by* Mial v. Ellington, 134 N.C. 131, 162, 46 S.E. 961, 971 (1903).

[32] Corum v. Univ. of N.C. *ex rel.* Bd. of Governors, 330 N.C. 761, 783 , 413 S.E.2d 276, 290 (1992).

The judiciary is obligated to vindicate the rights of Plaintiffs.

B. A violation of individual rights is not a political question and must be vindicated.

The adjudication of the right is not a political question but a question of the constitutionality of a legislative act.[33] The judiciary is obligated to protect the rights of Plaintiffs.

C. Plaintiffs' petition is not for proportional representation but for relief from government interference.

A critical point is that Plaintiffs do not seek to relitigate *Harper III*. Plaintiffs do not seek state-wide redistricting that will produce a proportionally representative outcome. Plaintiffs merely object to the Assembly amassing highly detailed personal data to discern Plaintiffs' convictions, determining that Plaintiffs are unlikely to support the Assembly's preferred

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[33] *Id*. 330 N.C. at 782, 413 S.E.2d at 289 ("one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution. . . . . [T]he common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right."); *see* Nixon v. Herndon, 273 U.S. 536, 540 (1927) ("The objection that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage [denial of the right to vote].").

candidate, and assigning them to a district where their dissenting vote will have no effect.

CONCLUSION

The trial court's dismissal under Rule 12(b)(6) should be reversed.

Respectfully submitted,

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WORD COUNT CERTIFICATION

I certify that this brief contains no more than the 3,750 words allowed by Rule 28.1. Footnotes and citations in the body of the brief are included in this word count. Covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance, counsel's signature block, and appendixes are not counted against these word-count limits pursuant to Rule 28(j)(1).

/s/ Jeffrey S. Warren

CERTIFICATE OF FILING AND SERVICE

I certify that on 28th February 2025, I caused a copy of the foregoing to be filed with the North Carolina Court of Appeals by submitting it through the Court's electronic filing website.

I further certify that on 28th February 2025, I caused the foregoing to be served on all counsel of record by sending a copy to counsel's correct and current electronic mail addresses, which are listed below:

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