

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

Docket No. 2022-0629

Miles Brown, et al.

v.

Secretary of State, et al.

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

The Defendants, by and through the Office of the Attorney General, submit the following notice of supplemental authority.

Introduction:

On April 28, 2023, the North Carolina Supreme Court overruled its decision in *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022) (“*Harper I*”). See *Harper v. Hall*, 2023 N.C. LEXIS 366 (N.C., Apr. 28, 2023) (“*Harper III*”).¹ Because the Plaintiffs extensively cited and relied on the now overruled *Harper I* decision in their opening brief, the Defendants respectfully submit this notice of supplemental authority regarding the recent North Carolina Supreme Court’s recent *Harper III* decision and how it persuasively demonstrates why this Court should rule that the Plaintiffs’ partisan gerrymandering claims are not justiciable under the State Constitution.

¹ The period for filing post-decision motions in *Harper III* has not yet run.

Brief background of Harper v. Hall decisions:

A. Harper I:

The Plaintiffs in *Harper I* alleged that certain redistricting plans for state and federal elections constituted partisan gerrymanders, which violated the free elections, equal protection, free speech, and freedom of assembly clauses of the North Carolina Constitution. *See Harper III*, 2023 N.H. LEXIS 366, at *13. Despite the fact that the North Carolina Constitution neither expressly prohibits partisan gerrymandering nor provides express standards for addressing and resolving partisan gerrymandering claims, the *Harper I* court ultimately concluded that these claims were justiciable “because the right to aggregate votes based on partisan affiliation is a fundamental right and there are several manageable standards for evaluating the extent to which districting plan dilute votes on the basis of partisan affiliation.” *Id.* at *18 (quotation omitted). In particular, the *Harper I* court determined that two specific political science tests and thresholds could demonstrate whether a redistricting map is presumptively constitutional (a 1% score on the “Mean-Median Difference” test and a 7% score on the “Efficiency Gap” test), although the court refused to delineate a precise standard for determining the constitutionality of a redistricting plan. *Id.*

The *Harper I* court concluded that the fundamental right to vote includes the right to “substantially equal voting power and substantially equal legislative representation,” which in turn required the North Carolina General Assembly to not diminish or dilute any individual’s vote on the basis of partisan affiliation. *Id.* at *19. As the *Harper III* court later noted, the reasoning in *Harper I* “ironically . . . requires consideration of

partisanship to remedy the perceived use of partisanship.” *Id.* at *20. The *Harper I* court remanded to the North Carolina General Assembly to submit new redistricting plans that satisfy all provisions of the North Carolina Constitution, as articulated in *Harper I*. *Id.* at *22.

B. Harper II:

On remand, the North Carolina General Assembly submitted proposed remedial redistricting plans to a three-judge panel. *Id.* at *23-27; *see Harper v. Hall*, 881 S.E.2d 156 (2022) (vacated by *Harper III*) (“*Harper II*”). The General Assembly used the same process to ensure that three redistricting plans complied with the two specific political science tests and thresholds that the *Harper I* court identified, and additionally prioritized creating “more purportedly Democratic leaning districts” while complying with “neutral and traditional redistricting criteria,” where possible. *Harper III*, 2023 N.C. LEXIS 366, at *26-27, 81. This process required the General Assembly to use “partisan election data.” *Id.* at *24.

In turn, the three-judge panel appointed three special masters to help review the proposed plans, and the special masters hired four “advisors.” *Id.* at *23. The three-judge panel adopted a report of the special masters, which found that the remedial house plan (“RHP”) and remedial senate plan (“RSP”) complied with *Harper I*, while the remedial congressional plan (“RCP”) did not because it scored below the *Harper I* court’s stated thresholds on the Mean-Median Difference and Efficiency Gap metrics. *Id.* at *27-28. The three-judge panel adopted an alternative RCP that the special masters proposed. *Id.* at *29.

The North Carolina Supreme Court heard an appeal of the three-judge panel’s decision in *Harper II*. *See Harper II*, 881 S.E.2d 156. The *Harper II*

court ultimately affirmed the panel’s rejection of the RCP and its approval of the RSP. However, the *Harper II* court reversed the panel’s approval of the RSP—even though that plan complied with the express judicial standards that the *Harper I* court had articulated. *Id.* at *30. Despite the fact that the *Harper I* court had stated that a 1% Mean-Median Difference and a 7% Efficiency Gap could serve as possible bright-line standards for identifying a plan that will give the voters of all political parties substantially equal opportunity to translate votes into seats, the *Harper II* court reversed course and stated that the ultimate constitutional standard is one of “broad fundamental rights,” not “narrow statistical measures” and therefore a trial court cannot “legally conclude *based on* [certain factual, statistical] *measures alone* that the plan is constitutionally compliant.” *Harper II*, 881 S.E.2d at 174 (emphasis in original). Thus, the *Harper II* court concluded that it could not delineate a particular set of metrics that would identify a constitutional redistricting map “because our constitution speaks in broad foundational principles, not narrow statistical calculations.” *Id.* at 175.

Harper III:

The defendants sought rehearing of *Harper II*, arguing that the decision confirmed that the redistricting standards set forth in *Harper I* and *Harper II* were unmanageable. *Harper III*, 2023 N.C. LEXIS 366, *34-35. The defendants additionally asked the North Carolina Supreme Court to revisit its decision in *Harper I* that partisan gerrymandering claims were justiciable under the North Carolina Constitution. *Id.*

The North Carolina Supreme Court granted rehearing and subsequently issued the *Harper III* decision on April 28, 2023, which overruled *Harper I* and vacated *Harper II*. *See generally id.*

The *Harper III* court relied on the United States Supreme Court's reasoning in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Specifically, the *Harper III* court agreed with *Rucho* that "partisan gerrymandering claims do not seek to redress a violation of any particular constitutional provisions; rather, such claims ask the courts to make their own political judgment about how much representation particular political parties deserve—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end." *Id.* at *40-41 (quotation omitted). In other words, "partisan gerrymandering claims ask courts to apportion political power as a matter of fairness," which is a "judgment call" that requires a "policy choice" for which there are no "clear, manageable, and politically neutral standard[s]." *Id.* at *41 (quotations omitted). Moreover, there is no "clear, manageable, and politically neutral test for 'fairness'" in this context because there are different potential approaches to achieving "fairness," each with their own potential problems and pitfalls. *Id.* at *41-42 (explaining two possible approaches). The *Harper III* court further noted that while *Rucho* recognized "it is possible for a constitution to provide the explicit guidance necessary to adjudicate partisan gerrymandering claims," the states that have done so have enacted express constitutional and statutory provisions to that effect. *Id.* at *43-44.

Ultimately, the *Harper III* court ruled that partisan gerrymandering claims were nonjusticiable under the North Carolina Constitution for three independent reasons: (1) a textually demonstrable commitment of the matter to another branch; (2) a lack of judicially discoverable and manageable standards, and (3) the impossibility of deciding a case without making a policy determination of a kind clearly suited for nonjudicial discretion. *Id.* at *55.

Textual Commitment: The *Harper III* court determined that the North Carolina Constitution “expressly assigns the task of redistricting to the General Assembly.” *Id.* at *57. For example, like the New Hampshire Constitution, the North Carolina Constitution expressly provides that, following the decennial Congressional census, the North Carolina state legislature “shall revise the senate districts and the apportionment of Senators from those districts, subject to” express requirements regarding districts having equal populations, being contiguous, and not dividing counties. *Id.* at *63-64.

Lack of Judicially Discoverable and Manageable Standards: The *Harper III* court recognized that the North Carolina Constitution did not contain any provision expressly prohibiting or limiting partisan gerrymandering. *Id.* at *75. The *Harper III* court expressly rejected the reasoning in *Harper I* that the North Carolina Constitution’s Declaration of Rights could “provide[] a standard for identifying partisan gerrymandering.” *Id.* at *78. The *Harper III* court noted that the *Harper I* court “could not consistently enunciate what that standard supposedly is,” to the point that the *Harper II* court ultimately struck down a redistricting plan (which followed the same process as another plan the *Harper II* court affirmed) based on a “standard” that was not clear to the General Assembly, the three-judge panel, the three special masters, and the three dissenting *Harper II* justices. *Id.* at *81. Put differently, the *Harper I* court’s inability to “answer basic questions like how much partisan gerrymandering is too much and how can courts consistently and reliably measure partisanship in a redistricting plan” demonstrated that the North Carolina Constitution did not, in fact, contain judicially discoverable and manageable standards for resolving partisan gerrymandering claims. *Id.*

Lack of an initial policy determination:

The *Harper III* court determined that partisan gerrymandering claims cannot be adjudicated without courts having to make a “host of policy determinations of a kind clearly for nonjudicial discretion.” *Id.* at *91 (cleaned up). For example, the *Harper I* and *Harper II* decisions demonstrated that the state’s constitution did not prescribe, and the court could not articulate: “how much partisan gerrymandering is too much”; how political parties must be or should be proportionally represented at a statewide level; what constitutes “fairness” with respect to proportional representation of political parties at a statewide level; how to measure such “fairness”; and what data should be used in attempting to measure such “fairness.” *Id.* at *91-102. Thus, the *Harper I* court inappropriately “usurped the role of the General Assembly—the policymaking branch of the government”—by placing all of these policy decisions with the judicial branch. *Id.* at *101.

The Harper III decision persuasively demonstrates that this Court should find the Plaintiffs’ partisan gerrymandering claims to be nonjusticiable:

The *Harper I* court created a novel standard for resolving partisan gerrymandering claims, despite the fact that the North Carolina Constitution did not expressly prohibit partisan gerrymandering or provide any standards for determining whether and to what extent the legislature can or must consider partisan impact when fulfilling its constitutional duty to reapportion legislative districts. As a result, the legislature, lower court, appointed special masters, and *Harper II* court were all unable to clearly and consistently determine whether, and articulate why, remedial plans violated the “standard” set forth in *Harper I*. As the *Harper III* court recognized, this failure perfectly demonstrates why the judicial branch

should not intervene in matters that a state constitution has committed to another branch of government, particularly where the constitution does not provide judicially manageable standards for resolving such matters and where the constitution does not make initial legislative policy determinations that are necessary to resolve such matters.

Just like North Carolina's Constitution, the New Hampshire Constitution commits reapportionment authority to the New Hampshire Legislature.

Just like North Carolina's Constitution, the New Hampshire Constitution does not expressly prohibit, restrict, or otherwise provide, whether, how, or to what extent Legislature may consider partisanship when exercising its constitutional redistricting authority.

Just like North Carolina's Constitution, the New Hampshire Constitution does not provide any judicially discoverable or manageable standards for this State's courts to determine whether a particular plan would constitute an unconstitutional partisan gerrymander.

In sum, the Plaintiffs relied on extensively on *Harper I* in arguing that this Court should find the Plaintiffs' partisan gerrymandering claims are justiciable under the State Constitution. The subsequent proceedings following *Harper I*, which culminated in the case being overruled, demonstrate that the *Harper I* decision represents judicial overreach in violation of the principle of separation of powers. As explained in *Rucho* and *Harper III*, the judicial branch should not intervene in a legislature's execution of its redistricting authority by hearing partisan gerrymandering claims absent an express constitutional or legislative grant of authority to do so. Because the State Constitution commits redistricting authority to the

legislature and provides no such constitutional or statutory provisions that expressly prohibit, restrict, or otherwise provide, whether, how, or to what extent Legislature may consider partisanship when exercising its constitutional redistricting authority, this Court should dismiss the Plaintiffs' claims as nonjusticiable.

Respectfully Submitted,

THE STATE OF NEW HAMPSHIRE
AND THE NEW HAMPSHIRE
SECRETARY OF STATE

By its Attorneys,

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Date: May 4, 2023

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief was served on all parties of record through the Court's electronic filing system.

Date: May 4, 2023

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