No. 413PA21-2 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, et al., Plaintiffs, COMMON CAUSE, Plaintiff-Intervenor, v. REPRESENTATIVE DESTIN HALL, et al., Defendants.	From Wake County

REBECCA HARPER, et al., Plaintiffs, v. REPRESENTATIVE DESTIN HALL, et al., Defendants.	From Wake County

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MOTION OF GOVERNOR ROY COOPER
AND ATTORNEY GENERAL JOSHUA H. STEIN
FOR LEAVE TO FILE AMICUS BRIEF
IN SUPPORT OF PLAINTIFFS-APPELLANTS

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Governor Roy Cooper and Attorney General Joshua H. Stein respectfully seek leave under Appellate Rule 28(i) to file the attached amicus brief in support of Plaintiffs-Appellants.[1]

INTEREST OF AMICI CURIAE

Our state constitution is meant to establish a democracy, under which the people of our State are empowered to choose their representatives, not the other way around. Partisan gerrymandering subverts our democracy by allowing legislators to manipulate district lines to entrench themselves in power.

Given the profound importance of these issues for the governance of our State, the Governor and the Attorney General previously filed amicus briefs in earlier appeals in these cases, asking this Court to hold that partisan gerrymandering violates our state constitution. This Court, after hearing those arguments, correctly held that "[p]artisan gerrymandering of legislative and congressional districts violates" multiple provisions of our

[1] All parties were consulted prior to the filing of this motion. N.C. R. App. P. 37(c). The *Harper* Plaintiffs and the *NCLCV* Plaintiffs consent and do not intend to file a response to this motion. Common Cause, the Legislative Defendants, and the State Board Defendants take no position on this motion and do not intend to file a response.

state constitution. *Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, ¶ 160, 868 S.E.2d 499.

Now, Legislative Defendants ask this Court to take the extraordinary step of overruling this precedent, simply because the composition of this Court recently changed. Legislative Defendants also seek this Court's blessing to, once again, draw districts to predetermine the result of future elections to the greatest extent possible. *See id.* ¶¶ 48-49 (noting that the original 2021 districts favored Legislative Defendants' political party more than 99.9% of all possible alternatives).

Granting this relief would undermine respect for our State's judiciary and the rule of law, by showing that the weight of the Court's precedents depends on the composition of its membership. But more fundamentally, granting this relief would also have grave consequences for the future of self-government in our State. Because overruling *Harper* would so profoundly undermine the government in which the Governor and the Attorney General were elected to serve, they have strong interests in being heard.

The Governor is the State's chief executive, and he bears primary responsibility for enforcing our State's laws. N.C. Const. art. III, §§ 1, 5(4). He works to defend the rule of law and to promote the public's confidence in

our State's government. He also plays a key role in the legislative process—proposing legislation and, when appropriate, exercising the veto. *Id.* art. II, § 22; *see id.* art. III, §§ 5(2)-(3). Because gerrymandering affects the Governor's authority in these areas, he has a strong interest in being heard.

The Attorney General is our State's chief legal officer, and he is charged with defending our constitution and the rights that it guarantees to the sovereign people. *Martin v. Thornburg*, 320 N.C. 533, 546, 359 S.E.2d 472, 479 (1987); *Tice v. Dep't of Transp.*, 67 N.C. App. 48, 52, 312 S.E.2d 241, 244 (1984). In keeping with this constitutional role, section 1-260 of our General Statutes provides that whenever a statute "is alleged to be unconstitutional, the Attorney General of the State shall . . . be entitled to be heard." N.C. Gen. Stat. § 1-260. Because partisan gerrymandering violates the right of the sovereign people to govern themselves, the Attorney General has a strong interest in being heard as well.

REASONS WHY AN AMICUS BRIEF IS DESIRABLE

Amici's views will assist this Court in several ways. First, because the Governor and the Attorney General are elected to represent all the people of our State, they are well situated to advocate for the interests of all voters. Second, by virtue of their constitutional roles and experiences in office, both

are well versed in the rights that our state constitution protects. Third, they also well understand the harm to the rule of law that granting the relief that Legislative Defendants seek could cause.

ISSUES TO BE ADDRESSED

In their prior briefs, Amici showed how partisan gerrymandering distorts the governance of our State and violates our state constitution. In their proposed new brief, Amici show that because Legislative Defendants' petition for rehearing is procedurally defective, it should be dismissed as improvidently granted. They also show that Legislative Defendants have failed to identify any persuasive rationale for overruling or withdrawing this Court's previous decisions in these cases. They finally show that allowing the General Assembly to redraw districts once again this decade would violate our state constitution's prohibition on mid-decade redistricting.

CONCLUSION

Governor Cooper and Attorney General Stein respectfully request that this Court consider the attached amicus brief.

This 3rd day of March, 2023.

JOSHUA H. STEIN
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/s/ Ryan Y. Park

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I certify that the attorney listed below has authorized me to list his name on this brief as if he had personally signed it.

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This 3rd day of March, 2023.

/s/ Electronically submitted
Ryan Park

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BRIEF OF AMICI CURIAE GOVERNOR ROY COOPER AND ATTORNEY GENERAL JOSHUA H. STEIN IN SUPPORT OF PLAINTIFFS-APPELLANTS[1]

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[1] No outside persons or entities wrote any of this brief or contributed any money to support the brief's preparation. *See* N.C. R. App. P. 28(i)(2).

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****

INTRODUCTION

Our state constitution is based on the foundational principle that the people have the right to govern themselves. That "[a]ll political power is vested in and derived from the people" and "is founded upon their will only." N.C. Const. art. I, § 2.

Partisan gerrymandering is antithetical to this constitutional commitment to self-government. In a functioning democracy, the people should choose their representatives, not the other way around. To preserve popular sovereignty, our State's elected representatives cannot be allowed to entrench themselves in power by manipulating district lines to insulate themselves from popular will.

A year ago, this Court stood up for the democratic principles enshrined in our constitution. It recognized that partisan gerrymandering violates our state constitution's Declaration of Rights in multiple ways, including its guarantee that "[a]ll elections shall be free," *id.* art. I, § 10, and that voters have a fundamental right to "vote on equal terms," *Stephenson v. Bartlett*, 355 N.C. 354, 358, 562 S.E.2d 377, 381 (2002) (*Stephenson I*). Simply put, "our constitution's Declaration of Rights guarantees the equal power of each person's voice in our government through voting in elections that matter."

Harper v. Hall, 380 N.C. 317, 2022-NCSC-17, ¶ 4, 868 S.E.2d 499 (*Harper I*). And if elections are not free and equal in this way, it deprives the General Assembly of the popular legitimacy on which our entire constitutional system is based. *Id.* ¶ 4, 130.

This Court then enforced these rights. It invalidated the first round of state legislative maps drawn by Legislative Defendants in 2021, which were "extreme partisan outliers" more favorable to Legislative Defendants' political party than 99.9% of all possible maps. *Id.* ¶ 49. It then directed the legislature to redraw maps that were responsive to the people's will. *See id.* ¶ 130.

Barely two months ago, this Court again applied and enforced these rights, upholding the new house map drawn by Legislative Defendants in 2022 as constitutional, but holding that their new senate map did not meet constitutional standards. *Harper v. Hall*, 2022-NCSC-121, ¶¶ 94, 102, 881 S.E.2d 156 (*Harper II*). This ruling was confirmed by reality: In an election where statewide candidates from the favored political party tended to win a slight majority of votes, the gerrymandered senate map yielded a *super*majority of seats, whereas the house map yielded a simple majority that more fairly reflected the people's will.

Legislative Defendants seek to undo all this progress. Just weeks after this Court was newly constituted, they asked the Court to overrule *Harper I*, withdraw *Harper II*, and hold that the legislature has unbridled authority to draw state legislative districts to prevent voters from exercising control over their own government. This Court should reject these audacious requests.

First, the rehearing petition should be dismissed as improvidently granted. Legislative Defendants do not even try to show that they have satisfied the standards for rehearing. Never before has this Court vacated an opinion of such consequence on rehearing, and never before has it done so solely because new members of the Court disagreed with a prior ruling. If the rule of law means anything, it means that the law does not swing wildly based on the composition of this Court.

Second, *Harper I* should not be overruled. Stare decisis is the foundation stone of this Court's legitimacy. It requires the Court to adhere to past precedents unless they are grievously wrong, even if a Justice might have decided the case differently in the first instance. But *Harper I* was not wrong at all, let alone grievously so. To the contrary, by recognizing that partisan gerrymandering is corrosive to the very idea of democracy, *Harper I* vindicated our constitution's highest ideals.

Third, *Harper II* should not be withdrawn. *Harper II* merely involved a routine and case-specific application of *Harper I*. And this application proves that the standard established in *Harper I* was workable: The Court proved that it was able to successfully discern which maps were unconstitutional gerrymanders and which were not.

And fourth, even if this Court were to take the extreme step of withdrawing *Harper II* and overruling *Harper I*, our constitution's ban on mid-decade redistricting would still apply. The 2022 state legislative maps were duly enacted through legislation, were approved by the superior court, and were actually used in the last election to constitute the current General Assembly that Legislative Defendants lead. Even if *Harper II* is withdrawn, the existing legislative maps are therefore established by law, and may not be altered by the General Assembly until the next decennial census.

In sum, Legislative Defendants can point to nothing that has changed since this Court decided *Harper II*—except the composition of this Court. If a decision of such consequence could be withdrawn merely based on a change in the Court's membership, it would fatally undermine this Court's standing as the independent arbiter of our State's constitutional disputes. The Governor and Attorney General respectfully request that the Court

dismiss the rehearing petition, allow *Harper II* to stand, and decline Legislative Defendants' improper request to overrule *Harper I*.

ARGUMENT

I. This Court Should Dismiss the Petition for Rehearing as Improvidently Granted.

This Court erred in granting Legislative Defendants' rehearing petition. That petition was a flagrant violation of both the letter of the Appellate Rules and the spirit of procedural fairness and regularity that is so central to the proper functioning of the judicial branch. This Court should dismiss the petition as improvidently granted.

Legislative Defendants filed their rehearing petition for the transparent, improper purpose of capitalizing on the recent change in this Court's membership. But this Court has *never* before granted rehearing merely because its composition changed. "A partial change in the personnel of the Court affords no reason for a departure from the rule" that rehearing is granted "only in exceptional cases." *Weisel v. Cobb*, 122 N.C. 67, 69-70, 30 S.E. 312, 312-13 (1898). To the contrary, a change in the Court's membership "emphasizes the necessity of [the rule's] application." *Id.* at 70, 30 S.E. at 313. Were the Court to flout the rules in this way, the Court "would tend to

unsettle confidence in the adjudications of the Court as a final arbiter in disposing of controversies." *Dupree v. Va. Home Ins. Co.*, 93 N.C. 237, 243 (1885).

Here, all that has changed between the decision in *Harper II* and Legislative Defendants' rehearing petition is the Court's composition. When the Court considered and rejected Legislative Defendants' arguments in *Harper II*, it did not "overlook[ ]" or "misapprehend[ ]" anything, as the Appellate Rules require for rehearing. *See* N.C. R. App. P. 31(a). Legislative Defendants do not disagree. They identify no point of law or fact that the Court in *Harper II* looked past or misunderstood. Rather, they argue that the Court—having understood and evaluated their arguments—was wrong to reject them. *See, e.g.*, Leg. Supp. Br. at 2-3 (arguing that *Harper II* was wrong to reject a bright-line rule for partisan-gerrymandering claims).

But that approach would make a mockery of the rules under which this Court functions. Appellate Rule 31(a) requires a rehearing petition to "state with particularity the points of fact or law that, in the opinion of the petitioner, the court has *overlooked* or *misapprehended*." N.C. R. App. P. 31(a) (emphasis added). "Overlook" means "[t]o fail to notice or consider." *Overlook*, *The American Heritage Dictionary* (5th ed. 2011). "Misapprehend"

means to "misunderstand." *Misapprehend*, *id*. Thus, this Court appropriately grants rehearing only when a "material point was overlooked, or some direct authority was not called to the attention of the court." *Haywood v. Daves*, 81 N.C. 8, 9 (1879) (emphasis omitted).

The Appellate Rules emphatically do not, however, allow rehearing merely to reconsider arguments that the Court has already decided. For more than a century, this Court has consistently reaffirmed that rehearing petitions are for the narrow, limited purpose of correcting factual and legal errors—not to reconsider the same arguments that the Court has previously evaluated. "[I]t is not in the contemplation or scope of the rule," this Court has admonished, "to permit an adjudged case to be reviewed, and the rulings made therein controverted by the same course of reasoning and the reproduction of the same authorities, which were relied on in the former argument, and then, with due and careful deliberation, considered and disposed of." *Dupree*, 93 N.C. at 239.

Thus, time and again, this Court has dismissed rehearing petitions when "the grounds of error assigned in the petition are substantially the same as those argued and passed upon on the former hearing." *Montgomery v. Blades*, 223 N.C. 331, 331, 26 S.E.2d 567, 567 (1943); *see also, e.g.*, *Ivey v.*

Rollins, 251 N.C. 345, 346, 111 S.E.2d 194, 195 (1959) (per curiam) (similar); *Jolley v. W. Union Tele. Co.*, 205 N.C. 108, 170 S.E. 145, 145 (1933) (similar); *Weston v. John L. Roper Lumber Co.*, 168 N.C. 98, 83 S.E. 693, 693 (1914) (per curiam) (similar); *Weathers v. Borders*, 124 N.C. 610, 32 S.E. 881, 881 (1899) (similar); *Fisher v. Cid Copper Min. Co.*, 97 N.C. 95, 4 S.E. 772, 774 (1887) (similar); *Haywood*, 81 N.C. at 9 (similar); *Devereux v. Devereux*, 81 N.C. 12, 16-18 (1879) (similar).[2]

Because losing parties may not use rehearing to reargue their case, this Court has reheard its prior decisions rarely. It has granted rehearing to account for previously overlooked facts. *E.g.*, *Clary v. Alexander Bd. of Educ.*, 286 N.C. 525, 529, 212 S.E.2d 160, 163 (1975); *Bailey v. Meadows Co.*, 154 N.C. 71, 69 S.E. 746, 747 (1910). It has granted rehearing to consider overlooked legal authorities. *E.g.*, *Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 180,

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[2] Interpreting language in the Federal Rules of Appellate Procedure that is virtually identical to Appellate Rule 31(a), the federal courts of appeals have reached a similar conclusion. *See* Fed. R. App. P. 40(a)(2). Like this Court, the federal appellate courts have rejected rehearing petitions that repeat arguments that courts have already assessed and found wanting. *See* Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3986.1 (5th ed. 2019) (collecting cases and remarking that "[i]t should go without saying that a petition for rehearing should not be filed simply to reargue matters already argued unsuccessfully in the original appeal proceedings.").

237 S.E.2d 21, 31 (1977). And it has granted rehearing to correct or clarify the Court's prior understanding of the relevant issues raised in the appeal. *E.g.*, *Wilson v. State Farm Mutual Auto. Ins.*, 329 N.C. 262, 263-64, 404 S.E.2d 852, 854 (1991) (per curiam) (correcting erroneous reliance on a statute while leaving the "ultimate conclusion" unchanged); *Swanson v. State*, 330 N.C. 390, 396, 410 S.E.2d 490, 495 (1991) (addressing additional issues while "reaffirm[ing]" prior opinion), *vacated and remanded*, 509 U.S. 916 (1993); *Lowe v. Tarble*, 313 N.C. 460, 464, 329 S.E.2d 648, 650 (1985) (addressing two additional issues while leaving the original opinion "unchanged").

By contrast, Legislative Defendants simply ask a newly constituted Court to reverse course on an opinion decided just a few months ago to change the outcome of that case. But as the Appellate Rules and this Court's precedents clearly show, arguments of that kind are not grounds for rehearing. Indeed, "the weightiest considerations make it the duty of the courts to adhere to their decisions and not to reverse the same." *Devereux*, 81 N.C. at 17. Because Legislative Defendants have failed to show that this Court overlooked or misapprehended any points of law or fact—and because accepting Legislative Defendants' transparent attempt to capitalize on changes in the Court's membership would profoundly destabilize the

institutional legitimacy of this Court and the rule of law—the rehearing petition should be dismissed as improvidently granted.[3]

II. *Harper I* Should Not Be Overruled.

In their petition, Legislative Defendants ask this Court to overrule its holding in *Harper I* that partisan gerrymandering violates our constitution. Leg. Supp. Br. 30-49. This Court, however, only overrules precedents that are palpably or manifestly erroneous. Because *Harper I* is palpably and manifestly *correct*, Legislative Defendants cannot show that this Court should take the extraordinary step of discarding one of its precedents.

A. Stare decisis allows prior decisions to be overruled only if they are palpably or manifestly erroneous.

Stare decisis is "an established rule to abide by former precedents." 1 William Blackstone, *Commentaries on the Laws of England* 69 (1765). "It means that [courts] should adhere to decided cases and settled principles, and not disturb matters which have been established by judicial

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[3] Because the Appellate Rules do not allow for a response to a rehearing petition, *see* N.C. R. App. P. 31(c), the Court has previously dismissed rehearing petitions as improvidently granted when, after briefing and argument, the Court concludes that it "neither overlooked nor misapprehended any material points of fact or law when [the Court] first considered th[e] case." *In re Stallings*, 319 N.C. 669, 669-70, 356 S.E.2d 339, 339 (1987) (per curiam).

determination." *Hill v. Atlantic & N.C. R. Co.*, 143 N.C. 539, 573, 55 S.E. 854, 866 (1906).

This rule is at the heart of our State's legal system. Indeed, this Court has stated that "[n]o court has been more faithful to [s]tare decisis." *Rabon v. Rowan Memorial Hosp., Inc.*, 269 N.C. 1, 20, 152 S.E.2d 485, 498 (1967). More than a century ago, this Court explained that stare decisis "is one of the ancient maxims, which has improved by its age, and is worthy of the greatest reverence, and the fullest acceptation." *Lowdermilk v. Butler*, 182 N.C. 502, 506-07, 109 S.E. 571, 573 (1921).

This Court's adherence to stare decisis serves critically important rule-of-law values. To begin, following prior precedent ensures stability in the law. It allows for "evenhanded, predictable, and consistent development of legal principles." *Bacon v. Lee*, 353 N.C. 696, 712, 549 S.E.2d 840, 852 (2001); *see also Bulova Watch Co., Inc. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 472, 206 S.E.2d 141, 145 (1974) (adhering to precedent "promotes stability in the law and uniformity in its application"). Stare decisis thus keeps "the scale of justice even and steady, and not liable to waver with every new judge's opinion." 1 Blackstone, *Commentaries*, *supra*, at 69.

By ensuring stability in the law, stare decisis in turn "contributes to the actual and perceived integrity of the judicial process." *Bacon*, 353 N.C. at 712, 549 S.E.2d at 852 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). North Carolinians "are supposed to have confidence in their highest Court." *Lowdermilk*, 182 N.C. at 508, 109 S.E. at 574. If this Court's prior cases were "easily assailed and overthrown in the future," it would "impair[ ] public confidence in the integrity, permanency, and reliability of what [this Court] may decide to be the rule of reason and of conduct which is sanctioned by the law." *Id.*

Because stare decisis requires courts to adhere to prior precedent, the doctrine may call on a judge to follow a case that the judge might have decided differently in the first instance. As Justice Scalia put it, stare decisis "would be no doctrine at all" if courts could overrule prior cases merely because they thought those decisions were wrong. *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring). In other words, "[a] judicial precedent does its most strenuous work when a later court thinks it's wrong." Bryan A. Garner, Neil M. Gorsuch, Brett M. Kavanaugh et al., *The Law of Judicial Precedent* 4 (2016).

In keeping with this principle, this Court has a long tradition of Justices adhering to prior decisions with which they disagree. In these cases, Justices have recognized that despite having "strong reservations" about the Court's prior case law, they will ordinarily "adhere to [the Court's] precedent" "[i]n accordance with the principles of stare decisis." *Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 512, 681 S.E.2d 278, 287 (2009) (Newby, J., concurring). Justices have even followed stare decisis when they previously filed "trenchant dissents" from past cases. *State v. Moody*, 345 N.C. 563, 582 n.1, 481 S.E.2d 629, 639 n.1 (1997). Examples of this commitment to stare decisis abound. *E.g.*, *State v. Forte*, 360 N.C. 427, 449, 629 S.E.2d 137, 151 (2006) (Martin, J., concurring) (accepting "as controlling" a prior case from which a Justice had dissented "in light of the doctrine of stare decisis," even as he continued to maintain that the reasoning of his dissenting opinion was correct).[4]

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[4] *See also, e.g.*, *State v. Evans*, 346 N.C. 221, 229 n.1, 485 S.E.2d 271, 275 n.1 (1997) (noting that the author of the opinion was "bound by *stare decisis* to apply . . . precedent in the instant case," even though the author had dissented from that prior case when it was decided); *State v. Bishop*, 346 N.C. 365, 397 n.1, 488 S.E.2d 769, 786 n.1 (1997) (similar); *State v. Harris*, 360 N.C. 145, 155, 622 S.E.2d 615, 621 (2005) (Newby, J., concurring) (similar); *Roberts v. Swain*, 353 N.C. 246, 251, 538 S.E.2d 566, 569 (2000) (Parker, J., concurring)

As these numerous cases show, "[t]his Court has never overturned its decisions lightly." *Rabon*, 269 N.C. at 20, 152 S.E.2d at 498. Instead, only "extraordinary circumstances" justify overturning prior precedent. *Harris*, 360 N.C. at 155, 622 S.E.2d at 621 (Newby, J., concurring); *accord Potter v. Carolina Water Co.*, 253 N.C. 112, 118, 116 S.E.2d 374, 378 (1960) (requiring the "most cogent reasons"); *Lowdermilk*, 182 N.C. at 507, 109 S.E. at 574 (requiring a "strong and imperious necessity"). Specifically, this Court has asked whether a prior decision represents a "palpable" or "manifest" error. *Lowdermilk*, 182 N.C. at 507, 109 S.E. at 573-74. Thus, the question is not whether the prior case was wrongly decided. Rather, the question is whether the prior case was a "grievous wrong." *State v. Ballance*, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949).

B. *Harper I* was rightly decided.

Legislative Defendants cannot make the difficult showing that *Harper I* is so palpably or manifestly wrong that it should be overruled. The decision is rather palpably and manifestly correct.

(similar); *State v. Camacho*, 337 N.C. 224, 235, 446 S.E.2d 8, 14 (1994) (Mitchell, J., concurring) (similar).

In *Harper I*, this Court confronted factual findings supported by overwhelming evidence that the legislature's majority party had drawn districts in 2021 to predetermine the result of elections to the greatest extent possible, in order to entrench itself in power. A three-judge panel appointed by the Chief Justice had unanimously found that the legislature had enacted gerrymanders that were so extreme that they were more favorable to the majority party than 99.9% of all possible other plans. 2022-NCSC-17, ¶¶ 48-49. The partisan gerrymanders were so extreme that they frequently gave the favored party a supermajority or majority of seats when virtually no other alternate plans did so. *Id.* ¶ 38. As the panel observed, plans like these are "incompatible with democratic principles." *Id.* ¶ 5.

Faced with all this, *Harper I* held that the plans violated the state constitution. The Court explained that the overriding purpose of our constitution is to enable our State's citizens, standing on equal terms with each other, to govern themselves by choosing their representatives. *Id.* ¶¶ 127-30. But this process breaks down when "the ruling party chokes off the channels of political change on an unequal basis." *Id.* ¶ 130. When that occurs, the "government ceases to 'derive[ ]' its power from the people.'" *Id.*

(quoting N.C. Const. art. I, §§ 1, 2). In other words, North Carolinians are denied the self-government that our state constitution promises them.

Given how profoundly gerrymandering undermines self-government, *Harper I* correctly held that it violates multiple clauses in our Declaration of Rights that safeguard democracy. *Id.* ¶¶ 133-74. To give those provisions effect, the *Harper I* Court adopted a test to ensure that partisan gerrymandering does not fatally undermine the people's authority to govern themselves. Under that test, if plaintiffs can show that a "map infringes on their fundamental right to equal voting power," then the plan is subject to strict scrutiny and can only survive if its burden on voters is necessary to achieve a compelling governmental interest. *Id.* ¶ 170. Notably, compelling interests include compliance with traditional districting criteria. *Id.*

To assess whether plans should face strict scrutiny, this Court held that courts should assess plans using a variety of evidentiary measures to test whether they will likely entrench one party in power, "even as electoral conditions change and voter preferences shift." *Id.* ¶ 3. Although the Court mentioned a number of metrics that could be used to show a plan had this effect, such as "mean-median difference analysis" and "efficiency gap analysis," it was careful to emphasize that its listed metrics were not

"exhaustive" and that it had not identified "precise mathematical thresholds" to govern all future cases. *Id.* ¶ 163. Instead, the Court explained, what "is marginally permissible in one [case] may be unsatisfactory in another." *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 578 (1964)). Further emphasizing that its listed metrics were not exhaustive, the Court invited the trial court to consider on remand any "other standards" identified by the parties. *Id.* ¶ 169. In other words, the Court made clear that no specific metric was controlling. Statistical metrics are merely "*evidence* [that] might be relevant to prove a redistricting plan's discriminatory effect." *Id*. (emphasis added).

Having articulated this test, *Harper I* also held that claims challenging gerrymandering are justiciable under our state constitution. *Id.* ¶¶ 111, 174. That holding was consistent with our State's proud history of judicial review. Since the founding, the purpose of judicial review in our State has always been to ensure that legislators could not use their authority to undermine the people's right to govern themselves. *Id.* ¶ 173 (citing *Bayard v. Singleton*, 1 N.C. 5, 7 (1787)).

Despite *Harper I*'s manifest correctness, Legislative Defendants advance a variety of arguments to try to undermine it. But their efforts fail to show that *Harper I* was wrong at all, let along grievously so.

1. *Harper I* correctly held that partisan gerrymandering violates our state constitution.

Gerrymandering flouts our state constitution's commitment to popular sovereignty. For that reason, *Harper I* held that the practice violates multiple clauses in our Declaration of Rights that protect and reinforce popular sovereignty: specifically, the free-elections, equal-protection, speech, and assembly clauses. *Id.* ¶¶ 133-74.

To try to show that *Harper I* is palpably wrong, Legislative Defendants first argue that the free-elections clause bans only interfering with or intimidating voters during elections. Leg. Supp. Br. 41-44. They provide no explanation, however, for why the clause's reach should be cabined in that way. As *Harper I* observed, the origins of the clause in the English Glorious Revolution show that it was meant to forbid practices like gerrymandering that manipulate the composition of the electorate to try to ensure that a favored party wins elections. 2022-NCSC-17, ¶ 134.

Notably, Legislative Defendants do not dispute any of this history. They rather argue that the free-elections clause cannot ban gerrymandering, because so-called "rotten boroughs" with unequal population existed in England after the Glorious Revolution. Leg. Supp. Br. 42. That argument is a non-sequitur. As *Harper I* explained, the history of the free-elections clause

shows that it bans "manipulat[ing] the composition of the electorate" to try to ensure that one favored party wins elections. 2022-NCSC-17, ¶ 141.

Legislative Defendants' argument betrays a further misunderstanding of our State's constitutional history. Rights protected under our constitution are not limited by past historical practices when those practices diverge from the document's fundamental values. As a result, for example, our state constitution is today properly interpreted to require compensation for takings of property, even though no "compensation requirement was . . . generally recognized at the time of the framing." William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782, 785 (1995).

The reason, moreover, that past practices do not control its meaning today is that our constitution itself foreswears such an interpretative methodology. Our charter demands that when it is interpreted, "frequent recurrence" should be made to "fundamental principles." N.C. Const. art. I, § 35. As *Harper I* recognized, this command requires courts to "return *ad fontes* (to the sources) and [to] rethink for themselves the implications of the fundamental principles of self-government that animated the revolutionary generation." 2022-NCSC-17, ¶ 171 (quoting John V. Orth & Paul M. Newby,

The North Carolina Constitution 91 (2d ed. 2013)). Returning to fundamental principles helps ensure that our liberties cannot be "permanently lost through obsolescence." *In re Harris Teeter*, 378 N.C. 108, 2021-NCSC-80, ¶ 39, 861 S.E.2d 720 (2021) (Berger, J., dissenting) (quoting *State v. Harris*, 216 N.C. 746, 762-63, 6 S.E.2d 854, 865-66 (1940)).

Here, a recurrence to fundamental principles makes it manifestly clear that elections are not free when districts are manipulated to entrench one party in power. *Harper I* was therefore manifestly right to hold that partisan gerrymandering violates the free-elections clause.

Legislative Defendants are equally wrong that partisan gerrymandering does not violate our constitution's equal-protection, speech, and assembly clauses. Leg. Supp. Br. 44-49. It is widely accepted that these clauses help enforce our constitution's guarantee of self-government.

In *Stephenson I*, after all, this Court held that the equal-protection clause guarantees North Carolinians "the fundamental right to vote on equal terms." 355 N.C. at 378, 562 S.E.2d at 393. And this Court further held that practices that grant certain favored voters more "representational influence" than others offend this right. *Id.* at 377, 562 S.E.2d at 393. Relying on this holding, *Harper I* held that because partisan gerrymandering grants certain

favored voters considerably more "representational influence" than others, the practice offends the right to vote on equal terms. 2022-NCSC-17, ¶ 148 (quoting *Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393). This correct, common-sense holding surely cannot be manifestly wrong.

But it is not only common ground that our equal-protection clause helps secure self-government; the same is true for the speech and assembly clauses as well. This Court has long interpreted "this triumvirate of fundamental rights" to "provide the utmost protection" for our "foundational democratic freedoms." *Libertarian Party v. State*, 365 N.C. 41, 55-56, 707 S.E.2d 199, 208-09 (2011) (Newby, J., dissenting). These rights therefore serve to ensure that our right to vote is not made "illusory." *Id.* at 55, 707 S.E.2d at 208 (Newby, J., dissenting). And that right is made illusory when our representatives are not chosen "from the great body of the society," but rather from "a favored class of it." *Id.* (Newby, J., dissenting) (quoting The Federalist No. 39, at 233 (James Madison) (Henry Cabot Lodge ed., 1888)).

Gerrymandering makes the right to vote illusory in just that way: It ensures that "the great body of society" does not control the legislature. Rather, control is awarded to certain "favored" voters, whose legislators are then able to wield disproportionate influence over our government. *Harper I*

was therefore right to hold that this pernicious practice offends our "foundational democratic freedoms." *See id.* at 208-09 (Newby, J., dissenting).

The Court's decision in *Libertarian Party* also refutes Legislative Defendants' claim that our constitution had never before been construed to protect the rights of persons collectively to join together in political parties to try to win elections. *See* Leg. Supp. Br. 40. In *Libertarian Party*, this Court held that because "citizens form parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs," laws that burden their ability to do so implicate the speech, assembly, and equal-protection clauses. 365 N.C. at 49, 707 S.E.2d at 205. Thus, *Harper I* did not break new ground when it held that the Declaration of Rights protects the right of political parties to represent their voters' interests. *See Harper I*, 2022-NCSC-17, ¶ 154 (discussing *Libertarian Party*).

2. *Harper I* correctly held that partisan-gerrymandering claims are justiciable.

Harper I was right to hold that challenges to partisan gerrymanders are justiciable. Our constitution does not textually commit districting decisions to the General Assembly alone. And *Harper I* identified judicially manageable standards to adjudicate partisan-gerrymandering claims.

i. *Harper I* correctly held that courts have the authority to review districting decisions.

Legislative Defendants fail to show that our state constitution's text expressly commits unreviewable power to the legislature to gerrymander districts in its sole discretion. Leg. Supp. Br. 32-36.

This Court has previously held that the General Assembly cannot exercise its Article II districting authority in ways that violate the Declaration of Rights. Specifically, in *Stephenson I*, this Court held that the right to equal-voting power secured by our equal-protection clause limits the legislature's authority to draw plans that have a combination of both single- and multiple-member districts. 355 N.C. at 378, 562 S.E.2d at 394. It is true, of course, that *Stephenson I* did not itself involve partisan-gerrymandering claims. But *Harper I* rightly rejected that attempt to limit *Stephenson I* to its facts. If Legislative Defendants were right that the constitution confers plenary authority on the legislature to redistrict in its sole discretion, then *all* districting claims based on the Declaration of Rights would be nonjusticiable. *See Harper I*, 2022-NCSC-17, ¶¶ 114-16. *Stephenson I* squarely forecloses that argument.

To further support their claim to unreviewable districting authority, Legislative Defendants cite a series of cases that they claim hold that the legislature has plenary power "to draw political boundaries." Leg. Supp. Br. 33. Those cases, however, generally concern the drawing of boundaries for units of *local government*,[5] which is governed by different constitutional provisions. *See* N.C. Const. art. VII, § 1 (directing legislature to draw "boundaries of counties, cities and towns, and other governmental subdivisions"). At issue here, in contrast, is the power of the legislature to draw districts under *Article II*, which *Stephenson* already held does not exempt the legislature from compliance with the Declaration of Rights.[6]

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[5] *See Town of Boone v. State*, 369 N.C. 126, 127, 794 S.E.2d 710, 712 (2016) (holding that legislature could alter town's extraterritorial jurisdiction); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 13-14, 269 S.E.2d 142, 150-51 (1980) (resolving corporation's claims concerning municipal annexation); *State ex rel. Tillett v. Mustian*, 243 N.C. 564, 570, 91 S.E.2d 696, 700-01 (1956) (holding that local vote to disincorporate municipality did not comply with statutory requirements); *Carolina-Va. Coastal Highway v. Coastal Tpk. Auth.*, 237 N.C. 52, 62, 74 S.E.2d 310, 317 (1953) (holding that the legislature has authority to establish municipal corporations subject to constitutional limits); *Norfolk & S.R. Co. v. Washington Cnty.*, 154 N.C. 333, 70 S.E. 634, 635 (1911) (holding in tax dispute that legislature has authority to set county boundaries); *Howell v. Howell*, 151 N.C. 575, 577-78, 66 S.E. 571, 572-73 (1909) (rejecting statutory challenge to creation of special tax local district).

[6] The other authorities cited by Legislative Defendants on this score are inapposite as well. For example, *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d

ii. *Harper I* identified judicially manageable standards.

Legislative Defendants also argue that *Harper I* is wrongly decided because it supposedly fails to identify judicially manageable standards to resolve partisan-gerrymandering claims. Leg. Supp. Br. 36; *see also id.* at 19, 25. *Harper I*'s standards, however, are no different from standards that this Court applies without controversy to many other constitutional claims.

Legislative Defendants first fault *Harper I*'s decision to adjudicate gerrymandering claims based on a qualitative, holistic standard that will be developed and refined in "future cases." *Id.* at 19, 36. There is nothing unusual, however, about adopting a qualitative standard and then leaving the standard's application to later cases.

In *IMT, Inc. v. City of Lumberton*, 366 N.C. 456, 457, 738 S.E.2d 156, 157 (2013), for example, this Court considered a novel claim under the state

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238 (2014), did not hold that districting claims are categorically nonjusticiable. It rejected the claims at issue because, unlike this case, plaintiffs had "proposed no standards" to resolve such claims. Def. Br. at 160, *Dickson*, 367 N.C. 542, 766 S.E.2. 238 (No. 201PA12-2); *see also Leonard v. Maxwell*, 216 N.C. 89, 98-99, 3 S.E.2d 316, 324 (1939) (rejecting as nonjusticiable a claim that a statute was invalid because it was enacted by a legislature that had allegedly not been legally constituted); *Raleigh & Gaston R.R. Co. v. Davis*, 19 N.C. 451, 465 (1837) (holding that deciding placement of railroads is "political question").

constitution's just-and-equitable-tax clause. The plaintiff argued that a city had violated the clause by increasing the privilege tax on a class of businesses by a minimum of 59,900% compared to the prior year. *Id.* at 458, 738 S.E.2d at 157. In resolving this claim, this Court declined to establish a mechanical rule that could conclusively resolve future cases under the just-and-equitable-tax clause. Instead, it held that the extreme tax increase at issue was unconstitutional because it was "wholly detached from the moorings of anything reasonably resembling a just and equitable tax." *Id.* at 462, 738 S.E.2d at 160. It then listed several factors for courts to consider in future cases involving the clause, while also holding that "those factors should not be viewed as exhaustive." *Id.*

Harper I proceeded along a similar path. The Court noted that the three-judge panel had found that the plans enacted by the legislature were such extreme gerrymanders that they benefited the favored party more than 99.9% of all possible alternative plans. 2022-NCSC-17, ¶ 49. It then held that such an extreme gerrymander was invalid and provided a list of non-exhaustive metrics that courts could consider to resolve future cases. *Id.* ¶¶ 165-69. As cases like *IMT* show, such judicial decision-making methods are routine.

Legislative Defendants also fault *Harper I* for adopting a qualitative standard instead of "precise mathematical thresholds [that] conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Id.* ¶ 163; *see* Leg. Supp. Br. 19. But this Court's precedents amply show that such qualitative standards are judicially manageable. To resolve takings claims, for example, courts sometimes have to assess whether a statute that regulates property is an exercise of the police power or the power of eminent domain. *See Kirby v. N.C. Dep't of Trans.*, 368 N.C. 847, 854, 786 S.E.2d 919, 924 (2016). The need for such qualitative line-drawing has not, of course, stopped this Court from resolving takings claims. In *Kirby*, for example, this Court held that the Map Act's limits on development in certain transportation corridors was not an exercise of the police power, nearly two decades after the General Assembly had apparently reached the opposite conclusion. *Id.* at 848, 786 S.E.2d at 921.

Legislative Defendants further fault *Harper I* because they claim that the quantitative metrics it identifies to test gerrymandering can "yield disparate results." Leg. Supp. Br. 25. But, again, standards are not unmanageable simply because they require courts to parse complex quantitative metrics that can be calculated in different ways. When courts

hear takings claims, for example, parties often make contradictory claims about the fair market value of property. *See, e.g.*, *N.C. Dep't of Transp. v. Chappell*, 374 N.C. 273, 285, 841 S.E.2d 513, 523 (2020). Not only do parties dispute the proper metrics for evaluating property values—such as comparable sales, capitalization of income, and cost—they also often dispute the results of any particular measure to the property in question. *See id.* But the need to resolve conflicts about such metrics does not make takings claims non-justiciable. The same is equally true for claims based on rights that preserve popular sovereignty by limiting partisan gerrymandering.

Finally, it bears emphasizing that, contrary to Legislative Defendants' protestations, *Harper I*'s justiciability holding *enables and legitimatizes* judicial deference to the political branches. This Court affords statutes a presumption of constitutionality because the legislature is meant to serve as "the arm of the electorate." *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001). This deference presupposes that the General Assembly actually reflects the will of the people. But if incumbent legislators can entrench themselves in power regardless of the people's will, such deference would make little sense.

* * *

In sum, Legislative Defendants have utterly failed to show that *Harper I* is palpably wrong and should be overruled. *Harper I* is a manifestly correct reading of our constitution that honors that charter's promise of self-government to the people of our State.[7]

III. *Harper II* Should Not Be Withdrawn.

Legislative Defendants fail to identify any valid grounds for withdrawing this Court's opinion in *Harper II*. *See* Leg. Supp. Br. 22-28. Far from being wrongly decided, *Harper II* was a routine and correct application of *Harper I*.

Consistent with *Harper I*'s guidance, *Harper II* assessed the 2022 remedial plans holistically, across a variety of dimensions. Based on this holistic analysis, the Court observed that the remedial congressional and senate plans demonstrated "durable partisan asymmetry"—meaning that

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[7] That conclusion is confirmed by decisions of courts in other states interpreting analogous protections in their state constitutions. *See, e.g.*, *Szeliga v. Lamone*, No. C-02-CV-001816, at 93-94 (Md. Cir. Ct. Mar. 25, 2022), https://bit.ly/3EFP2tH (finding that the legislature had gerrymandered the state's congressional districts to suppress the voice of Republican voters, violating the free-elections, equal-protection, and free-speech clauses of the Maryland Constitution); *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 (Pa. 2018) (holding that Pennsylvania's analogue to our free-elections clause bans partisan gerrymandering).

they allowed the favored party to "consistently win more seats" than the other party "across a variety of electoral conditions." 2022-NCSC-121, ¶ 83. The remedial house plan, in contrast, "reflect[ed] very similar partisan symmetry as alternative plans" proposed by plaintiffs. *Id.* ¶ 100.

The Court in *Harper II* therefore held that the remedial house plan satisfied *Harper I*'s test while the remedial senate and congressional plans did not. *Id.* ¶¶ 112-13. In doing so, *Harper II* demonstrated the workability of *Harper I*'s holistic test, showing that it *can* be used to separate plans that are unduly discriminatory from those that are not.

Despite *Harper II*'s unsurprising and routine holding, Legislative Defendants advance a variety of arguments to try to justify the extraordinary step of withdrawing *Harper II*. None is persuasive.

First, Legislative Defendants claim that *Harper II* was "the first decision" in this State's history to "ignore" the presumption of constitutionality in reviewing the validity of a statute. Leg. Supp. Br. 23. That assertion is puzzling: *Harper II* repeatedly referenced the trial court's application of the presumption of constitutionality. *See, e.g.*, 2022-NCSC-121, ¶¶ 20, 45-47, 56-58, 77, 91, 96. *Harper II* simply held that the presumption had been overcome with respect to certain districting plans. In any event,

the presumption is so well understood that this Court often resolves constitutional challenges without discussing it at all. *See, e.g.*, *Kirby*, 368 N.C. at 856, 786 S.E.2d at 926 (Newby, J.) (invalidating the Map Act without mentioning the presumption).

Legislative Defendants further suggest that the evidence that the plaintiffs and special masters submitted was insufficient to overcome the presumption. Specifically, they claim that *Harper II* should have deferred to the legislature's policy decision to defend their remedial plans solely based on mean-median difference and the efficiency gap, as calculated using particular software and election data. Leg. Supp. Br. 23-24. But that argument again ignores the clear holding of *Harper I*, which held that the constitutionality of redistricting plan turns on a holistic analysis of *a variety* of factors, not simply the mean-median difference and efficiency gap. *See supra* pp 17-18.

But more fundamentally, the presumption has never been understood to require courts to defer to the legislature's policy choices in this way. In *Stephenson II*, for example, a trial court invalidated remedial districting plans because the legislature had not drawn compact and contiguous districts that kept together communities of interest. *Stephenson v. Bartlett*,

357 N.C. 301, 309, 582 S.E.2d 247, 252 (2003) (*Stephenson II*). On appeal, this Court rejected the argument that the presumption required it to defer to the legislature's discretionary choices about how best to achieve compactness or keep together communities of interest. *Id.* at 314, 582 S.E.2d at 254; *see also id.* at 315, 582 S.E.2d at 255 (Parker, J., dissenting). Here as well, the presumption does not require courts to defer to legislative decisions about how best to calculate the metrics at issue.

Second, the Legislative Defendants argue that *Harper II* should be withdrawn because it rejected certain of the remedial plans without making a finding of discriminatory intent. This was error, they claim, because only intentional discrimination violates the clauses of the Declaration of Rights that are implicated by partisan gerrymandering. Leg. Supp. Br. 24-25.

This argument again ignores *Harper I*, which never held that plans can only be invalidated upon a showing of discriminatory intent. *See, e.g.*, 2022-NCSC-17, ¶ 169 (directing courts to consider factors that do not necessarily turn on a showing of intent). And for good reason—it has long been accepted that the clauses of the Declaration of Rights at issue here can be violated in the absence of discriminatory intent.

In *Stephenson I*, as noted, this Court considered how to fashion a remedial districting plan that would be consistent with the equal-protection clause. 355 N.C. at 375-81, 562 S.E.2d at 392-95. In doing so, it held that plans that combine single- and multiple-member districts deny equal-voting power and therefore must satisfy strict scrutiny. *Id.* This Court nowhere suggested that its holding was premised on a showing of intentional discrimination. *See id.* Similarly, this Court often resolves claims under the free-elections and speech clauses without assessing if laws were enacted with discriminatory intent. *See, e.g.*, *State v. Petersilie*, 334 N.C. 169, 182-91, 432 S.E.2d 832, 839-45 (1993) (speech); *Clark v. Meyland*, 261 N.C. 140, 141-43, 134 S.E.2d 168, 169-71 (1957) (free elections). *Harper II* was therefore consistent with longstanding precedent in not requiring a specific showing of discriminatory intent.

Third, Legislative Defendants argue that *Harper II* should be withdrawn because it supposedly mandates proportional representation—despite the uneven geographic distribution of voters across our State. Leg. Supp. Br. 28. Once again, Legislative Defendants misread this Court's rulings. Neither *Harper I* nor *Harper II* sought perfect proportional representation. To the contrary, both decisions repeatedly recognized that

deviations from proportionality are constitutional. *Harper I*, for example, expressly held that plans that place unequal burdens on voters *survive* strict scrutiny when "a meaningful partisan skew necessarily results from North Carolina's unique political geography." 2022-NCSC-17, ¶ 163. And *Harper II* upheld the remedial house map not because it produced no partisan skew, but because achieving *less* partisan skew while complying with traditional districting criteria "may be difficult." 2022-NCSC-121, ¶ 100; *see also Harper I*, 2022-NCSC-17, ¶ 169 (noting that plans need not achieve proportionality if doing so would require abandoning traditional criteria).

Legislative Defendants therefore fail to identify any reason for taking the extraordinary step of setting aside *Harper II*.

IV. The Constitution's Bar on Mid-Decade Redistricting Applies Here.

Legislative Defendants next ask this Court to authorize them to discard the 2022 districts from which they were themselves elected, so they can engage in yet another round of redistricting. Leg. Supp. Br. 53-62. Granting this request would violate our constitution's ban on mid-decade redistricting.

The constitution could not be clearer: Once legislative districts are "established," the legislature is barred from drawing new districting maps

until the next decennial census. N.C. Const. art. II, §§ 3(4), 5(4). The plain meaning and historical context of Article II, §§ 3 and 5 make clear that this bar on mid-decade redistricting applies to remedial maps enacted by the legislature following a court order. After all, legislatively enacted remedial maps *are law*, just like any other statute. Thus, under the term's plain meaning, remedial maps are "established," so long as they are free from constitutional defects. And Legislative Defendants themselves insist that the 2022 maps *are* constitutional. They are therefore established by law.[8]

A. Constitutional text makes clear that the 2022 maps are established.

Our constitution requires the General Assembly to "revise" state legislative districts "at the first regular session convening after the return of every decennial census of population taken by order of Congress." *Id.* §§ 3, 5. It further mandates that these districts must remain fixed until the next decennial census. It states: "When established, the [house and] senate districts and the apportionment of Senators [and Representatives] shall

[8] To be clear, the bar on mid-decade redistricting does not apply to congressional maps. Thus, the constitution does not bar the General Assembly from redrawing the 2022 congressional maps, regardless of whether those maps were drawn by courts.

remain unaltered until the return of another decennial census of population taken by order of Congress." *Id.* §§ 3(4), 5(4).

"It is difficult to imagine any directive more 'clear, complete, and unmistakable' than the plainly-worded rule that legislative districts 'shall remain unaltered until the return of another decennial census.'" *Covington v. North Carolina*, No. 1:15-CV-399, 2017 WL 5992358, at *36 (M.D.N.C. Dec. 1, 2017) (quoting *Kornegay v. Goldsboro*, 180 N.C. 441, 445, 105 S.E. 187, 189 (1920)), *aff'd in part, rev'd in part*, 138 S. Ct. 2548 (2018). Indeed, the ban on mid-decade redistricting is one of just "four express limitations" on the General Assembly's redistricting authority found in the text of Article II. *Harper I*, 2022-NCSC-17, ¶ 301 (Newby, J, dissenting). And as this Court has held, these express limitations "must be enforced to the maximum extent possible." *Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397; *see also Granville Cty. Comm'rs v. Ballard*, 69 N.C. 18, 20-21 (1873) (holding the constitution's ban on mid-decade redistricting takes precedence over the whole county provision).

The ban on mid-decade redistricting applies when districts are "established." By any measure, that term encompasses the 2022 house map here. That map was duly enacted by the General Assembly, approved by the

superior court for use in the November 2022 elections, and was actually used in those elections to constitute the General Assembly that sits today. These are precisely the features that Legislative Defendants elsewhere claim are required for a redistricting map to become "established." *See* Leg. Supp. Br. 57-58 (arguing that the 2021 maps are not established because they lack these features).

Of course, "an unconstitutional statut[e]" . . . is a nullity and void when enacted. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2353 (2020) (internal quotation marks omitted); *accord City of New Bern v. New Bern-Craven Cnty. Bd. of Educ.*, 338 N.C. 430, 442-43, 450 S.E.2d 735, 742-43 (1994). As a result, legislative districts are not "established" if they are otherwise unlawful—either because they violate the state constitution or federal law.

But when districting maps enacted by the legislature *survive* judicial review for compliance with the state constitution and federal law, they then become "established" as a matter of law. Thus, when this Court definitively approved the 2022 house maps in *Harper II*, rejecting claims by certain plaintiffs that they violated our constitution, that map became fixed until the next decennial census. And no one has asked this Court to reconsider its

decision approving the house maps. That is, no one is now claiming that the General Assembly lacked the legal authority to draw the house districts reflected in the 2022 plans—say, because they violated the whole county provision or the free-elections clause. Because those 2022 house districts were duly enacted by the legislature and are free from constitutional defects, they are "established" under Article II, section 5(4).

As for the 2022 senate maps, *Harper II* held that those maps do not comply with the state constitution and must be redrawn. They are therefore not yet established by law, and will not be until the General Assembly draws maps that survive judicial review. Yet if this Court accepts the Legislative Defendants' request to vacate *Harper II*, that decision would fix the 2022 senate districts in place until the next decennial census. After all, those maps were also duly enacted by the legislature, approved by the superior court, and used in the last election to elect the General Assembly that Legislative Defendants lead. And vacating *Harper II* would affirm the superior court's approval of the 2022 senate map as constitutional.

The same is true if this Court takes up Legislative Defendants' invitation to overrule *Harper I*. The only relevant questions for determining whether the 2022 maps are "established" are whether: (1) they were duly

enacted by the General Assembly, and (2) the districts are constitutional. Overruling *Harper I* would merely eliminate a possible basis for *challenging* the 2022 plans as unconstitutional. Thus, overruling *Harper I* would only strengthen the conclusion that the 2022 plans are now "established" and subject to the mid-decade redistricting ban.

B. The mid-decade redistricting ban applies to maps enacted by the legislature to comply with a court order.

Legislative Defendants do not claim that the 2022 maps are unconstitutional. Instead, they claim that the ban on mid-decade redistricting does not apply to the 2022 plans, because those plans were supposedly "established by courts, not the General Assembly." Leg. Supp. Br. 54. That argument fails for four independent reasons.

First, and most directly, this claim is factually inaccurate. The 2022 house and senate maps were duly enacted by the General Assembly, not drawn by a court. *See* Act of Feb. 17, 2022, S.L. No. 2022-2 (senate); Act of Feb. 17, 2022, S.L. No. 2022-4 (house). They are therefore altogether distinct from court-drawn interim maps, which are good for one election only in North Carolina. *See Stephenson I*, 355 N.C. at 385 n.9, 562 S.E.2d at 398 n.9. Thus, even if there were a requirement that maps be drawn by the General

Assembly before the mid-decade redistricting ban applies, that condition would be satisfied here.

In other words, Legislative Defendants make a simple category error. As they have previously acknowledged, a court-ordered redistricting plan enacted by a legislature *is a law* like any other. *See* Leg. Br. at 58, *Harper I*, 2022-NCSC-17 (No. 413PA21). They must therefore be treated fully *as law* unless they violate the constitution. And Legislative Defendants do not claim that the 2022 remedial maps are unconstitutional. To the contrary, they have previously argued that the "legislatively enacted [2022] maps are presumed constitutional and are, in fact constitutional" and that the "presumption [of constitutionality] applies in full force, even though the acts were enacted to remedy prior redistricting acts the Court invalidated." Leg. Opp. Br. at 2, *Harper I*, 2022-NCSC-17 (No. 413PA21). Legislative Defendants were right before: The 2022 remedial plans must be treated like any other statute, even though they were created in response to a court order.[9]

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[9] Legislative Defendants note that the text of the relevant session laws states that the districts are only effective upon "approval by the superior court." But that likewise gets them nowhere. The districts *were* approved by the superior court, thus satisfying the statutory precondition to their becoming established. In fact, Legislative Defendants themselves previously

Second, the ordinary meaning of the term "established" includes districts that were enacted in response to a court order. Courts, including this one, frequently use the word "establish" to mean established by court decision. *See, e.g.*, *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 397 (requiring districts to "comply with the legal requirements of the [whole county provision], *as herein established* for all redistricting plans") (emphasis added).

The U.S. Supreme Court has explicitly embraced this commonsense understanding of when state legislative districts become "established." In *Branch v. Smith*, 538 U.S. 254 (2003), the Court interpreted a federal statute whose effect similarly depended on whether districts had been "established." *See* 2 U.S.C. § 2c. And like here, the plaintiffs in that case argued that only legislatures can "establish" state legislative districts.

The Supreme Court disagreed. Writing for the Court, Justice Scalia explained that the plain meaning of the word "establish" clearly encompasses districts established by courts, *in addition to* those fixed by "legislative

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told this Court that "the superior court properly affirmed the State Remedial Plans and afforded the General Assembly deference in its policy and legislative decisions." *See* Leg. Br. at 19, *Harper I*, 2022-NCSC-17 (No. 413PA21).

action" alone. In support, the Court observed that courts "establish law" in innumerable contexts. *See Branch*, 538 U.S. at 271-72 (citing the illustrative examples of qualified immunity, attorney-client privilege, and standards of review). It therefore concluded that "the more common meaning" of the term "establish" includes districting maps drawn by, or under the influence, of court orders. *Id.* at 272. The same result applies here.

Third, historical context confirms that the plain meaning of the term "establish" includes remedial maps enacted by the legislature. While the bar on mid-decade redistricting for senate districts dates back to 1868, the current text of sections 3 and 5 of Article II traces back only to 1968. *See* An Act to Rewrite Article II, Sections 4, 5, and 6 of the Constitution of North Carolina, ch. 640, 1967 N.C. Sess. Laws 704, 704-05, secs. 1. At that time, judicial review of state legislative districts for compliance with constitutional constraints—as well as court-ordered redrawing of legislative maps—was widespread and commonplace.

Indeed, the 1968 amendments were themselves designed to comply with a court order. The year before they were proposed, the U.S. Supreme Court had affirmed a federal court decision invalidating North Carolina's state legislative districts and ordering the General Assembly to redraw them.

See Drum v. Seawell, 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd* 383 U.S. 831 (1966) (holding that the state legislative districts were unconstitutional because they did not comply with the federal Constitution's one-person one-vote requirement established in *Reynolds v. Sims*); *Stephenson I*, 355 N.C. at 367, 562 S.E.2 at 387 (recognizing that the 1968 amendments were adopted in response to *Drum*).

Given this context, in which the current constitutional language was explicitly crafted to accommodate court-ordered remedial maps, it is utterly inconceivable that the term "establish" in sections 3 and 5 was intended to exclude maps drawn by the legislature in response to a court order. *See Branch*, 538 U.S. at 271 (similarly finding it "implausib[le] that the term "establish" "was meant to apply only to legislative reapportionment" because "[w]hen Congress adopted § 2c in 1967, the immediate issue was precisely the involvement of the courts in fashioning electoral plans").

Finally, Legislative Defendants argue that the 2022 maps are not "established" because they were drawn by the legislature based on a misapprehension of the legal constraints on its redistricting authority. That is nonsense. It cannot be the case that *lawful* statutes somehow become inoperative because they were crafted conservatively to comply with the law.

Any other result would be profoundly destabilizing: If Legislative Defendants were correct, whenever a judicial precedent is altered or overruled, any statute crafted in reliance on that precedent would immediately become suspect. That cannot be the law.

Once again, the U.S. Supreme Court has squarely rejected this line of reasoning. In *Abbott v. Perez*, 138 S. Ct. 2305 (2018), the Texas state legislature's 2011 state legislative maps were invalidated by a federal trial court, which then drew interim maps for use in the next election. The legislature then enacted those *same court-ordered interim maps*, with minor adjustments, as its established maps. It did so to comply with the prior court order and "to bring the litigation about the State's districting plans to an end as expeditiously as possible." *Id.* at 2318. The Court, in an opinion authored by Justice Alito, held that this decision was "entirely reasonable and certainly legitimate." *Id.* at 2327. The legislature "kn[e]w that any new plans it devised were likely to be attacked by one group of plaintiffs or another," and that until districts "are firmly established, a degree of uncertainty clouds the electoral process." *Id.* It is therefore completely "proper" for a state legislature to draw remedial state legislative maps to ward off *possible* legal challenges, regardless of their merit. *Id.*

The situation here is materially the same. The 2022 maps were duly enacted by the General Assembly in an attempt to comply with a court order and stymie future legal challenges. Thus, as long as those legislatively enacted 2022 maps are otherwise lawful, they are "firmly established" until the next decennial census. *Id*.

CONCLUSION

Governor Cooper and Attorney General Stein respectfully request that this Court dismiss the petition for rehearing as improvidently allowed and leave this Court's prior decisions in *Harper I* and *Harper II* in place.

This 3rd day of March, 2023.

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