NO. COA 24-1109 TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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BEVERLY BARD, RICHARD LEVY, SUSAN KING COPE, ALLEN WELLONS, LINDA MINOR, THOMAS W. ROSS, SR., MARIE GORDON, SARAH KATHERINE SCHULTZ, JOSEPH J. COCCIA, TIMOTHY S. EMRY, and JAMES G. ROWE,

Plaintiffs-Appellants,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, JEFF CARMON III in his official capacity as Secretary of the North Carolina State Board of Elections, STACY "FOUR" EGGERS in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O'DUFFY MILLEN in her official capacity as a member of the North Carolina State Board of Elections, KEVIN N. LEWIS in his official capacity as a Member of the North Carolina State Board of Elections, PHILLIP E. BERGER in his official capacity as President Pro Tem of the North Carolina Senate, and DESTIN HALL in his official capacity as Speaker of the North Carolina House of Representatives.

Defendants-Appellees.

From Wake County

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

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PLAINTIFFS-APPELLANTS' REPLY BRIEF

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ARGUMENT

I. The complaint sufficiently alleged a violation of the constitutional right to a fair election in the challenged districts.

A. The complaint forecast the results of the 2024 election in the districts challenged, and the final election results of the election confirmed that forecast—a result preordained by virtue of the unconstitutional governmental action to "rig" the election results.

The complaint seeks to preserve North Carolina citizens' rights to a fair election, regardless of party affiliation. Specifically, the complaint asserts that the citizens of North Carolina have a constitutional right to fair elections in which the government has not intervened in the selection of voters for the office in such a way as to "tilt the playing field" so that the government's favored candidate or party would have an electoral advantage.

Legislative Defendants' attempt to characterize this case and the issues raised as one that has nothing to do with elections, instead arguing that it is only about the drawing of the maps and the aggregate apportionment of voters into districts in each of the maps. To that end, Legislative Defendants would have this Court view the issues as about drawing maps for all of the 14 congressional districts; 120 State House Districts; and 50 State Senate Districts. However, these arguments completely distort the realities of the unconstitutional governmental action being challenged in this case. Each of

the individual districts challenged is created under the Constitution for the election of an individual in each of those particular districts.

What is more, the Legislative Defendants' response invites this Court to hold that the citizens of North Carolina—regardless of their political affiliation with a particular party or as unaffiliated voters—do not have any right to a fair elections, such that there is no prohibition on the government "rigging" elections. In the Legislative Defendants' view, the legislature is not only all powerful, but in aggregating voters for specific election districts, there are absolutely no constitutional limitations preventing it from "stacking the deck" however it suits their partisan benefit. *See* Legis. Defs.' Br. 16 (arguing that the General Assembly can engage in "apportioning voters based on political ideologies"); *see also id.* 16–17 (arguing that the North Carolina Constitution "permits political intent").

The fallacy of Legislative Defendants' reliance on this proposition is that the statements relied on were made in the context of the proportionality argument advanced and rejected in *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023) (hereinafter "*Harper III*"), which challenged the maps that arguably worked a political disadvantage on the minority political party. When applied to the allegations in this case, the Legislative Defendants ask the Court to sanction the government utilizing "political intent" and "political ideologies" to manipulate election outcomes. Such a proposition and such a

ruling would completely eviscerate the fundamental principles underlying elections by the people in a democracy.

B. *Harper III* does not control.

Legislative Defendants continue to claim that *Harper III* bars Plaintiffs' claim. Full stop." Legis. Defs.' Br. 10. However, *Harper III* is inapplicable here for multiple reasons. Legislative Defendants fail to acknowledge that this case:

1. Does not claim the Plaintiffs are entitled to any level of "political support."

2. Does not claim the Plaintiffs are entitled to a "commensurate level of political power and influence" with anyone or any political party.

3. Does not claim the districting maps are "unconstitutional because it makes it too difficult for [Plaintiffs or any political] party to translate statewide support into seats in the legislature" or Congress.

4. Does not claim the plaintiffs—all of whom are in this suit in their individual capacity as citizens and voters in North Carolina—are entitled to a remedy of "proportionate representation."

See Harper III, 384 N.C. at 339, 886 S.E.2d at 424.

Plaintiffs do not represent any group or entity in this case. They seek only to have their rights under the North Carolina Constitution protected in the Challenged Districts as against the government's stacking the deck, so as

to preordain the outcome of the election—a result that dilutes the value of Plaintiffs' votes. (R p 97). *Harper III* does not control this question.

Legislative Defendants have also failed in their brief to even remotely address the specific language in *Harper III* which explains not only what "partisan gerrymandering" is but also how it works in the context of the remedy sought in that case and in *Rucho*. *See* Pls.' Br. 27–34 (describing the nature of a "partisan gerrymandering" claim).

Finally, even if the Court were to accept the argument that the Plaintiffs' claim with respect to the specific districts here is somehow a claim of "partisan gerrymandering," the Legislative Defendants' proposition that the claim is automatically a non-justiciable political question under *Harper III* should be rejected. As the majority of the Court in *Harper III* explained:

> Because some level of partisan gerrymandering is constitutional, "[t]he 'central problem'" with such claims is not determining whether a jurisdiction has engaged in any partisan gerrymandering, which is a simple, yes-or-no delineation. Rather, the problem with partisan gerrymandering claims is "determining when political gerrymandering has gone too far." That sort of question requires more than a yes-or-no answer. Instead, it requires "a standard for deciding how much partisan dominance is too much."

Id. at 316, 886 S.E.2d at 410 (citations omitted) (emphasis added). Thus, although *Harper III* held that no justiciable standard existed in the context of the challenge to the maps in that case and the claim of proportionality at issue there, *Harper III* cannot be read to automatically eliminate the

judiciary's duty to resolve constitutional issues of fair elections in specific districts.

Moreover, an election violated by government manipulation is an entirely different question than the one presented in a challenge of a map of multiple districts and a claim seeking political proportionality. In contrast with the "too much" question in *Harper III*, the standard proposed here is straightforward in its application: Government action "rigging" or "attempting to rig" an election is a constitutional violation, regardless of the extent of governmental action.

C. Plaintiffs' claims are justiciable.

Legislative Defendants contend that Article I, Section 36 "cannot be used to state a claim for fair elections," arguing that because the North Carolina Constitution does not explicitly set out a right to fair elections, then the citizens of the state have no such right. Legis. Defs.' Br. 13. This extraordinary and troubling declaration undermines the entire basis of constitutional elections and eliminates for all practical purposes Article I, Section 36, which protects rights not enumerated but reserved by the people.

Legislative Defendants' attempt to rely on *McKinney v. Goins*, 387 N.C. 35, 911 S.E. 2d 1 (2025), to support their view, but they overlook the critical, additional language in the opinion and the cases upon which it relies. As the

Court in *McKinney* recognized, "it is for the appellant to show that the Legislature is restricted by the express provisions of the Constitution, *or by necessary implication therefrom*." *Id.* at 44, 911 S.E.2d at 9 (emphasis added).

As Plaintiffs fully acknowledge, the North Carolina Constitution does not utilize the word "fair" in any of the rights enumerated. But that does not mean that no such right exists. For example, the North Carolina Constitution contains an enumerated right to a jury trial, N.C. Const. art. I, §§ 24–25, and there is nothing in the express language of the right nor in any other provision in the Constitution that uses the word "fair." Surely, though, that does not mean that North Carolinians lack the right to a fair jury trial.

The Constitution expressly reserves other rights to the people that are "by necessary implication" a restriction and limitation on the power of government. *See McKinney*, 387 N.C. at 44, 911 S.E.2d at 9. Just as the government cannot constitutionally manipulate a trial to deprive a citizen of the right to a fair trial, the government cannot constitutionally manipulate an election process to deprive the citizens of a fair election.

For all of these reasons, Legislative Defendants' argument that there is no constitutional limitation on the government when it comes to the election process must fail.

D. Plaintiffs' claims are not a political question.

In *Baker v. Carr*, the United States Supreme Court emphasized the distinction between "political questions" and "political cases," admonishing that "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker v. Carr*, 369 U.S. 186, 217 (1962). Yet that is precisely the distinction that Legislative Defendants attempt to blur here.

For the reasons below, each of Legislative Defendants' political-question-doctrine arguments is without merit.[1]

1. The fact that "redistricting" is textually committed to the General Assembly does not deprive the judiciary of its duty to determine whether an act of the General Assembly violates a constitutional right.

Legislative Defendants essentially argue that because redistricting is textually committed to the General Assembly by the North Carolina Constitution, there can be no judicial check on the General Assembly's redistricting decisions. This premise is not only wrong, but if adopted, would deprive North Carolinians of any and all rights that are not expressly

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[1] See *Stein v. Hall, et al., 23CV029308-910, Order Granting Plaintiff's Motion for Summary Judgment, (Wake County, Apr. 23, 2025*), wherein a three-judge panel held that a constitutional challenge to a legislative act impairing the Governor's executive authority is not a political question and is justiciable.

enumerated, thus eliminating Article I, Section 36 and the constitutional principle of unenumerated rights.

To support their assertion of unbridled power, Legislative Defendants primarily rely on *McKinney*, 387 N.C. at 40–41, 911 S.E.2d at 7. However, their reliance on *McKinney* fails to recognize the limitations by "necessary implication" on the General Assembly found in other rights in the Constitution. *Id.* at 44–45, 911 S.E.2d at 9.

As discussed below, our Supreme Court has repeatedly found limitations on the General Assembly's powers through other constitutional provisions such as the Law of the Land clause. *See* N.C. Const. art. I, § 19. To hold there are no limitations on the General Assembly's powers in this matter is to simply cast aside Article I, Section 36, which preserves the unenumerated rights of the people. As Chief Justice Newby and Professor John Orth describe in their treatise on the North Carolina State Constitution:

> Although the people of North Carolina have expressly declared many rights in Article I, <u>they have not attempted a complete enumeration</u>. . . . Section 36 reminds us that <u>the whole declaration of rights, despite its great importance, is no more than that: a selection only, not a complete catalog</u>.

John V. Orth & Paul Martin Newby, The North Carolina State Constitution 92 (2d ed. 2013) (emphasis added).

In *Harper III*, Chief Justice Newby again emphasized that point, observing that "The Declaration of Rights is an expressive yet non-exhaustive list of protections afforded to citizens against government intrusion, along with 'the ideological premises that underlie the structure of government.'" *Id.* at 321, 886 S.E.2d at 413 (emphasis added) (quoting Orth & Newby, State Const. 46).

Legislative Defendants have no answer for those two statements, both of which are at odds with Legislative Defendants' argument that only "express" rights can limit the General Assembly's power in creating election districts.

As described above and in the Plaintiffs' opening brief, the people of North Carolina have an unenumerated right to election integrity that limits the General Assembly's ability to "rig" elections through manipulation of apportioning voters using political data and analytics for the Challenged Districts. The mere fact that the General Assembly has the authority to engage in the revision and apportionment of election districts does not change this. Instead, the Legislative Defendants' creation of the Challenged Districts is subject to the same constitutional scrutiny as any other legislative act.

2. Plaintiffs' claim has a judicially manageable standard that is politically neutral and does not involve policy questions.

Unlike the Plaintiffs in *Harper III*, who sought proportionality and a result favorable to the Plaintiffs' political partisanship, Plaintiffs here have made no such claims. The "determinative advantage" argument presented here by Plaintiffs at this stage of the case pertains to a "determinative advantage" in the Challenged Districts for those favored by the government, not a "determinative advantage" for any political party or the Plaintiffs themselves. The remedy sought by Plaintiffs is to be free of a "determinative disadvantage" created by the government preordaining the winners by unconstitutionally rigging the election.

Plaintiffs would have the burden at trial of presenting evidence that the government utilized political data in moving precincts and census blocks of voters around, knowing the voting propensities of those voters and aggregating them in such a way in the Challenged Districts to influence or guarantee the election success of the government's preferred candidate.

In that regard, the standard to be applied by the trial court here would be no different than in other constitutional challenges: determining whether the Plaintiffs have met their burden of showing a violation of a constitutional right—here, whether the evidence shows the General Assembly's actions in the Challenged Districts prove they intended to, and in fact did, influence or

"rig" the election by manipulating the voters in specific precincts or census blocks.

The evidence of this is strong, as the complaint describes. The complaint details how the General Assembly manipulated individual voter pools assigned to "pods" (either precincts or census blocks), which were calculated by the General Assembly to take into account a multitude of political factors. *See* R pp 12–13, 25 (Compl. ¶¶ 31–32, 87). Compiling those "pods" into a district allowed the General Assembly to predetermine the likely outcomes of the elections in the Challenged Districts. *See* R pp 5, 11, 25–26 (Compl. 5, ¶¶ 33, 96).

This description shows the fallacy in the Legislative Defendants' assertion that "determinative advantage" requires "that one candidate achieve 'a determinative advantage.'" Legis. Defs.' Br. 17. Here, the General Assembly manipulated voting "pods," which influenced and intentionally impacted the "determinative advantage" for each Challenged District, regardless of what any candidate might have done. Indeed, the filings and elections results in the Challenged Districts for the 2024 election cycle

confirm as much, proving that the complaint's analysis in the Challenged Districts was remarkably accurate in predicting the election outcome.[2]

As these points show, the Plaintiffs' "determinative advantage" standard is entirely appropriate for this case.

E. Plaintiffs' argument that they have an unenumerated right to fair elections that can be enforced or manifested through the Law of the Land clause or the Free Elections clause are not "new" arguments, and are properly before the Court.

Legislative Defendants' contention that Plaintiffs have raised "new legal theories" on appeal is without merit. Plaintiffs are not "swapping horses" by pointing out to the Court the various paths it can take in recognizing and applying the unenumerated right to fair elections.

Throughout this litigation, Plaintiffs have consistently acknowledged that the North Carolina Constitution has no enumerated right to fair elections. However, Plaintiffs have consistently argued that an unenumerated right to fair elections is a fundamental right and should be recognized and enforced by the Courts. They have argued that their right to fair elections is an unenumerated right which is reserved for the people through Article I, Section 36.

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[2] *See* https://www.ncsbe.gov/results-data/election-results (last visited Apr. 23, 2025).

How this Court chooses to articulate that right, as discussed in Plaintiffs' earlier brief, can take different paths. The Court could declare there is a right to fair elections which is manifested through Article I, Section 19 (Law of the Land Clause). *See Long v. City of Charlotte*, 306 N.C. 187, 195–96, 293 S.E.2d 101, 107 (1962). Likewise, this Court could declare that the language in *Harper III* pertaining to the Free Election clause in Article I, Section 10 stating that elections must be free from "interference" by the government and that the government "rigging" an election constitutes "interference" with Plaintiffs' right to fair elections. These are not new legal theories but merely arguments informing the Court of the multiple paths to reach the same conclusion: that Plaintiffs have a constitutional right to fair elections. Regardless, the "essential question" at the Rule 12 stage is "whether the complaint, when liberally construed, states a claim upon which relief can be granted on *any theory*." *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 266, 827 S.E.2d 458, 465 (2019) (emphasis added).

Finally, Legislative Defendants contend that *Harper III* concludes that "many of the Declaration's provisions are nonjusticiable, meaning any underlying concepts contained therein are only enforceable through express constitutional provisions or statutes." Legis. Defs.' Br. 22. *Harper III* makes no such pronouncement, nor is there any caselaw to support this proposition.

On the contrary, *Harper III* referenced *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014) (*Dickson I*) and *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 404 (2015)(*Dickson II*) in regard to the "Good of the Whole" provision in Article I, Section 2 of the N.C. Constitution. The Court in *Dickson II* concluded there was no justiciable standard for the Good of the Whole clause. Such conclusion does not support the assertion of Legislative Defendants that the Declaration of Rights includes many provisions which are nonjusticiable. As the *Dickson II* Court noted:

> [P]laintiffs argue that the enacted plans violate the "Good of the Whole" clause found in Article I, Section 2 of the Constitution of North Carolina. We do not doubt that plaintiffs' proffered maps represent their good faith understanding of a plan they believe to be best for our State as a whole; however, the maps enacted by the duly elected General Assembly also represent an equally legitimate understanding of legislative districts that will function for the good of the whole. Because plaintiffs' argument is not based upon a justiciable standard, and because acts of the General Assembly enjoy "a strong presumption of constitutionality," plaintiffs' claims fail .

Id. at 534, 781 S.E.2d at 440.

Here, Plaintiffs seek the protection of their constitutional right to fair elections, free of governmental manipulation. That is not a "political right" nor a "political preference." It is a constitutional right. As recognized in *Dickinson II*:

> "[R]edistricting in North Carolina is an inherently political and intensely partisan process that results in political winners and, of course, political losers. . . . Political losses and partisan

> disadvantage are not the proper subject for judicial review. . . . Rather, the role of the court in the redistricting process is to ensure that North Carolinians' constitutional rights – not their political rights or preferences – are secure."

Id. at 493, 781 S.E.2d at 415.

It is in that spirit that Plaintiffs ask this Court for the opportunity to secure their constitutional right to a fair election.

CONCLUSION

Plaintiffs respectfully request that the Court reverse the trial court's dismissal of the complaint.

Respectfully submitted the 24th day of April, 2025.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Plaintiffs-Appellants certifies that the foregoing brief, which was prepared using 13-point proportionally spaced font with Century Schoolbook, is less than 3,750 words (excluding covers, captions, indexes, table of authorities, counsel's signature block, certificates of service, this certificate of compliance and any appendixes) as reported by the word-processing software/word count.

This the 24th day of April, 2025.

/s/ Thomas R. Wilson
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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document has been served by e-mail on the following:

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