IN THE SUPREME COURT OF NORTH CAROLINA

2022-NCSC-17

No. 413PA21

Filed 14 February 2022

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

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH HISE, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS; YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; and COSMOS GEORGE

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of

Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as Chairman of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; JEFF CARMON III, in his official capacity as Member of the North Carolina State Board of Elections; STACY EGGERS IV, in his official capacity as Member of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as Member of the North Carolina State Board of Elections; and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections

Appeal pursuant to N.C.G.S. § 7A-27(b)(1) from the unanimous decision of a three-judge panel of the Superior Court in Wake County, denying plaintiffs' claims and requests for Declaratory Judgment and Permanent Injunctive Relief. On 8 December 2021, pursuant to N.C.G.S. § 7A-31 and Rule 15(e) of the North Carolina Rules of Appellate Procedure, the Supreme Court allowed plaintiffs' petitions for discretionary review prior to determination by the Court of Appeals. Heard in the Supreme Court on 2 February 2022.

Patterson Harkavy LLP, by Narendra K. Ghosh, Burton Craige, and Paul E. Smith; Elias Law Group LLP, by Abha Khanna, Lalitha D. Madduri, Jacob D. Shelly, and Graham W. White; and Arnold and Porter Kaye Scholer LLP, by Elisabeth S. Theodore, R. Stanton Jones, and Samuel F. Callahan, for Harper plaintiff-appellants.

Robinson, Bradshaw & Hinson, P.A., by Stephen D. Feldman, John R. Wester, Adam K. Doerr, and Erik R. Zimmerman; and Jenner & Block LLP, by Sam Hirsch, Jessica Ring Amunson, Zachary C. Schauf, Karthik P. Reddy, and Urja

Mittal, for North Carolina League of Conservation Voters, Inc. plaintiff-appellants.

Southern Coalition for Social Justice, by Hilary H. Klein, Allison J. Riggs, Mitchell Brown, Katelin Kaiser, Jeffrey Loperfido, and Noor Taj; and Hogan Lovells US LLP, by J. Tom Boer and Olivia T. Molodanof, for Common Cause plaintiff-appellant.

North Carolina Department of Justice, by Amar Majmundar, Senior Deputy Attorney General, and Terence Steed, Mary Carla Babb, and Stephanie A. Brennan, Special Deputy Attorneys General, for State defendant-appellees.

Nelson Mullins Riley & Scarborough, LLP, by Phillip J. Strach, Alyssa M. Riggins, John Branch, and Thomas A. Farr; and Baker & Hostetler LLP, by Katherine L. McKnight and E. Mark Braden, for Legislative Defendants defendant-appellees.

Abraham Rubert-Schewel, Chris Lamar, and Orion de Nevers, for Campaign Legal Center, amicus curiae.

Haynsworth Sinkler Boyd, P.A., by William C. McKinney, Jonathan D. Klett and Sara A. Sykes; and States United Democracy Center, by Christine P. Sun and Ranjana Natarajan, for former governors, amici curiae.

Poyner Spruill LLP, by Edwin M. Speas Jr. and Caroline P. Mackie, for Buncombe County Board of Commissioners, amicus curiae.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, James W. Doggett, Deputy Solicitor General, and Zachary W. Ezor, Solicitor General Fellow, for Governor Roy A. Cooper II and Attorney General Joshua H. Stein, amici curiae.

Phelps Dunbar LLP, by Nathan A. Huff and Jared M. Burtner, for National Republican Congressional Committee, amicus curiae.

Forward Justice, by Kathleen E. Roblez, Caitlin A. Swain, Daryl V. Atkinson, Ashley M. Mitchell, and Aviance Brown; and Irving Joyner for NC NAACP, amicus curiae.

Poyner Spruill LLP, by Caroline P. Mackie, for Professor Charles Fried, amicus curiae.

HUDSON, Justice.

¶ 1 Today, we answer this question: does our state constitution recognize that the people of this state have the power to choose those who govern us, by giving each of us an equally powerful voice through our vote? Or does our constitution give to members of the General Assembly, as they argue here, unlimited power to draw electoral maps that keep themselves and our members of Congress in office as long as they want, regardless of the will of the people, by making some votes more powerful than others? We hold that our constitution's Declaration of Rights guarantees the equal power of each person's voice in our government through voting in elections that matter.

¶ 2 In North Carolina, we have long understood that our constitution's promise that "[a]ll elections shall be free" means that every vote must count equally. N.C. Const. art. I, § 10. As early as 1875, this Court declared it "too plain for argument" that the General Assembly's malapportionment of election districts "is a plain violation of fundamental principles."[1] *People ex rel. Van Bokkelen, v. Canaday,* 73 N.C. 198, 225 (1875). Likewise, this Court has previously held that judicial review

[1] Even earlier, in 1787, this Court held that the courts must interpret the constitution and invalidate laws that violate it. *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 7 (1787).

was appropriate in legislative redistricting cases to enforce the requirements of the state constitution, even when doing so means interpreting state constitutional provisions more expansively than their federal counterparts. *See Stephenson v. Bartlett*, 355 N.C. 354, 379–82 (2002).

¶ 3 "A system of fair elections is foundational to self-government." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 2021-NCSC-6, ¶ 86 (Newby, C.J., concurring in the result). While partisan gerrymandering is not a new tool, modern technologies enable mapmakers to achieve extremes of imbalance that, "with almost surgical precision,"[2] undermine our constitutional system of government.[3] Indeed, the programs and algorithms now available for drawing electoral districts have become so sophisticated that it is possible to implement extreme and durable partisan gerrymanders that can enable one party to effectively guarantee itself a supermajority for an entire decade, even as electoral conditions change and voter

[2] We note this expression was coined to describe the precision with which the North Carolina General Assembly targeted African American voters through the identification and exclusion of various forms of voter photo identification. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016). We believe it is equally apt as a description of the technical proficiency with which legislators across the country dilute the power of votes through the drawing of district lines.

[3] In fact, the term "gerrymander" was coined in 1812 after the redrawing of Massachusetts Senate election districts to ensure the advantage of the Democratic-Republican Party under then-Governor Elbridge Gerry, in reference to a district drawn in a manner so contrived that it was said to resemble a salamander. The gerrymander was successful, as although the Federalist Party ousted Governor Gerry and flipped the Massachusetts House in the 1812 election, the Democratic-Republicans retained control of the state senate under this map. *See* Elmer C. Griffith, *The Rise and Development of the Gerrymander* 73–77 (1907).

preferences shift. Fortunately, the technology that makes such extreme gerrymanders possible likewise makes it possible to reliably evaluate the partisan asymmetry of such plans and review the extent to which they depart from and subordinate traditional neutral redistricting principles.

¶ 4 Partisan gerrymandering creates the same harm as malapportionment, which has previously been held to violate the state constitution: some peoples' votes have more power than others. But a legislative body can only reflect the will of the people if it is elected from districts that provide one person's vote with substantially the same power as every other person's vote. In North Carolina, a state without a citizen referendum process and where only a supermajority of the legislature can propose constitutional amendments, it is no answer to say that responsibility for addressing partisan gerrymandering is in the hands of the people, when they are represented by legislators who are able to entrench themselves by manipulating the very democratic process from which they derive their constitutional authority. Accordingly, the only way that partisan gerrymandering can be addressed is through the courts, the branch which has been tasked with authoritatively interpreting and enforcing the North Carolina Constitution.

¶ 5 Here, the General Assembly enacted districting maps for the United State Congress, the North Carolina House of Representatives, and the North Carolina Senate that subordinated traditional neutral redistricting criteria in favor of extreme

partisan advantage by diluting the power of certain people's votes.[4] Despite finding that these maps were "extreme partisan outliers[,]" "highly non-responsive" to the will of the people, and "incompatible with democratic principles[,]" the three-judge panel below allowed the maps to stand because it concluded that judicial action "would be usurping the political power and prerogatives" of the General Assembly.

¶ 6 We emphatically disagree. Although the task of redistricting is primarily delegated to the legislature, it must be performed "in conformity with the State Constitution." *Stephenson*, 355 N.C. at 371. It is thus the solemn duty of this Court to review the legislature's work to ensure such conformity using the available judicially manageable standards. We will not abdicate this duty by "condemn[ing] complaints about districting to echo into a void." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). Today, we hold that the enacted maps violate several rights guaranteed to the people by our state constitution. Accordingly, we reverse the judgment of the trial court below and remand this case back to that court to oversee the redrawing of the maps by the General Assembly or, if necessary, by the court.

¶ 7 Our dissenting colleagues have overlooked the fundamental reality of this case. Rather than stepping outside of our role as judicial officers and into the policymaking realm, here we are carrying out the most fundamental of our sacred duties: protecting

[4] The 2021 enacted plans for Congress, the North Carolina House of Representatives, and the North Carolina Senate have been attached in an appendix for ease of reference.

the constitutional rights of the people of North Carolina from overreach by the General Assembly. Rather than passively deferring to the legislature, our responsibility is to determine whether challenged legislative acts, although presumed constitutional, encumber the constitutional rights of the people of our state. Here, our responsibility is to determine whether challenged apportionment maps encumber the constitutional rights of the people to vote on equal terms and to substantially equal voting power. This role of the courts is not counter to precedent but was one of the earliest recognized. In 1787, in *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787), in a passage quoted by the dissenters, the Court held that it must step in to keep the General Assembly from taking away the state constitutional rights of the people, and "if the members of the General Assembly could do this, they might with equal authority . . . render themselves the Legislators of the State for life, without any further election of the people[,]" *id.* at 7. This we cannot countenance.

¶ 8 The dissenters here do not challenge in any way, as Legislative Defendants presented no evidence at trial to disprove, the extensive findings of fact of the trial court, to the effect that the enacted plans are egregious and intentional partisan gerrymanders, designed to enhance Republican performance, and thereby give a greater voice to those voters than to any others. Instead, they attempt at some length to justify our taking no action to correct the constitutional violations or to ignore them altogether. For example, while acknowledging that the "right to vote *on equal terms*

is a fundamental right," citing *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747 (1990) (emphasis by the dissent), the dissent asserts, contrary to the findings and the extensive evidence at the trial and with no citation to the record or other authority, that "partisan gerrymandering has no significant impact upon the right to vote on equal terms."

¶ 9 Our contrary view is the beating heart of this case. Accordingly, we must act as a Court to make sure that the rights of the people are treated with proper respect. In so doing, we are protecting the individual rights of voters to cast votes that matter equally, as guaranteed by our constitution in article I, sections 10, 12, 14, and 19:

> Sec. 10. Free elections.
> All elections shall be free.
>
> Sec. 12. Right of assembly and petition.
> The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; . . . .
>
> Sec. 14. Freedom of speech and press.
> Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.
>
> Sec. 19. Law of the land; equal protection of the laws.
> . . . No person shall be denied the equal protection of the laws; . . . .

N.C. Const. art. I, §§ 10, 12, 14, 19. We ground our decision in the text, structure, history, and intent of these provisions from the Declaration of Rights.

¶ 10 Despite the dissenters' repeated assertions, we seek neither proportional representation for members of any political party, nor to guarantee representation to any particular group. We are only upholding the rights of individual voters as guaranteed by our state constitution. As the dissenters have noted, in *Deminski* and *Corum*, this Court has recently recognized and even expanded the role of the Court to interpret and protect individual rights enumerated in the state constitution.

¶ 11 In this opinion, we give as much direction as appropriate to the General Assembly while fully respecting their authority to proceed first in the effort to draw maps that meet constitutional standards. Should they be unable to do so or if they produce maps that fail to protect the constitutional rights of the people, the trial court may select maps by the process it deems best, subject to our review, in accordance with the timeline already set out in our order of 4 February 2022.

I. Factual and Procedural Background

A. Redistricting Process

¶ 12 Article II, sections 3 and 5 of the North Carolina Constitution require that "[t]he General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the [legislative] districts and the apportionment of Senators [and Representatives] among those districts, subject to [certain] requirements[.]" N.C. Const. art. II § 3, 5. This redistricting authority is subject to limitations contained in the North Carolina

Constitution, including both in the provisions allocating the initial redistricting responsibility to the General Assembly and in other provisions which have been interpreted by this Court to be applicable to the redistricting process. *See, e.g.*, *Stephenson*, 355 N.C. 354*; Blankenship v. Bartlett*, 363 N.C. 518 (2009). Additionally, the General Assembly must comply with all applicable provisions of federal law, including federal one-person-one-vote requirements and the Voting Rights Act, under Article I, sections 3 and 5 of the North Carolina Constitution. *See id.*

¶ 13 On 12 February 2021, the United States Census Bureau announced that its release of the 2020 census data would be delayed by the COVID-19 pandemic and would not be released until the fall of 2021. On 24 February 2021, North Carolina State Board of Elections Executive Director Karen Brinson Bell recommended to the House Elections Law and Campaign Finance Reform Committee that the 2022 primary elections be delayed to a 3 May primary, 12 July second primary, and 8 November general election. The Committee, however, "did not follow the Board's recommendations to delay the primaries and provide more time for the redistricting cycle." The full census data was ultimately released to the states on 12 August 2021.

¶ 14 On 5 August 2021, the General Assembly's Senate Committee on Redistricting and Elections and House Redistricting Committee convened a Joint Meeting to begin the discussion on the redistricting process. On 9 August 2021, the chairs of the Joint Redistricting Committee released its "2021 Joint Redistricting Committee Proposed

Criteria." During the subsequent public comment period and committee debate, several citizens (including counsel for plaintiff Common Cause) and legislators (including Senate Minority Leader Dan Blue Jr.) urged the committee to change the criteria, which mandated a "race-blind" approach, to allow for the consideration of racial data in order to ensure compliance with the Voting Rights Act (VRA). The Joint Committee rejected these proposals. On 12 August 2021, the Joint Committee adopted the final redistricting criteria (Adopted Criteria), which were as follows:

> **Equal Population.** The Committees will use the 2020 federal decennial census data as the sole basis of population for the establishment of districts in the 2021 Congressional, House, and Senate plans. The number of persons in each legislative district shall be within plus or minus 5% of the ideal district population, as determined under the most recent federal decennial census. The number of persons in each congressional district shall be as nearly as equal as practicable, as determined under the most recent federal decennial census.
>
> **Contiguity.** No point contiguity shall be permitted in any 2021 Congressional, House, and Senate plan. Congressional, House, and Senate districts shall be compromised of contiguous territory. Contiguity by water is sufficient.
>
> **Counties, Groupings, and Traversals.** The Committees shall draw legislative districts within county groupings as required by *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*), *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 460 (2015) (*Dickson II*). Within county groupings, county

lines shall not be traversed except as authorized by *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*.

Division of counties in the 2021 Congressional plan shall only be made for reasons of equalizing population and consideration of double bunking. If a county is of sufficient population size to contain an entire congressional district within the county's boundaries, the Committees shall construct a district entirely within that county.

Racial Data. Data identifying the race of individuals or voters *shall not* be used in the construction or consideration of districts in the 2021 Congressional, House, and Senate plans. The Committees will draw districts that comply with the Voting Rights Act.

VTDs. Voting districts ("VTDs") should be split only when necessary.

Compactness. The Committees shall make reasonable efforts to draw legislative districts in the 2021 Congressional, House and Senate plans that are compact. In doing so, the Committee may use as a guide the minimum Reock ("dispersion") and Polsby-Popper ("permitter") scores identified by Richard H. Pildes and Richard G. Neimi in *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993).

Municipal Boundaries. The Committees may consider municipal boundaries when drawing districts in the 2021 Congressional, House, and Senate plans.

Election Data. Partisan considerations and election results data *shall not* be used in the drawing of districts in the 2021 Congressional, House, and Senate plans.

> **Member Residence.** Member residence may be considered in the formation of legislative and congressional districts.
>
> **Community Consideration.** So long as a plan complies with the foregoing criteria, local knowledge of the character of communities and connections between communities may be considered in the formation of legislative and congressional districts.

¶ 15 On 5 October 2021, after thirteen public hearings across the state during the month of September, the House and Senate redistricting committees convened separately to begin the redistricting process. The committee chairs announced that beginning on 6 October 2021, computer stations would be available in two rooms for legislators to draw potential maps. These stations would be open during business hours, and both the rooms and the screens of the station computers would be live-streamed and available for public viewing while the stations were open. In an apparent effort to show transparency and instill public confidence in the redistricting process, Legislative Defendants "requir[ed] legislators to draw and submit maps using software on computer terminals in the redistricting committee hearing rooms. That software did not include political data, and the House and Senate Committees would only consider maps drawn and submitted on the software." "According to Representative [Destin] Hall, [Chair of the House Standing Committee on Redistricting,] the Committee and 'the House as a whole' would 'only consider maps that are drawn in this committee room, on one of the four stations.' "

¶ 16 However, "[w]hile the four computer terminals in the committee hearing room did not themselves have election data loaded onto them, the House and Senate Committees did not actively prevent legislators and their staff from relying on pre-drawn maps created using political data, or even direct consultation of political data." For instance, between sessions at the public computer terminals, Representative Hall, who "personally drew nearly all of the House map [later] enacted[,] . . . met with his then-General Counsel . . . and others about the map-drawing in a private room adjacent to the public map-drawing room." During these meetings, and sometimes while sitting at the public terminals, Representative Hall viewed "concept maps" created on an unknown computer and using unknown software and data.[5] Further, "Representative Hall and Senator Ralph E. Hise, Jr., one of the Chairs of the Senate Redistricting Committee, confirmed that no restrictions on the use of outside maps were ever implemented or enforced."

¶ 17 Proposed versions of the congressional and House maps were filed on 28 and 29 October 2021 and then passed several readings in each chamber without alteration. A proposed version of the Senate map was filed on 29 October 2021. On 1 November 2021 the Senate Redistricting Committee adopted a substitute map. On 2

[5] On 21 December 2021, during trial, the court ordered Legislative Defendants to produce these "concept maps" and related materials. Legislative Defendants never did so. Instead, Legislative Defendants asserted in verified interrogatory responses that "the concept maps that were created were not saved, are currently lost[,] and no longer exist."

November 2021, the Committee adopted two amendments offered by Senator Natasha Marcus and Senator Ben Clark, respectively. On 3 and 4 November 2021, the final versions of each map passed several readings in each chamber without further alteration.

¶ 18 On 4 November 2021, the congressional, House, and Senate reapportionment maps were ratified into law as S.L. 2021-174, S.L. 2021-175, and S.L. 2021-173, respectively. Each map passed along strict party-line votes in each chamber.

B. Litigation

¶ 19 On 16 November 2021, plaintiffs North Carolina League of Conservation Voters, Inc., Henry M. Michaux Jr., Dandrielle Lewis, Timothy Chartier, Talia Fernos, Katherine Newhall, R. Jason Parsley, Edna Scott, Roberta Scott, Yvette Roberts, Jereann King Johnson, Reverend Reginald Wells, Yarbrough Williams Jr., Reverend Deloris L. Jerman, Viola Ryals Figueroa, and Cosmos George (NCLCV Plaintiffs) filed a complaint against Legislative Defendants (Civil Action No. 21 CVS 015426) contemporaneously with a Motion for Preliminary Injunction pursuant to Rules 7(b) and 65 of the North Carolina Rules of Civil Procedure. NCLCV Plaintiffs' complaint alleged

> that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution by establishing severe partisan gerrymanders in violation of the Free Elections Clause, Art. I, § 10, the Equal Protection Clause, Art. I, § 19, and the Freedom of Speech

> and Assembly Clauses, Art. I, §§ 12, 14; by engaging in racial vote dilution in violation of the Free Elections Clause, Art. I, § 10, and the Equal Protection Clause, Art. I, § 19; and by violating the Whole County Provisions, Art. II, §§ 3(3), 5(3).

¶ 20 On 18 November 2021, plaintiffs Rebecca Harper, Amy Clare Oseroff, Donald Rumph, John Anthony Balla, Richard R. Crews, Lily Nicole Quick, Gettys Cohen Jr., Shawn Rush, Mark S. Peters, Kathleen Barnes, Virginia Walters Brien, Eileen Stephens, Barbara Proffitt, Mary Elizabeth Voss, Chenita Barber Johnson, Sarah Taber, Joshua Perry Brown, Laureen Floor, Donald M. MacKinnon, Ron Osborne, Ann Butzner, Sondra Stein, Bobby Jones, Kristiann Herring, and David Dwight Brown (Harper Plaintiffs) filed a complaint against Legislative Defendants (Civil Action No. 21 CVS 500085) and a Motion for Preliminary Injunction pursuant to Rule 65 and N.C.G.S. § 1-485. On 13 December 2021, Harper Plaintiffs amended their complaint. Harper Plaintiffs' complaint "allege[d] that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution—namely its Free Elections Clause, Art. I, § 10; its Equal Protection Clause, Art. I, § 19; and its Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12, 14."

¶ 21 On 19 and 22 November 2021, "the NCLCV and Harper actions, respectively, were assigned to [a] three-judge panel of Superior Court, Wake County, pursuant to N.C.G.S. § 1-267.1." On 3 December 2021, the panel consolidated the two cases

pursuant to Rule 42 of the North Carolina Rules of Civil Procedure and heard NCLCV Plaintiffs' and Harper Plaintiffs' motions for preliminary injunction. On 3 December 2021, "after considering the extensive briefing and oral arguments on the motions, the [panel] denied [the parties'] Motion for Preliminary Injunction."

¶ 22 NCLCV Plaintiffs and Harper Plaintiffs subsequently filed a notice of appeal with the North Carolina Court of Appeals. On 6 December 2021, "[a]fter initially partially granting a temporary stay of the candidate filing period for the 2022 elections, the North Carolina Court of Appeals denied the requested temporary stay." NCLCV Plaintiffs and Harper Plaintiffs subsequently filed several items with this Court: two petitions for discretionary review prior to determination by the Court of Appeals; a motion to suspend appellate rules to expedite a decision; and a motion to suspend appellate rules and expedite schedule. On 8 December 2021, this Court granted a preliminary injunction and temporarily stayed the candidate filing period "until such time as a final judgment on the merits of plaintiffs' claims, including any appeals, is entered and remedy, if any is required, has been ordered." "The Order further directed [the panel] to hold proceedings on the merits of NCLCV Plaintiffs' and Harper Plaintiffs' claims and provide a written ruling on or before [11 January 2022]."

¶ 23 On 13 December 2021, the panel "entered a scheduling order . . . expediting discovery and scheduling [a] trial to commence on [3 January 2022]." That same day,

"Common Cause moved to intervene in the[ ] consolidated cases as a plaintiff, challenging the process undertaken by the General Assembly to create and enact the state legislative and congressional districts as a product of intentional racial discrimination undertaken for the purpose of racial vote dilution and to further the legislature's partisan gerrymandering goals." On 15 December 2021, the panel granted plaintiff Common Cause's motion. On 16 December 2021, plaintiff Common Cause filed its complaint, alleging

> that the 2021 districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives violate the North Carolina Constitution—namely its Equal Protection Clause, Art. I, § 19; its Free Elections Clause, Art. I, § 10; and its Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12, 14—and seeks, among other relief, a declaratory ruling under the Declaratory Judgment Act.

¶ 24 On 17 December 2021 "Defendants Representative Destin Hall, in his official capacity as Chairman of the House Standing Committee on Redistricting; Senators Ralph E. Hise, Jr., Warren Daniel, Paul Newton, in their official capacities as Co-Chairmen of the Senate Committee on Redistricting and Elections; Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate; Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives (hereinafter "Legislative Defendants") filed their Answer to NCLCV Plaintiffs' Complaint." Legislative Defendants asserted numerous affirmative defenses, including, *inter alia*, that: (1) granting the requested relief will violate the

VRA and the Constitution of the United States; (2) granting the requested relief will violate the rights of Legislative Defendants, Republican voters, and Republican candidates under the United States and North Carolina Constitutions; (3) the court cannot lawfully prevent the General Assembly from considering partisan advantage and incumbency protection; (4) plaintiffs seek to require districts where Democratic candidates are elected where such candidates are not currently elected; (5) plaintiffs' claims are barred by the doctrine of laches; (6) plaintiffs have failed to state claims upon which relief can be granted; (7) plaintiffs seek a theory of liability that will act to impose a judicial amendment to the North Carolina Constitution; (8) the only limitations on redistricting legislation are found in article II, sections 2, 3, 4, and 5 of the North Carolina Constitution; (9) plaintiffs' request for a court-designed redistricting plan violates the separation of powers doctrine; (10) plaintiffs' claims are nonjusticiable and fail to provide judicially manageable standards; (11) plaintiffs lack standing; and (12) plaintiffs have unclean hands and therefore are not entitled to equitable relief.

¶ 25 On 17 December 2021, defendants North Carolina State Board of Elections and its members Damon Circosta, in his official capacity as Chairman of the Board of Elections; Stella Anderson, in her official capacity as Secretary of the Board of Elections; and Jeff Carmon III, Stacy Eggers IV, and Tommy Tucker, in their official capacities as Members of the Board of Elections filed their answer to Harper

Plaintiffs' amended complaint. That same day, these same defendants along with defendant State of North Carolina and defendant Karen Brinson Bell, in her official capacity as Executive Director of the North Carolina State Board of Elections filed their answer to NCLCV Plaintiffs' complaint.

¶ 26 "Throughout the intervening and expedited two-and-a-half-week period reserved for discovery, the parties filed and the [c]ourt expeditiously ruled upon over ten discovery-related motions . . . ." "Plaintiffs collectively designated eight individuals as expert witnesses and submitted accompanying reports[, and] Legislative Defendants designated two individuals as expert witnesses and submitted accompanying reports." The parties' discovery period closed on 31 December 2021, and a three-and-one-half day trial commenced on 3 January 2022.

C. Trial Court's Judgment

1. Findings of Fact

¶ 27 First, the trial court made extensive factual findings based on the evidence presented at trial. In short, these factual findings confirmed plaintiffs' assertions that each of the three enacted maps were "extreme partisan outliers" and the product of "intentional, pro-Republican partisan redistricting."

a. Plaintiffs' Extreme Partisan Gerrymandering Claims

¶ 28 After reviewing the factual and procedural history summarized above, the trial court made factual findings regarding plaintiffs' constitutional claims of extreme

partisan gerrymandering. First, the court considered whether the evidence presented showed partisan intent and effects. Addressing direct evidence, the court found that "[t]here is no express language showing partisan intent within the text of the session laws establishing the Enacted Plans" and noted that "[t]he Adopted Criteria expressly forbade partisan considerations and election results data from being used in drawing districts in the Enacted Plans." Further, the court noted that "[n]o elections have been conducted under the Enacted Plans to provide direct evidence of partisan effects that could be attributed as a result of the Enacted Plans." However, the lack of direct evidence of intent did not stop the trial court from determining that the enacted plans were intentionally constructed to yield a consistent partisan advantage for Republicans in a range of electoral environments.

¶ 29 Instead, the trial court turned to circumstantial evidence of partisan intent and effects. After surveying the recent history of partisan redistricting litigation and legislation and the neutral districting criteria Legislative Defendants claimed they had adhered to, the court reviewed plaintiffs' and Legislative Defendants' expert analyses of the enacted plans. The court's extensive factual findings regarding each expert's analysis are summarized below.

¶ 30 ***Harper Plaintiffs' Expert Dr. Jowei Chen***. "Dr. Chen was qualified and accepted as an expert at trial in the fields of redistricting, political geography, simulation analyses, and geographic information systems." "Dr. Chen analyzed the

partisan bias of the enacted congressional plan on a statewide and district-by-district basis." Specifically, Dr. Chen analyzed the congressional plans using

> various computer simulation programming techniques that allow him to produce a large number of nonpartisan districting plans that adhere to traditional districting criteria using U.S. Census geographies as building blocks. Dr. Chen's simulation process ignores all partisan and racial considerations when drawing districts, and the computer simulations are instead programmed to draw districting plans following various traditional districting goals, such as equalizing population, avoiding county and Voting Tabulation District (VTD) splits, and pursuing geographic compactness. By randomly generating a large number of districting plans that closely adhere to these traditional districting criteria, Dr. Chen assesses an enacted plan drawn by a state legislature and determines whether partisan goals motivated the legislature to deviate from these traditional districting criteria. Specifically, by holding constant the application of nonpartisan, traditional districting criteria through the simulations, he is able to determine whether the enacted plan could have been the product of something other than partisan considerations.

¶ 31 "Based on his analysis, Dr. Chen concluded that partisan intent predominated over the 2021 Adopted Criteria in drawing the adopted congressional plan, and that the Republican advantage in the enacted plan cannot be explained by North Carolina's political geography or adherence to the Adopted Criteria."

¶ 32 ***Harper Plaintiffs' Expert Dr. Christopher Cooper***. "Dr. Cooper was qualified and accepted as an expert at trial in the field of political science with a specialty in the political geography and political history of North Carolina." Using

statewide voting data from the 2020 election, "Dr. Cooper analyzed the 2021 Congressional Plan [and] the partisan effects of each district's boundaries." Based on Dr. Cooper's analysis, the court observed that "[a]lthough North Carolina gained an additional congressional seat as a result of population growth that came largely from the Democratic-leaning Triangle (Raleigh-Durham-Chapel Hill) and the Charlotte metropolitan areas, the number of anticipated Democratic seats under the enacted map actually decreases, with only three anticipated Democratic seats, compared with the five seats that Democrats won in the 2020 election." This decrease, the court observed, is enacted "by splitting the Democratic-leaning counties of Guilford, Mecklenburg, and Wake among three congressional districts each." The court further noted that "[t]here was no population-based reason" for these splits.

¶ 33 After reviewing Dr. Cooper's maps showing these redistricted congressional lines as compared to county boundaries and VTD boundaries, the court noted that "[t]he congressional district map is best understood as a single organism given that the boundaries drawn for a particular congressional district in one part of the state will necessarily affect the boundaries drawn for the districts elsewhere in the state." Accordingly, the court found "that the 'cracking and packing' of Democratic voters in Guilford, Mecklenburg, and Wake counties has 'ripple effects throughout the map.' "

¶ 34 Reviewing Dr. Cooper's analysis of a few specific congressional districts within the new map as exemplars, the court noted that "[t]he 2021 Congressional Plan places

the residences of an incumbent Republican representative and an incumbent Democratic representative within a new, overwhelmingly Republican district, NC-11, 'virtually guaranteeing' that the Democratic incumbent will lose her seat." Similarly, the court observed that "[t]he 2021 Congressional Plan includes one district where no incumbent congressional representative resides . . . [which] 'overwhelmingly favors' the Republican candidate based on the district's partisan lean."

¶ 35 The court then found that the 2021 North Carolina House and Senate Plans "similarly benefit the Republican party." The court noted that "Legislative Defendants' exercise of . . . discretion in the Senate and House 2021 Plans resulted in Senate and House district boundaries that enhanced the Republican candidates' partisan advantage, and this finding is consistent with a finding of partisan intent." Finally, the court noted Dr. Cooper's finding that the "partisan redistricting carried out across the State has led to a substantial disconnect between the ideology and policy preferences of North Carolina's citizenry and their representatives in the General Assembly."

¶ 36 ***Harper Plaintiffs and Plaintiff Common Cause's Expert Dr. Jonathan Mattingly.***

> Dr. Mattingly was qualified and accepted as an expert at trial in the fields of applied math, statistical science, and probability.
>
> . . . Dr. Mattingly used the Metropolis-Hasting Markov Chain Monte Carlo ("MCMC") Algorithm to create a representative set, or "ensemble," of 100,000 maps for the

> state legislative districts and 80,000 maps for congressional districts as benchmarks against which he could compare the enacted maps. The algorithm produced maps that accorded with traditional districting criteria. Dr. Mattingly tuned his algorithm to ensure that the nonpartisan qualities of the simulated maps were similar to the nonpartisan qualities of the enacted map with respect to compactness and, for his primary ensembles, municipality splits.

"After generating the sample of maps, Dr. Mattingly used votes from multiple prior North Carolina statewide elections reflecting a range of electoral outcomes to compare the partisan performance and characteristics of the 2021 Congressional Plan to the simulated plans."

¶ 37 The trial court found, "based upon Dr. Mattingly's analysis, that the Congressional map is the product of intentional, pro-Republican partisan redistricting." The court further determined that "[t]he Congressional map is 'an extreme outlier' that is 'highly non-responsive to the changing opinion of the electorate.' "

¶ 38 Regarding the North Carolina legislative districts, the court likewise found, "based upon Dr. Mattingly's analysis, that the State House and Senate plans are extreme outliers that 'systematically favor the Republican Party to an extent which is rarely, if ever, seen in the non-partisan collection of maps.' " The court found that "[t]he intentional partisan redistricting in both chambers is especially effective in

preserving Republican supermajorities in instances in which the majority or the vast majority of plans in Dr. Mattingly's ensemble would have broken it."

¶ 39 Regarding the North Carolina House map, the court further found that "the enacted plan shows a systematic bias toward the Republican party, favoring Republicans in every single one of the 16 elections [Dr. Mattingly] considered." The court determined that the North Carolina House "map is also especially anomalous under elections where a non-partisan map would almost always give Democrats the majority in the House because the enacted map denied Democrats that majority. The probability that this partisan bias arose by chance, without an intentional effort by the General Assembly, is 'astronomically small.' " The court determined that

> [t]he North Carolina House maps show that they are the product of an intentional, pro-Republican partisan redistricting over a wide range of potential election scenarios. Elections that under typical maps would produce a Democratic majority in the North Carolina House give Republicans a majority under the enacted maps. Likewise, maps that would normally produce a Republican majority under nonpartisan maps produce a Republican supermajority under the enacted maps. Among every possible election that Dr. Mattingly analyzed, the partisan results were more extreme than what would be seen from nonpartisan maps. In every election scenario, Republicans won more individual seats tha[n] they statistically should under nonpartisan maps.
>
> . . . The 2021 House Plan's partisan bias creates firewalls protecting the Republican supermajority and majority in the House, and this effect is particularly robust when the Republicans are likely to lose the supermajority: the enacted plan sticks at 48 democratic seats or fewer, even in situations where virtually all of the plans in the

> nonpartisan ensemble would elect 49 Democratic seats or more.

¶ 40 Regarding the North Carolina Senate, the court found that

> the results are the same: the enacted plan is an outlier or extreme outlier in elections where Democrats win a vote share between 47.5% and 50.5%. This range is significant because many North Carolina elections have this vote fraction, and this is the range where the non-partisan ensemble shows that Republicans lose the super-majority. But the enacted map in multiple elections used in Dr. Mattingly's analysis sticks at less than 21 Democratic seats, preserving a [Republican] supermajority. Notably, the enacted map never favors the Democratic party in comparison to the non-partisan ensemble in a single one of the 16 elections that Dr. Mattingly considered.

¶ 41 The court then considered Dr. Mattingly's "cracking and packing" analysis of the congressional, House, and Senate maps. Here, the court found

> that cracking Democrats from the more competitive districts and packing them into the most heavily Republican and heavily Democratic districts is the key signature of intentional partisan redistricting and it is responsible for the enacted congressional plan's non-responsiveness when more voters favor Democratic candidates, as shown in [Dr. Mattingly's] charts. Across his 80,000 simulated nonpartisan plans, not a single one had the same or more Democratic voters packed into the three most Democratic districts—*i.e.*, the districts Democrats would win no matter what—in comparison to the enacted plan. And not a single one had the same or more Republican voters in the next seven districts—i.e., the competitive districts—in comparison to the enacted plan.

¶ 42 The trial court found similar "cracking and packing" in the House maps, noting that "the enacted maps, as compared to the sample maps, there is an

overconcentration of Democratic voters in the least Democratic districts and in the most Democratic districts." The court found that "the districts with the highest concentration of Democrats have far more Democratic voters than expected in nonpartisan maps, and threshold districts have far fewer Democratic voters than expected in nonpartisan maps." In contrast, the court found that

> [i]n the middle districts—between the 60th most Democratic seat and the 80th most democratic seat—the Democratic vote fraction in the enacted plan is far below the . . . nonpartisan plans. These are the seats that determine the supermajority line and the majority line (if Republicans win the 61st seat, they win the majority, and if they win the 72nd most Democratic seat, they win the supermajority). The [c]ourt [found] that the systematic depletion of Democratic votes in those districts signals packing, does not exist in the non-partisan ensemble, and is responsible for the map's partisan outlier behavior. Those Democrat[ic] votes are instead placed in the 90th to 105th most Democratic district[s], where they are wasted because those seats are already comfortably Democratic.

¶ 43 Regarding cracking and packing in the Senate maps, the court found that "the same structure appears where virtually all of the seats in the middle range that determines majority and supermajority control have abnormally few Democrats."

¶ 44 Next, the court determined that "a desire to prevent the pairing of incumbents cannot explain the extreme outlier behavior of the enacted plan."

¶ 45 The court also observed that the General Assembly selectively prioritized preserving municipalities within the maps, choosing to do so "only when doing so advantaged Republicans." "Put differently, prioritizing municipality preservation in

the Senate plans appears to enable more maps that favor Republicans. By contrast, for the House plan, where the enacted map does not prioritize preserving municipalities, . . . prioritizing municipalities would not have favored the Republican party in comparison."

¶ 46 Finally, the court found that "[t]he partisan bias that Dr. Mattingly identified by comparing the enacted plans to his nonpartisan ensemble could not be explained by political geography or natural packing."

¶ 47 ***Harper Plaintiffs' Expert Dr. Wesley Pegden***. "Dr. Pegden was qualified and accepted as an expert at trial in probability."

> In this case, Dr. Pegden used . . . outlier analysis to evaluate whether and to what extent the 2021 Plans were drawn with the intentional and extreme use of partisan considerations. To do so, using a computer program, Dr. Pegden began with the enacted plans, made a sequence of small random changes to the maps while respecting certain nonpartisan constraints, and then evaluated the partisan characteristics of the resulting comparison maps.

The trial court noted that "Dr. Pegden applied these constraints in a 'conservative' way, to 'avoid second-guessing the mapmakers' choices in how they implemented the districting criteria." The court observed that Dr. Pegden's algorithm repeated this process "billions or trillions of times": "begin[ning] with the enacted map, mak[ing] a small random change complying with certain constraints, and us[ing] historical voting data to evaluate the partisan characteristics of the resulting map."

¶ 48 Based on Dr. Pegden's analysis, the court found "that the enacted congressional plan is more favorable to Republicans than 99.9999% of the comparison maps his algorithm generated." Accordingly, the court determined that "the enacted congressional map is more carefully crafted to favor Republicans than at least 99.9999% of all possible maps of North Carolina satisfying the nonpartisan constraints imposed in [Dr. Pegden's] algorithm." In every "run" of the analysis, the court found, "the enacted congressional plan was in the most partisan 0.000031% of the approximately one trillion maps generated by making tiny random changes to the district's boundaries." "[I]f the districting had not been drawn to carefully optimize its partisan bias," the court stated, "we would expect naturally that making small random changes to the districting would not have such a dramatic and consistent partisan effect."

¶ 49 The court found similar extremes regarding North Carolina's legislative districts. Regarding the North Carolina House, the court determined based on Dr. Pegden's analysis that "the enacted House map was more favorable to Republicans than 99.99999% of the comparison maps generated by his algorithm making small random changes to the district boundaries." Accordingly, the court found "that the enacted map is more carefully crafted for Republican partisan advantage than at least 99.9999% of all possible maps of North Carolina satisfying [the nonpartisan] constraints." Regarding the North Carolina Senate, the court determined "that the

enacted Senate map was more favorable to Republicans than 99.9% of comparison maps." Accordingly, the court found "that the enacted Senate map is more carefully crafted for Republican partisan advantage than at least 99.9% of all possible maps of North Carolina satisfying [the nonpartisan] constraints." "These results," the court determined, "cannot be explained by North Carolina's political geography."

¶ 50 ***NCLCV Plaintiffs' Expert Dr. Moon Duchin***. "Dr. Duchin was qualified and accepted as an expert at trial in the field of redistricting." The trial court noted that Dr. Duchin's analysis "uses a Close-Votes-Close-Seats principle, [in which] 'an electoral climate with a roughly 50-50 split in partisan preference should produce a roughly 50-50 representational split.' " The trial court observed that "Close-Votes-Close-Seats is not tantamount to a requirement for proportionality. Rather, it is closely related to the principle of Majority Rule, which is where 'a party or group with more than half of the votes should be able to secure more than half of the seats.' "

¶ 51 Based on Dr. Duchin's analysis, the trial court found "that the political geography of North Carolina today does not lead only to a district map with partisan advantage given to one political party." Rather, the court determined, "[t]he Enacted Plans behave as though they are built to resiliently safeguard electoral advantage for Republican candidates." The results of Dr. Duchin's analysis, the court found, "reveal a partisan skew in close elections." For instance, the court determined that in a recent

statewide election in which the Republican candidate won by less than 500 total votes,

> [t]he Enacted Plans would have converted that near tie at the ballot box into a resounding Republican victory in seat share across the board: Republicans would have won 10 (71%) of North Carolina's congressional districts, 28 (56%) of North Carolina's Senate districts, and 68 (57%) of North Carolina's House districts. Nor is that election unusual.

In fact, the court found "that in every single one of the 52 elections decided within a 6-point margin, the Enacted Plans give Republicans an outright majority in the state's congressional delegation, the State House, and the State Senate." "This is true[,]" the court noted, "even when Democrats win statewide by clear margins." Or, more plainly, "more Democratic votes usually do not mean more [D]emocratic seats." Accordingly, the trial court determined that "[t]he Enacted Plans resiliently safeguard electoral advantage for Republican candidates. This skewed result is not an inevitable feature of North Carolina's political geography." Rather, the court found, "[t]he plan is designed in a way that safeguards Republican majorities in any plausible election outcome, including those where Democrats win more votes by clear margins."

¶ 52 Next, the court specified that these findings were consistent across all three of the enacted maps. First, regarding the enacted congressional plan, the court found that "a clear majority of Democratic votes does not translate into a majority of seats."

The court determined "that the Enacted Congressional Plan achieves these results by the familiar means of 'packing' and 'cracking' Democratic voters across the state."

¶ 53 Second, the court found that

> [t]he Enacted Senate Plan effectuates the same sort of partisan advantage as the Enacted Congressional Plan. The Enacted Senate Plan consistently creates Republican majorities and precludes Democrats from winning a majority in the Senate even when Democrats win more votes. Even in an essentially tied election or a close Democratic victory, the Enacted Senate Plan gives Republicans a Senate majority, and sometimes even a veto-proof 30-seat majority. And that result holds even when Democrats win by larger margins.

"As with the Enacted Congressional Plan, the [c]ourt [found] that the Enacted Senate Plan achieves its partisan goals by packing Democratic voters into a small number of Senate districts and then cracking the remaining Democratic voters by splitting them across other districts . . . ."

¶ 54 Third, the court likewise determined that

> the Enacted House Plan is also designed to systematically prevent Democrats from gaining a tie or a majority in the House. In close elections, the Enacted House Plan always gives Republicans a substantial House majority. That Republican majority is resilient and persists even when voters clearly express a preference for Democratic candidates.

"As with the Enacted Congressional Plan and the Enacted Senate Plan, the [c]ourt [found] that the Enacted House Plan achieves this resilient pro-Republican bias by the familiar mechanisms of packing and cracking Democratic voters . . . ."

¶ 55 ***Plaintiff Common Cause's Expert Dr. Daniel Magleby***. "Dr. Magleby was qualified and accepted as an expert at trial in the fields of political geography and legislative and congressional elections, mathematical modeling and political phenomena and measurements of gerrymandering." Like plaintiffs' previous experts, Dr. Magleby "used a peer-reviewed algorithm . . . to generate a set of unbiased maps against which he compared the enacted House, Senate, and congressional maps." "Dr. Magleby . . . used this algorithm to develop a set of between 20,000 and 100,000 maps, from which he took a random sample of 1,000 maps that roughly met the North Carolina Legislature's 2021 criteria for drawing districts." Using voting data from statewide races between 2016 and 2020, Dr. Magleby compared expected performance under the enacted maps with performance in the neutral sample maps. More specifically, Dr. Magleby's analysis utilized "median-mean" calculations. Median-mean calculations compare "the average Democratic vote share" in districts statewide with "the median Democratic vote share" in those districts "by lining up the enacted . . . districts from least Democratic to most Democratic and identifying the districts that fell in the middle. In a nonpartisan map, a low median-mean difference is expected."

¶ 56 Based on Dr. Magleby's analysis, the trial court found "that the level of partisan bias in seats in the House maps went far beyond expected based on the neutral political geography of North Carolina." Specifically, the court determined

"that the median-mean bias in the enacted maps was far more extreme than expected in nonpartisan maps." In fact, the court found, "[n]o randomly generated map had such an extreme median-mean share—meaning that . . . no simulated map . . . was as extreme and durable in terms of partisan advantage."

¶ 57 ***Legislative Defendants' Expert Dr. Michael Barber***.

> Dr. Barber was qualified and accepted as an expert at trial in the areas of political geography, partisanship statistical analysis, and redistricting.
>
> . . . Dr. Barber analyzed the Enacted Plans, as well as NCLCV Plaintiffs' Optimized Maps, in the context of the partisan gerrymandering claims brought by Plaintiffs challenging the North Carolina Senate and North Carolina House of Representatives Districts.
>
> . . . Dr. Barber utilized a publicly-available and peer-reviewed redistricting simulation algorithm to generate 50,000 simulated district maps in each county grouping in which there are multiple districts in both the North Carolina House of Representatives and the North Carolina Senate. In Dr. Barber's simulations, the model generates plans that adhere to the restrictions included in the North Carolina Constitution as well as the *Stephenson* criteria of roughly equal population, adherence to county cluster boundaries, minimization of county traversals within clusters, and geographic compactness. Only after the simulated district plans are complete is the partisan lean of each district in each plan computed . . . .

¶ 58 Although Dr. Barber was qualified as an expert, the trial court found that "Dr. Barber's method is not without limitations." "Because it is impossible for a redistricting algorithm to account for all non-partisan redistricting goals[,]" the court noted, "differences between the range of his simulated plans and the 2021 Plans may

be the result of non-partisan goals the algorithm failed to account for, rather than of partisan goals." The court observed that "under Dr. Barber's analysis, it is plausible that the 2021 Plans were prepared without partisan data or considerations." The court noted Dr. Barber's subsequent conclusion that "the advantage between the expected Republican seat share in the state legislature compared to the statewide Republican vote share in the recent past is more due to geography than partisan activity by Republican map drawers." Notably, the court did not adopt Dr. Barber's findings as its own as it did for plaintiffs' experts and later explicitly rejected his conclusions regarding the impact of political geography on the enacted maps.

¶ 59 ***Legislative Defendants' Expert Dr. Andrew Taylor***. "Dr. Taylor was qualified and accepted as an expert at trial in the areas of political science, political history of North Carolina[ ] and its constitutional provisions, and the comparative laws and Constitutions in other states and jurisdictions." The trial court reviewed Dr. Taylor's analysis of the enacted maps under political science principles, including noting that "in political science, an election is generally regarded as 'equal' so long as '[e]ach person has one vote to elect one legislator who has one vote in the legislature,' and departures even from that ideal are tolerated." Likewise, the court noted Dr. Taylor's opinion that "[i]n political science, equal outcomes are not generally accepted as a necessary facet of equal elections, administering such a rule would seem to be unworkable, and voting is not a feature of party participation but of individual

participation as a citizen." The court further noted Dr. Taylor's opinion that "purportedly 'fair' redistricting plans are not understood in the political-science field as germane to free speech, [because free speech] can occur regardless of the shapes and sizes of districts." "For many of these reasons," the court noted, "measuring gerrymanders can be elusive, problematic, and beyond the consensus of political scientists."

¶ 60 The trial court also noted Dr. Taylor's opinion that the "significant change in North Carolina's political geography over the past thirty years . . . 'is not the result of redistricting[,]' " but is instead "a function of slow social and economic forces, changes in the state's citizenry, and party ideology." As with Dr. Barber's similar conclusion noted above, the trial court again later explicitly rejected Dr. Taylor's conclusions regarding the impact of political geography on the enacted maps.

¶ 61 ***Legislative Defendants' Rebuttal Expert Sean Trende***. "Mr. Trende was qualified and accepted as an expert at trial in the areas of political science, redistricting, drawing redistricting maps[,] and analyzing redistricting maps." The trial court noted that Mr. Trende used color-coded maps of North Carolina counties "noting the number of counties in which a majority of voters voted for the Republican presidential candidate in the past decade (between 70 and 76 counties) and whether the Republican candidate performed better in a county than nationally." It is unclear

how, if at all, the trial court considered Mr. Trende's testimony. This concluded the trial court's review of the expert testimony.

¶ 62 After considering the analysis of each expert, the trial court engaged in a district-by-district analysis of each of the three enacted maps: those for the North Carolina Senate, North Carolina House, and Congress, respectively.

¶ 63 ***North Carolina Senate Districts***. The trial court found that the following North Carolina Senate district groupings minimized Democratic districts and maximized safe Republican districts through the "packing" and "cracking" of Democratic voters as the "result of intentional, pro-Republican partisan redistricting": the Granville-Wake Senate County Grouping; the Cumberland-Moore Senate County Grouping; the Guilford-Rockingham Senate County Grouping; the Forsyth-Stokes Senate County Grouping; the Iredell-Mecklenburg Senate County Grouping; the Northeastern Senate County Grouping (Bertie County, Camden County, Currituck County, Dare County, Gates County, Hertford County, Northampton County, Pasquotank County, Perquimans County, Tyrrell County, Carteret County, Chowan County, Halifax County, Hyde County, Martin County, Pamlico County, Warren County, and Washington County); and the Buncombe-Burke-McDowell Senate County Grouping. The trial court did not find any of the Senate district groupings to not be the result of intentional, pro-Republican redistricting through packing and cracking.

¶ 64 ***North Carolina House of Representatives District***. The trial court found that the following North Carolina House district groupings minimized Democratic districts and maximized safe Republican districts through the "packing" and "cracking" of Democratic voters as the "result of intentional, pro-Republican partisan redistricting": the Guilford House County Grouping; the Buncombe House County Grouping; the Mecklenburg House County Grouping; the Pitt House County Grouping; the Durham-Person House County Grouping; the Forsyth-Stokes House County Grouping; the Wake House County Grouping; the Cumberland House County Grouping; and the Brunswick-New Hanover House County Grouping. Notably, however, the trial court found the Duplin-Wayne House County Grouping and the Onslow-Pender House County Grouping "to not be the result of intentional, pro-Republican partisan redistricting."

¶ 65 ***North Carolina Congressional Districts***. Next, the trial court found "that the 2021 Congressional plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation." The court found that the enacted congressional map "fails to follow and subordinates the Adopted Criteria's requirement[s]" regarding splitting counties and VTDs. Further, the court found

> that the enacted congressional plan fails to follow, and subordinates, the Adopted Criteria's requirement to draw compact districts. The [c]ourt [found] that the enacted congressional districts are less compact than they would be

> under a map-drawing process that adhered to the Adopted Criteria and prioritized the traditional districting criteria of compactness.

Further, "when compared to the 1,000 computer-simulated plans[,]" the court found that "the enacted congressional plan is a statistical outlier" in regard to the total number of Republican-favoring districts it creates.

¶ 66 Next, the court noted four types of analyses in particular that confirm the "extreme partisan outcome" of the congressional map that "cannot be explained by North Carolina's political geography or by adherence to Adopted Criteria": (1) "mean-median difference" analysis ; (2) "efficiency gap" analysis ("measur[ing] . . . the degree to which more Democratic or Republican votes are wasted across an entire districting plan"); (3) "the lopsided margins test"; and (4) "partisan symmetry" analysis. Based on these methods, the trial court found "that the enacted congressional plan subordinates the Adopted Criteria and traditional redistricting criteria for partisan advantage."

¶ 67 Next, the trial court considered "whether the congressional plan is a statistical partisan outlier at the regional level." Here, the court found "that the enacted congressional plan's districts in each region examined exhibit[ed] political bias when compared to the computer-simulated districts in the same regions." These included the Piedmont Triad area, the Research Triangle area, and the Mecklenburg County area. "The [c]ourt [found] that the packing and cracking of Democrats in [these

regions] could not have resulted naturally from the region's political geography or the districting principles required by the Adopted Criteria." "The enacted congressional map[,]" the court determined, "was therefore designed in order to accomplish the legislature's predominant partisan goals." Later, the court again confirmed "that the enacted congressional plan's partisan bias goes beyond any 'natural' level of electoral bias caused by North Carolina's political geography or the political composition of the state's voters, and this additional level of partisan bias . . . can be directly attributed to the map-drawer's intentional efforts to favor the Republican Party."

¶ 68 Next, as it did for the North Carolina House and Senate districts, the trial court engaged in a district-by-district analysis of all fourteen enacted congressional districts. After individual analysis, the court found all fourteen districts "to be the result of intentional, pro-Republican partisan redistricting."

¶ 69 Finally, the trial court noted that "elections are decided by any number of factors." Statistical analyses, the court observed, "treat the candidates as inanimate objects" and "assume that voters will vote along party lines." In essence, the court doubted that a computer analysis could ever "take the human element out of the human." "Notwithstanding these doubts," though, the court "conclude[d] based upon a careful review of all of the evidence that the Enacted Maps are a result of intentional, pro-Republican partisan redistricting." This concluded the court's factual findings regarding plaintiffs' partisan gerrymandering claims.

b. Plaintiffs' Intentional Racial Discrimination and Racial Vote Dilution Claims

¶ 70 Second, the trial court considered plaintiffs' intentional racial discrimination and racial vote dilution claims. Beginning with intentional racial discrimination, the court found that "[t]here is no express language showing discriminatory intent within the text of the session laws establishing the Enacted Plans." Next, the court noted plaintiffs' circumstantial evidence of racial discrimination, including testimony from plaintiff Common Cause's expert James Leloudis II, regarding the historical connection between North Carolina's past racial gerrymandering practices and the current plans.

¶ 71 The trial court then considered plaintiffs' racial vote dilution claims. After reviewing the evidence presented by plaintiffs' and Legislative Defendants' experts on this matter, the court found that "[r]ace was not the predominant, overriding factor in drawing the districts in the Enacted Plans." The court found that "[t]he General Assembly did not subordinate traditional race-neutral districting principles, including compactness, contiguity, and respect for political subdivisions to *racial* considerations." Accordingly, the court found that a district-by-district analysis of racial vote dilution, as it had previously performed for the extreme partisan gerrymandering claim, was not necessary. This concluded the trial court's findings regarding plaintiffs' intentional racial discrimination and racial vote dilution claims.

c. Plaintiffs' Whole County Provision Claims

¶ 72 Finally, the court made findings regarding plaintiffs' whole county provision claim. Here, the court noted that under the enacted plans, 35 senate districts and 107 North Carolina House districts split counties. The court observed that the Senate districts divided 15 total counties, while the House districts divided 37 total counties. The court noted that in instances where "multiple county groupings were possible under the Supreme Court's interpretation of the Whole County Provision[,] . . . groupings were chosen from the range of legally possible groupings." "Within each remaining county grouping containing a district challenged under the Whole County Provision," the court found, "the district line's traversal of a county line occurs because of the need to comply with the equal-population rule required by law and memorialized in the Adopted Criteria."

2. Trial Court's Conclusions of Law

¶ 73 After making these extensive findings of fact, the trial court concluded as a matter of law that claims of extreme partisan gerrymandering present purely political questions that are nonjusticiable under the North Carolina Constitution. Accordingly, the court concluded that the enacted maps are not unconstitutional as a result of partisan gerrymandering.

a. Standing

¶ 74 First, the court addressed plaintiffs' standing to bring their various claims. Because "[i]ndividual private citizens and voters of a county have standing to sue to

seek redress from an alleged violation of N.C. Const. art II, §§ 3 and 5[,]" the court held, "the Individual NCLCV Plaintiffs challenging a district based upon the Whole County Provision have standing." However, based on its legal conclusion that "Plaintiffs have not stated any cognizable claim for partisan gerrymandering under the various provisions of the North Carolina Constitution[,]" the court concluded that all plaintiffs lack standing for these claims.

¶ 75 Finally, the court addressed NCLCV Plaintiffs' and Common Cause Plaintiffs' standing to bring claims of intentional racial discrimination and racial vote dilution under the North Carolina Constitution. Because the court found "there to be no factual basis underlying these asserted claims," it concluded that "there is a lack of the requisite 'direct injury'—i.e., the deprivation of a constitutionally guaranteed personal right. Accordingly, [the court concluded that] these Plaintiffs do not have standing for these claims." Similarly, the court concluded that "Plaintiff Common Cause lacks standing for its claim requesting a declaratory judgment . . . directing the legislative process to be undertaken in redistricting."

b. Partisan Gerrymandering Claims

¶ 76 Next, the court addressed plaintiffs' partisan gerrymandering claims under various provisions of the North Carolina Constitution. Here, the court determined that plaintiffs' claims amounted to political questions that are nonjusticiable under the North Carolina Constitution. Specifically, after surveying the history of the

constitutional provisions under which plaintiffs brought their claims, the court concluded that "redistricting is an inherently political process" that "is left to the General Assembly."

¶ 77 The court then addressed each of plaintiffs' constitutional claims. First, the court held that the enacted maps do not violate the free elections clause, which mandates that "[a]ll elections shall be free." N.C. Const. art. I, § 10. The court noted that "[w]hile the Free Elections Clause has been part of our constitutional jurisprudence since the 1776 Constitution, there are very few reported decisions that construe the clause." Based on a survey of the clause's history, the court "conclude[d] that the Free Elections Clause does not operate as a restraint on the General Assembly's ability to redistrict for partisan advantage."

¶ 78 Second, the trial court addressed plaintiffs' claims under the free speech clause and the equal protection clause. After reviewing the historical background of the addition of these clauses to the constitution in 1971, the court concluded that "the incorporation of the Free Speech Clause and the Equal Protection Clause to the North Carolina Constitution of 1971 was not intended to bring about a fundamental change to the power of the General Assembly." Accordingly, the court refused to "assume that . . . the Equal Protection Clause and Free Speech Clause impose new restrictions on the political process of redistricting."

¶ 79 From this historical foundation, the court concluded that "the Enacted Maps do not violate the Equal Protection Clause." The court concluded that although "[i]t is true that there is a fundamental right to vote[,] . . . [r]edistricting and the political considerations that are part of that process do not impinge on the right to vote. Nothing about redistricting affects a person's right to cast a vote." Accordingly, and because political affiliation is not a suspect class, the court concluded that "[a]ny impingement is limited and distant and as such is subject to rational basis review." The court then concluded "that the plans are amply supported by a rational basis and thus do not violate the Equal Protection Clause."

¶ 80 Third, the court likewise concluded that "the Enacted Plans do not violate the Free Speech Clause." Specifically, the court concluded that "plaintiffs are free to engage in speech no matter what the effect the Enacted Plans have on their district."

¶ 81 Fourth, the trial court concluded that "the Enacted Plans do not violate the Right of Assembly Clause." Specifically, the court noted that "Plaintiffs remain free to engage in their associational rights and rights to petition no matter what effect the Enacted Plans have on their district."

¶ 82 In total, the trial court concluded that "[t]he objective constitutional constraints that the people of North Carolina have imposed on legislative redistricting are found in Article II, Sections 3 and 5 of the 1971 Constitution and not in the Free Elections, Equal Protection, Freedom of Speech[,] or Freedom of Assembly

Clauses found in Article I of the 1971 Constitution." "Therefore, the [c]ourt conclude[d] that our Constitution does not address limitations on considering partisan advantage in the application of its discretionary redistricting decisions and Plaintiffs' claims on the basis of 'extreme partisan advantage' fail."

c. Justiciability

¶ 83 Next, the court again addressed justiciability. First, the court considered whether the North Carolina Constitution delegates the responsibility and oversight of redistricting exclusively to the General Assembly. Citing article II, sections 3, 5, and 20, the court concluded that "[t]he constitutional provisions relevant to the issue before [it] establish that redistricting is in the exclusive province of the legislature."

¶ 84 Second, the court considered "whether satisfactory and manageable criteria or standards exist for judicial determination of the issue." Here, relying on its analysis of the Supreme Court of the United States in *Rucho*, 139 S. Ct. at 2506–07, regarding the justiciability of partisan gerrymandering claims in *federal* courts, the trial court "determine[d] that satisfactory and manageable criteria or standards do not exist for judicial determination of the issue and thus the partisan gerrymandering claims present a political issue beyond our reach."

¶ 85 In reaching this conclusion, the court noted that it

> agree[s] with the United States Supreme Court that excessive partisanship in districting leads to results that are incompatible with democratic principles. *Rucho*, 139 S. Ct[.] at 2504. Furthermore, it has the potential to violate

> "the core principle of republican government . . . that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 567 U.S. 787, 824 . . . (2015). Also, it can represent "an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties at the expense of the public good." *LULAC v. Perry*, 548 U.S. 399, 456 . . . (2006) (Stevens, J.[,] concurring in part and dissenting in part) (quotation and citation omitted)).

The Court then added that it "neither condones the enacted maps nor their anticipated potential results" and that it has a "disdain for having to deal with issues that potentially lead to results incompatible with democratic principles and subject our State to ridicule." Nevertheless, the court concluded that because redistricting "is one of the purest political questions which the legislature alone is allowed to answer[,]" judicial action "in the manner requested . . . would be usurping the political power and prerogatives of an equal branch of government." Accordingly, the trial court concluded that plaintiffs' partisan gerrymandering claims are nonjusticiable.

d. Intentional Racial Discrimination and Racial Vote Dilution

¶ 86 Next, the trial court addressed plaintiffs' claims of intentional racial discrimination and racial vote dilution. The court "conclude[d] that based upon the record before [it], Plaintiffs have failed to prove the merit of their claim."

¶ 87 Here, the court noted that "[t]he North Carolina Constitution's guarantees of 'substantially equal voting power' and 'substantially equal legislative representation' are violated when a redistricting plan deprives minority voters of 'a fair number of

districts in which their votes can be effective,' measured based on 'the minority's rough proportion of the relevant population[,]' " quoting *Bartlett v. Strickland*, 556 U.S. 1, 28–29 (2009) (Souter, J., dissenting). The court then stated that "[a]n act of the General Assembly can violate North Carolina's Equal Protection Clause if discriminatory purpose was 'a motivating factor.' " "And whether discriminatory purpose was a motivating factor[,]" the court observed, "can be 'inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.' " "To determine whether this is true," the court stated, "the court may weigh the law's historical background, the sequence of events leading up to the law, departures from normal procedure, legislative history, and the law's disproportionate impact."

¶ 88 Based upon these standards, the court then concluded that "NCLCV Plaintiffs and Plaintiff Common Cause have failed to satisfy their burden of establishing that race was the predominant motive behind the way in which the Enacted Plans were drawn." The court first reached this conclusion based on plaintiffs' "fail[ure] to show a predominant racial motive through direct [or circumstantial] evidence." Second, the court concluded, "Plaintiffs have failed to establish that the General Assembly failed to adhere to traditional districting principles *on account of racial considerations*." Third, the court concluded that "Plaintiffs have failed to make the requisite evidentiary showing that the General Assembly sought to dilute the voting strength

of Blacks based upon their race, or that Blacks have less of an opportunity to vote for or nominate members of the electorate less than those of another racial group." Although the court agreed with plaintiffs' showing "that a substantial number of Black voters are affiliated with the Democratic Party[,]" it nevertheless concluded that plaintiffs had not shown

> how the General Assembly targeted this group on the basis of race instead of partisanship. Black voters who also happen to be Democrats have therefore been grouped into the partisan intent of the General Assembly. There is nothing in the evidentiary record before th[e] [c]ourt showing that race *and* partisanship were *coincident* goals predominating over all other factors in redistricting.

Accordingly, the court rejected plaintiffs' claims of intentional racial discrimination within the enacted plans.

¶ 89 Second, the court addressed plaintiffs' claims of racial vote dilution in violation of the free elections clause. Having previously concluded that the free elections clause should be narrowly interpreted to not apply in the redistricting context, the court concluded that "NCLCV Plaintiffs' claim that the Enacted Plans unnecessarily dilute the voting power of citizens on account of race in violation of the Free Elections Clause of Art. I, § 10 is without an evidentiary or legal basis." Accordingly, the court rejected this claim.

e. Whole-County Provision Claims

¶ 90 Next, the trial court addressed plaintiffs' claims under the whole county provision of article II, sections 3 and 5 of the North Carolina Constitution. Although the boundaries of certain legislative districts under the enacted plans indeed crossed county lines, the court "conclude[d] that the counties grouped and then divided in the formation of the specific districts at issue for this claim were the minimum necessary, and contained the minimum number of traversals and maintained sufficient compactness, to comply with the one-person-one-vote standard in such a way that it met the equalization of population requirements set forth in *Stephenson v. Bartlett*, 355 N.C. 354, 383[–]84 . . . (2002)." Accordingly, the court "conclude[d] that the manner by which the counties at issue for this specific claim were traversed was not unlawful because it was predominantly for traditional and permissible redistricting principles, including for partisan advantage, which are allowed to be taken into account in redistricting."

f. Declaratory Judgment Claim

¶ 91 Finally, the trial court addressed plaintiff Common Cause's declaratory judgment claim regarding the redistricting process laid out in *Stephenson* and *Dickson v. Rucho*, 368 N.C. 481 (2015). On this issue, the court stated that "[t]he requirement in *Stephenson* that districts required by the VRA be drawn first was put in place to alleviate the conflict and tension between the WPC and VRA." But, the court noted, "[t]here is nothing in *Stephenson* that requires any particular analysis

prior to making a decision as to whether VRA districts are necessary." Accordingly, the court concluded that "[t]he fact is, whether correct or not, the Legislative Defendants made a decision that no VRA Districts are required." The court then stated that, in this situation, "[w]hat Plaintiff Common Cause asks of this [c]ourt is to impose a judicially-mandated preclearance requirement . . . [that] does not exist in *Stephenson*." Therefore, the court concluded as a matter of law "that Plaintiff Common Cause is not entitled to a Declaratory Judgment or Injunctive Relief."

3. Trial Court's Decree

¶ 92 Following these extensive factual findings and conclusions of law, the trial court issued its ultimate decree. Specifically, the trial court ordered that (1) plaintiffs' requests for declaratory judgment are denied; (2) plaintiffs' requests for permanent injunctive relief are denied; (3) the court's judgment fully and finally resolves all claims of plaintiffs, judgment is entered in favor of Legislative Defendants, and plaintiffs' claims are dismissed with prejudice; and (4) the candidate filing period for the 2022 primary and municipal elections is set to resume at 8:00 a.m. on Thursday, 24 February 2022, and shall continue through and end at 12:00 noon on Friday, 4 March 2022.

D. Present Appeal

¶ 93 Pursuant to this Court's 8 December 2021 order certifying the case for discretionary review prior to determination by the Court of Appeals, all plaintiffs filed

notices of appeal to this Court from the trial court's final judgment on 11 and 12 January 2022. The parties' briefs and arguments before this Court largely echoed the arguments made before the trial court. Namely, plaintiffs asserted that the enacted plans constitute extreme partisan gerrymandering in violation of the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of the North Carolina Constitution and that these state constitutional claims were justiciable in state court. Legislative Defendants argued that plaintiffs' claims presented nonjusticiable political questions and therefore did not violate any of the asserted state constitutional provisions. The Court also accepted amicus briefs from several interested parties. Due to the time-sensitive nature of this case, oral arguments were calendared and heard in a special session on 2 February 2022.

II. Legal Analysis

¶ 94 Now, this Court must determine whether plaintiffs' claims are justiciable under the North Carolina Constitution and, if so, whether Legislative Defendants' enacted plans for congressional and state legislative districts violate the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of our constitution. After careful consideration, we conclude that partisan gerrymandering claims are justiciable under the North Carolina Constitution and that Legislative Defendants' enacted plans violate each of these provisions of the North Carolina Constitution beyond a reasonable doubt.

A. Standing

¶ 95 As a threshold issue, we must determine whether plaintiffs have standing to bring their claims. As noted above, the trial court ruled that individual NCLCV Plaintiffs had standing to challenge the enacted plans under the whole county provision but that plaintiffs lacked standing to bring their partisan gerrymandering claims because they had "not stated any cognizable claim for partisan gerrymandering under the various provisions of the North Carolina Constitution." The court further determined that NCLCV Plaintiffs and plaintiff Common Cause likewise lacked standing to bring their intentional racial discrimination and racial vote dilution claims under the North Carolina Constitution. Specifically, the court ruled that "[b]ecause . . . there [is] no factual basis underlying these asserted claims, there is a lack of the requisite 'direct injury'—i.e., the deprivation of a constitutionally guaranteed personal right."

¶ 96 We cannot agree. As this Court held in *Committee to Elect Dan Forest v. Employees Political Action Committee*, "the federal injury-in-fact requirement has no place in the text or history of our Constitution." 376 N.C. 558, 2021-NCSC-6, ¶ 73. Rather, in the case of direct constitutional challenges to statutes or other acts of government, we require only the requisite "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* ¶ 64 (quoting *Stanley v. Dep't of Cons. and Dev.*,

284 N.C. 15, 28 (1973)). Accordingly, as a "prudential principle of judicial self-restraint" and not as a limitation on the judicial power, we have required that a person challenging government action be directly injured or adversely affected by it. *Id.* ¶ 63. This prudential requirement that the person challenging a statute be directly injured or adversely affected thereby is purely to ensure that the putative injury belongs to them and not another, and hence that they "can be trusted to battle the issue." *Id.* ¶ 64 (citing *Stanley*, 284 N.C. at 28). Accordingly, "[t]he 'direct injury' required in this context could be, *but is not necessarily limited to*, 'deprivation of a constitutionally guaranteed right or an invasion of his property rights,' " *id.* ¶ 62 (emphasis added), and "[w]hen a person alleges the infringement of a legal right . . . *arising under* . . . the North Carolina Constitution, . . . the legal injury itself gives rise to standing," *id.* ¶ 82 (emphasis added). This direct injury requirement does not require a showing that a party will in fact prevail under the constitutional theory they advance. Rather, alleging the violation of a legal right which belongs to them, even if widely shared with others and even if they are not entitled to relief under their theory of the legal right, is sufficient to show the requisite "concrete adverseness" in our courts which we, for purely pragmatic reasons, require in the resolution of constitutional questions. To hold otherwise would resuscitate an injury-in-fact requirement as a barrier to remedy by the courts in another form.

¶ 97 The trial court contravened the concrete adverseness rationale for the direct injury requirement by concluding that plaintiffs lacked standing because their partisan gerrymandering claims, which they contended violated their constitutional rights under the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause, were not "cognizable."[6] The allegation of violations of these constitutional rights was sufficient to generate an actual controversy and hence concrete adverseness, whether or not their theory of the violation ultimately prevailed in the courts. For example, in *Baker v. Carr*, from which this Court in part derived its concrete adverseness rationale, *see Comm. to Elect Dan Forest*, ¶ 64, the Supreme Court of the United States announced for the first time that claims of vote dilution were cognizable and justiciable under the Equal Protection Clause. *See generally Baker v. Carr*, 369 U.S. 186 (1962); *see also Comm. to Elect Dan Forest*, ¶ 46 ("[T]he only injury asserted [in *Baker*] is the impairment of a constitutional right broadly shared and divorced from any 'factual' harm experienced by the plaintiffs"). The constitutional right to equal protection of the laws existed although the *Baker* Court had not yet extended it to the precise theory the plaintiffs advanced. Similarly, here, the plaintiffs all had standing to challenge the maps based on their allegation of violations of their constitutional rights under the free elections clause, equal

[6] The trial court also conflated the existence of a "cognizable" claim under the state constitution with one that is justiciable. A claim may violate the constitution yet not be justiciable because it is a political question.

protection clause, free speech clause, and freedom of assembly clause of our Declaration of Rights, which are injuries to legal rights that they directly suffered, irrespective of whether courts previously or the court below determined their particular theory under those rights ultimately entitled them to prevail.

¶ 98 Finally, the court also determined that "the organizational Plaintiffs each seek to vindicate rights enjoyed by the organization under the North Carolina Constitution" and that "organizational Plaintiffs each have members who would otherwise have standing to sue in their own right, the interests each seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." We agree.

¶ 99 Taken together, the trial court's findings are sufficient to establish that each individual and organizational plaintiff here meets the standing requirements under the North Carolina Constitution as summarized above. Accordingly, the trial court erred in ruling to the contrary.

B. The Political Question Doctrine

¶ 100 We next address Legislative Defendants' contention that plaintiffs' claims present only nonjusticiable political questions. Whether partisan gerrymandering claims present a nonjusticiable "purely political question" under North Carolina law is a question of first impression. We have held that certain claims raising "purely

political question[s]" are "nonjusticiable under separation of powers principles." *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 618 (2004). Purely political questions are those questions which have been wholly committed to the "sole discretion" of a coordinate branch of government, and those questions which can be resolved only by making "policy choices and value determinations." *Bacon v. Lee*, 353 N.C. 696, 717 (2001) (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986)). Purely political questions are not susceptible to judicial resolution. When presented with a purely political question, the judiciary is neither constitutionally empowered nor institutionally competent to furnish an answer. *See Hoke Cnty. Bd. of Educ.*, 358 N.C. at 638–39 (declining to reach the merits after concluding that "the proper age at which children should be permitted to attend public school is a nonjusticiable political question reserved for the General Assembly").

¶ 101 The trial court and Legislative Defendants rely in part on *Rucho* and other federal cases. These cases may be instructive, but they are certainly not controlling. We have previously held that "[w]hile federal standing doctrine can be instructive as to general principles . . . and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine." *Goldston v. State*, 361 N.C. 26, 35 (2006). This principle extends to all justiciability doctrines. "Federal justiciability doctrines—standing, ripeness, mootness, and the prohibition against advisory opinions—are not explicit within the constitutional text,

but are the fruit of judicial interpretation of Article III's extension of the 'judicial Power' to certain 'Cases' or 'Controversies.' " *Comm. to Elect Dan Forest*, 376 N.C. 558, 2021-NCSC-6, ¶ 35. Originally, federal courts showed great reluctance to involve themselves in policing redistricting practices at all. The result was both the grossly unequal apportionment of representation of legislative and congressional seats and the drawing of district lines in pursuit of partisan advantage.[7] The judicial repudiation of any role in redistricting was summarized in *Colegrove v. Green*, where the Supreme Court declared a challenge to the drawing of congressional districting lines in Illinois nonjusticiable under the Fourteenth Amendment. 328 U.S. 549, 556 (1946). Writing for the Court, Justice Frankfurter reasoned that "effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not [fit] for judicial determination." *Id.* at 552. "Authority for dealing with such problems resides elsewhere." *Id.* at 554. The Court concluded, revealing the prudential basis of its reasoning, that "[c]ourts *ought not* to enter this political

[7] Before the "reapportionment revolution" of *Baker v. Carr* and its progeny in the 1960s, "states had much more leeway over when, and even if, to redraw district boundaries. One result was that in many states, district lines remained frozen for decades—often leading to gross inequalities in district populations and substantial partisan biases." Erik J. Engstrom, *Partisan Gerrymandering and the Construction of American Democracy* 13 (2013). "Connecticut, for instance, kept the exact same congressional district lines for 70 years (1842–1912)." *Id.* at 8. Other state legislatures redrew maps whenever they wanted. "In every year from 1862 to 1896, with one exception, at least one state redrew its congressional district boundaries. Ohio, for example, redrew its congressional district boundaries six times between 1878 and 1890." *Id.* Moreover, "parties were willing to push partisan advantage to the edge. To do so, partisan mapmakers carved states into districts with narrow, yet winnable, margins." *Id.*

thicket." *Id.* at 556 (emphasis added).

¶ 102 In the landmark decision of *Baker v. Carr*, the Supreme Court reversed course and held in a case involving claims that malapportionment violates the Equal Protection Clause of the Fourteenth Amendment that such claims are justiciable since they do not present political questions. 369 U.S. 186, 209 (1962). The *Baker* Court began its justiciability analysis by noting that "the mere fact that the suit seeks protection of a political right does not mean it presents a political question. Such an objection is little more than a play upon words." *Id.* (cleaned up). After reviewing cases to discern the threads that, in various formulations, comprise a nonjusticiable political question, the Court identified what has become the standard definition of the political question doctrine under federal law:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217. The Court in *Baker* held that the plaintiffs' claim under the Equal Protection Clause, unlike prior claims under the Guaranty Clause, was justiciable

because it presented, *inter alia*, "no question decided, or to be decided, by a political branch of government coequal with th[e] Court" and no "policy determinations for which judicially manageable standards are lacking," as "[j]udicial standards under the Equal Protection Clause are well developed and familiar," which are "that a discrimination reflects no policy, but simply arbitrary and capricious action." *Id.* at 226. Accordingly, over a dissent written by Justice Frankfurter and joined by Justice Harlan, the Court entered the political thicket. The Court did not in that decision announce a remedy for the violation of the Equal Protection Clause but in later cases held that the principle of "one person, one vote" required as close to mathematical equality as practicable in the drawing of congressional districts and "substantial equality" in the drawing of legislative districts. *Cf. Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (holding that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's"); *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) ("So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.").

¶ 103 Although federal courts concluded that malapportionment claims were justiciable, the Supreme Court of the United States did not expressly hold that a

partisan gerrymandering claim was justiciable until *Davis v. Bandemer*, where it held that a partisan gerrymandering claim existed under the Fourteenth Amendment that did not present a nonjusticiable political question.[8] 478 U.S. 109, 124 (1986) (plurality opinion), *abrogated by Rucho*, 139 S. Ct. 2484. The plurality opinion in *Bandemer* identified the claim as being "that each political group in a State should have the same chance to elect representatives of its choice as any other political group," and although the claim was distinct from that in *Reynolds* involving districts of unequal size, "[n]evertheless, the issue is one of representation, and we decline to hold that such claims are never justiciable." *Id.* The plurality adopted as a test that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Id.* at 132. Justice O'Connor concurred in the judgment, arguing in part that the Court's decision would result in a requirement for "roughly proportional representation."[9] *Id.* at 147 (O'Connor, J., concurring in the judgment).

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[8] As noted in the plurality opinion in *Bandemer*, the Supreme Court did address a partisan gerrymandering claim in *Gaffney v. Cummings*, by holding that a districting plan which incorporated a "political fairness principle" across the plan did not violate the Equal Protection Clause; however, no concern about justiciability was raised in *Gaffney*. 412 U.S. 735, 751–52 (1973).

[9] The plurality responded that their decision did not reflect "a preference for proportionality *per se* but a preference for a level of parity between votes and representation sufficient to ensure that significant minority voices are heard and that majorities are not consigned to minority status." *Davis v. Bandemer*, 478 U.S. 109, 125 n.9 (1986).

¶ 104 Eighteen years later the Supreme Court overruled *Bandemer* in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a challenge to Pennsylvania's 2001 congressional redistricting plan on the grounds that it was a political gerrymander. Justice Scalia wrote the plurality opinion, in which three other justices joined, and would have also held partisan gerrymandering claims to be nonjusticiable political questions because they lack a "judicially discernable and manageable standard[,]" *id.* at 306—"judicially discernible in the sense of being relevant to some constitutional violation[,]" *id.* at 288. Justice Kennedy concurred in the judgment but refused to hold partisan gerrymandering nonjusticiable because "in another case a standard might emerge." *Id.* at 312 (Kennedy, J., concurring in the judgment).

¶ 105 In *Rucho*, completing its retreat from *Bandemer*, the Supreme Court of the United States abandoned the field in policing partisan gerrymandering claims. The Supreme Court held that claims alleging that North Carolina's and Maryland's congressional districts were unconstitutionally gerrymandered for partisan gain were nonjusticiable in federal court. *Rucho*, 139 S. Ct. at 2493–2508. It reached this conclusion because it could find "no legal standards discernible in the [United States] Constitution for" resolving partisan gerrymandering claims, "let alone limited and precise standards that are clear, manageable, and politically neutral." *Id.* at 2500.

¶ 106 Three concerns appear to have motivated the Court in *Rucho*. The first premise which concerned the Court in *Rucho* was the absence of a "judicially discernable"

standard, that is, one that is "relevant to some constitutional violation." *Vieth*, 541 U.S. at 288; *see Rucho*, 139 S. Ct. at 2507 (" '[J]udicial action must be governed by *standard*, by *rule*,' and must be 'principled, rational, and based upon reasoned distinctions' founded in the [United States] Constitution or laws." (first alteration in original) (quoting *Vieth*, 541 U.S. at 278)). In essence, the Supreme Court concluded that no provision of the United States Constitution supplied a cognizable legal basis for challenging the practice of partisan gerrymandering. *See, e.g.*, *Rucho*, 139 S. Ct. at 2501 ("[T]he one-person, one-vote . . . requirement does not extend to political parties."); *id.* at 2502 ("[O]ur racial gerrymandering cases [do not] provide an appropriate standard for assessing partisan gerrymandering."); *id.* at 2504 ("[T]here are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue."); *id.* at 2506 ("The North Carolina District Court further concluded that the 2016 Plan violated the Elections Clause and Article I, § 2. We are unconvinced by that novel approach.").

¶ 107 The second premise underpinning *Rucho*'s political-question holding was the absence of a standard that the Court deemed to be "clear, manageable[,] and politically neutral." *Id.* at 2500. This rationale was particularly pressing because, "while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, 'a jurisdiction may engage in constitutional political gerrymandering' " under federal law. *Id.* at 2497 (quoting

Hunt v. Cromartie, 526 U.S. 541, 551 (1999)). According to the Court, "the question is one of degree," and "it is vital in such circumstances that the Court act only in accord with especially clear standards." *Id.* at 2498. However, the Court held the plaintiffs had not supplied standards to answer the question, "At what point does permissible partisanship become unconstitutional?" *Id.* at 2501. Moreover, the tests adopted by the lower courts were unsatisfactory because they failed to articulate such a standard that was sufficiently "clear" and "manageable." *Id.* at 2503–05. Finally, the dissent's proposed test, using "a State's own districting criteria as a neutral baseline" was unmanageable because "it does not make sense to use criteria that will vary from State to State and year to year." *Id.* at 2505.

¶ 108 A third consideration animating the Court's decision was a prudential evaluation of the role of federal courts in the constitutional system. *Rucho*, 139 S. Ct. at 2494 (framing the question presented as "whether there is an 'appropriate role for the *Federal Judiciary*' in remedying the problem of partisan gerrymandering" (emphasis added) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1926 (2018))); *id.* at 2507 ("Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role."); *id.* (advocating action through states, including by state supreme courts on state law grounds); *id.* at 2508 (suggesting Congress could act); *id.* at 2499 ("But federal courts

are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so.").

¶ 109 In summary, federal courts initially forswore virtually any role in the "political thicket" of apportionment. *See Colegrove*, 328 U.S. at 556. However, in *Baker* and its progeny, the Supreme Court of the United States entered that thicket at least to the extent of policing malapportionment. *See Baker*, 369 U.S. 186. The Court's reasons for entering the thicket are relevant today: the Supreme Court recognized that absent its intervention to enforce constitutional rights, our system of self-governance would be representative and responsive to the people's will in name only. The Court entered the political thicket for a time as well to review partisan gerrymandering claims in *Bandemer*, but ultimately rejected that decision in *Vieth*, and in *Rucho*, the Court removed such claims from the purview of federal courts altogether. The premises that animated the Court in *Rucho* are substantially the same as those that kept it from policing malapportionment claims in the first place: the perception that there is no "discernable" right to such claims cognizable in the federal Constitution, a prudential evaluation that courts are ill-equipped to hear such claims, and a belief that courts should not involve themselves in "political" matters.

¶ 110 However, simply because the Supreme Court has concluded partisan gerrymandering claims are nonjusticiable in federal courts, it does not follow that they are nonjusticiable in North Carolina courts, as Chief Justice Roberts himself

noted in *Rucho*. *Rucho*, 139 S. Ct. at 2507 ("Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply."). First, our state constitution "is more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Corum v. Univ. of N.C. Through Bd. of Governors*, 330 N.C. 761, 783 (1992). Second, state law provides more specific neutral criteria against which to evaluate alleged partisan gerrymanders, and those criteria would not require our court system to consider fifty separate sets of criteria, as would federal court involvement. Finally, *Rucho* was substantially concerned with the role of federal courts in policing partisan gerrymandering, while recognizing the independent capacity of state courts to review such claims under state constitutions as a justification for judicial abnegation at the federal level. The role of state courts in our constitutional system differs in important respects from the role of federal courts.

¶ 111 Having canvassed relevant federal decisions, we now consider whether as a matter of state law plaintiffs' partisan gerrymandering claims are justiciable under the North Carolina Constitution. We conclude that they are.

C. The Question Presented Is Not Committed to the "Sole Discretion" of the General Assembly

¶ 112 Under North Carolina law, courts will not hear "purely political questions." This Court has recognized two criteria of political questions: (1) where there is "a textually demonstrable constitutional commitment of the issue" to the "sole

discretion" of a "coordinate political department[,]" *Bacon v. Lee*, 353 N.C. 696, 717 (2001) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)); and (2) those questions that can be resolved only by making "policy choices and value determinations[,]" *id.* (quoting *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986)).

¶ 113 We first consider the issue of whether there is a textually demonstrable commitment of the issue to the "sole discretion" of a coordinate branch of government. The constitution vests the responsibility for apportionment of legislative districts in the General Assembly under article II of our state constitution. Article II provides: "The General Assembly . . . shall revise the senate districts and the apportionment of Senators among those districts." N.C. Const. art. II, § 3; *see* N.C. Const. art. II, § 5 (stating the same requirement for the North Carolina House). Legislative Defendants contend that "a delegation of a political task to a single political branch of government impliedly forecloses the other branches of government from undertaking that task" and that these provisions evidence such a textual commitment. They argue that this Court "has repeatedly acknowledged that this constitutional text is a grant of unreviewable political discretion to the legislative branch." This argument—that gerrymandering claims are categorically nonjusticiable because reapportionment is committed to the sole discretion of the General Assembly—is flatly inconsistent with our precedent interpreting and applying constitutional limitations on the General Assembly's redistricting authority. We have interpreted and applied both the

expressly enumerated limitations contained in article II, sections 3 and 5, and the limitations contained in other constitutional provisions such as the equal protection clause. *Stephenson v. Bartlett*, 355 N.C. 354, 370–71, 378–81 (2002) (determining whether the General Assembly's use of its article II power to apportion legislative districts complied with federal law in accordance with article I, sections 3 and 5 of our constitution, and our state's equal protection clause in article I, section 19); *Blankenship v. Bartlett*, 363 N.C. 518, 525–26 (2009) (holding that General Assembly's exercise of its power under article IV, section 9 to establish the election of superior court judges in judicial districts must comport with our state's equal protection clause in article I, section 19). Legislative defendants' argument is, essentially, an effort to turn back the clock to the time before courts entered the political thicket to review districting claims in *Baker v. Carr*. Yet, as the facts of this case demonstrate, the need for this Court to continue to enforce North Carolinians' constitutional rights has certainly not diminished in the intervening years.

¶ 114 Relatedly, but more specifically, Legislative Defendants argue that even if certain gerrymandering claims may be justiciable, claims alleging partisan gerrymandering in violation of state constitutional provisions are nonjusticiable because this Court has endorsed the consideration of partisan advantage in the redistricting process. In support of this proposition, Legislative Defendants cite to our decision in *Stephenson*, where we stated the following in full:

> The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, *see Gaffney v. Cummings*, 412 U.S. 735, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973), but it must do so in conformity with the State Constitution. To hold otherwise would abrogate the constitutional limitations or "objective constraints" that the people of North Carolina imposed on legislative redistricting and reapportionment in the State Constitution.

355 N.C. at 371. Legislative Defendants misread this statement. We did not conclude that the text of our state constitution permits the General Assembly to "consider partisan advantage and incumbency protection"; we concluded that *federal law* permitted that consideration by citing to the decision of *Gaffney v. Cummings*, 412 U.S. 735 (1973). *See Stephenson*, 355 N.C. at 371. Moreover, *Gaffney* in no way supports Legislative Defendants' argument that we have endorsed their interest in securing partisan advantage to any extent and which results in systematically disfavoring voters of one political party. In *Gaffney*, the Supreme Court of the United States rejected a partisan gerrymandering claim to an apportionment plan that pursued a principle of "political fairness" in order to "allocate political power to the parties *in accordance with their voting strength*." *Gaffney*, 412 U.S. at 754 (emphasis added). We expressly reserved the question of whether the General Assembly could consider such criteria "in conformity with the State Constitution," while also affirming the applicability of "constitutional limitations" that the people imposed on the legislative redistricting process in other provisions of the North Carolina

Constitution, such as the equal protection clause. *Stephenson*, 355 N.C. at 371. Simply put, resolving *Stephenson* did not require us to decide the legality of partisan gerrymandering under the North Carolina Constitution.

¶ 115 The commitment of responsibility for apportionment to the General Assembly in article II provides no support for the Legislative Defendants' argument. First, the list of criteria the General Assembly is required to consider by that section does *not* include "partisan advantage." *See* N.C. Const. art. II, § 3. Furthermore, we cannot infer the non-justiciability of partisan gerrymandering purely from the structural fact that the decennial apportionment of legislative districts is committed to a "political" branch. The General Assembly has the legislative power of apportionment under article II, but exercise of that power is subject to other "constitutional limitations." *Stephenson*, 355 N.C. at 371. Put another way, the mere fact that responsibility for reapportionment is committed to the General Assembly does not mean that the General Assembly's decisions in carrying out its responsibility are fully immunized from any judicial review. That startling proposition is, again, entirely inconsistent with our modern redistricting precedents and, on a more fundamental level, inconsistent with this Court's obligation to enforce the provisions of the North Carolina Constitution dating to 1787.

¶ 116 *Stephenson* itself is incompatible with Legislative Defendants' argument. *Stephenson* was a vote-dilution challenge under the equal protection clause of our

state constitution. If *Stephenson* concluded that redistricting decisions were exclusively constitutionally committed to the General Assembly because of article II, then no other constitutional limitations would be applicable. Plainly they are. *See id.* at 379.

¶ 117 This case does not ask us to remove all discretion from the redistricting process. The General Assembly will still be required to make choices regarding how to reapportion state legislative and congressional districts in accordance with traditional neutral districting criteria that will require legislators to exercise their judgment. Rather, this case asks how constitutional limitations in our Declaration of Rights limit the General Assembly's power to apportion districts under article II. It is thus analogous to *Cooper v. Berger*, 370 N.C. 392 (2018), in that it "involves a conflict between two competing constitutional provisions," and it "involves an issue of constitutional interpretation, which this Court has a duty to decide." *Id.* at 412.

¶ 118 More fundamentally, Legislative Defendants' argument that the textual grant of a power to a "political" branch is sufficient to render exercise of that power unreviewable strikes at the foundation stone of our state's constitutional caselaw—*Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787). In *Bayard*, the courts of North Carolina first asserted the power and duty of judicial review of legislative enactments for compliance with the North Carolina Constitution, and to strike down laws in conflict therewith. *Id.* at 7. In holding that we had the power of judicial review we specifically

reasoned that if "members of the General Assembly" could violate some constitutional rights, "they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, [but] from thence transmit the dignity and authority of legislation down to their heirs male forever." *Id.* It was out of concern for the very possibility that the legislature might intercede in the elections for their own office, which our constitution delegates the legislature power over, in contravention of the constitutional rights of the people to elect their own representatives that led this Court to assert the power of judicial review. To conclude that the mere commitment of the apportionment power in article II to the General Assembly renders its apportionment decisions unreviewable would require us to betray our most fundamental constitutional duty. "It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992).

¶ 119 The General Assembly has the power to apportion legislative and congressional districts under article II and state law, but exercise of that power is subject to other "constitutional limitations," including the Declaration of Rights. The question is whether the General Assembly complied with provisions of the Declaration of Rights in its exercise of the apportionment power. There is no textually demonstrable commitment of that issue to the legislative branch.

¶ 120 In determining whether plaintiffs' claims would require the court to make "policy choices and value determinations," *Bacon*, 353 N.C. at 717, we must determine whether, as plaintiffs argue, the Declaration of Rights of the North Carolina Constitution prohibits partisan gerrymandering and, if so, whether the application of those claims would require such determinations. As we long ago established and have since repeatedly affirmed, "[t]his Court is the ultimate interpreter of our State Constitution." *Corum*, 330 N.C. at 783 (citing *Bayard*, 1 N.C. (Mart.) 5). So too when it comes to reapportionment. *Stephenson*, 355 N.C. at 370–71, 378–81; *Blankenship*, 363 N.C. at 525–26.

D. Partisan Gerrymandering Violates the Declaration of Rights in the North Carolina Constitution and Is Justiciable

¶ 121 Plaintiffs argue that Legislative Defendants' districting plans violate the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of our constitution's Declaration of Rights. Accordingly, we must examine the text and structure of the Declaration of Rights as well as the intent and history of these constitutional provisions to determine whether the rights plaintiffs allege are protected by the Declaration of Rights and whether this Court is empowered by the constitution to guarantee those rights.

¶ 122 Before examining specific provisions in detail, we make some general observations about the Declaration of Rights in article I of our constitution. First, "[t]he Declaration of Rights was passed by the Constitutional Convention on 17

December 1776, the day before the Constitution itself was adopted, manifesting the primacy of the Declaration in the minds of the framers."[10] *Corum*, 330 N.C. at 782. The Declaration of Rights preceded the constitution, and hence the rights reserved by the people preceded the division of power among the branches therein. "The relationship is not that exhibited by the U.S. Constitution with its appended Bill of Rights, the latter adding civil rights to a document establishing the basic institutions of government. Instead, North Carolina's declaration of rights . . . is logically, as well as chronologically, prior to the constitutional text." John V. Orth & Paul M. Newby, *The North Carolina Constitution* 5–6 (2d ed. 2013). That logical and chronological primacy is preserved in our present constitution, with the Declaration of Rights now incorporated in the text of the constitution itself as article I.

¶ 123 Second, early in this Court's history we "recognized the supremacy of rights protected in Article I and indicated that [we] would only apply the rules of decision

[10] The primacy of the Declaration of Rights over the powers allocated in the constitutional text in the minds of the framers is fitting for a people so opposed to government tyranny coalesced in any source. North Carolinians preceded the Revolution by ten years through the Regulator Movement opposing the Royal Governor William Tryon. They preceded the Declaration of Independence with the Halifax Resolves. After the Revolution they only belatedly approved by convention the federal Constitution because of its failure to include a Bill of Rights, an implicit rejection of the notion that structural protections of rights, like the separation and division of powers, would suffice. It is worth noting that a leading argument for the adoption of a federal Bill of Rights, in the words of Thomas Jefferson, was "the legal check which [such a Bill would put] into the hands of the judiciary," as "a body, which if rendered independent, and kept strictly to their own department merits great confidence for their learning and integrity." Laurence H. Tribe, *American Constitutional Law* 8 & n.8 (3d ed. 2000) (quoting 14 The Papers of Thomas Jefferson 659 (Julian P. Boyd ed., 1958)).

derived from the common law and such acts of the legislature that are consistent with the Constitution." *Corum*, 330 N.C. at 783 (citing *Trs. of the Univ. of N.C. v. Foy*, 5 N.C. 57 (1805)). In tying judicial review to the primacy of the Declaration of Rights, we recognized that

> [t]he fundamental purpose for [the Declaration's] adoption was to provide citizens with protection from the State's encroachment upon these rights. Encroachment by the State is, of course, accomplished by the acts of individuals who are clothed with the authority of the State. The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State.

Id. at 782–83 (citing *State v. Manuel*, 20 N.C. 144 (1838)); *see also id.* at 782 ("The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action . . . .").

¶ 124 Finally, the framers of our Declaration of Rights and constitution guarded against not only abuses of executive power but also the tyrannical accumulation of power that subverts democracy in the legislative branch. William Hooper, a North Carolina delegate to the Continental Congress, urged that the state constitution prevent legislators from making "their own political existence perpetual." Letter from William Hooper to the Provincial Congress of North Carolina (Oct. 26, 1776), *in* 10 *Colonial and State Records of North Carolina* 867–68, *available at* https://docsouth.unc.edu/csr/index.php/document/csr10-0407. John Adams, "already

a renowned authority on constitutionalism," Orth & Newby at 5, submitted two letters of advice to the Convention, recommending that to prevent the legislature from "vot[ing] itself perpetual" the constitution must divide the General Assembly into two chambers so each could check the other. Essay by John Adams on "Thoughts on Government" (March 1776), *in* 11 *Colonial and State Records of North Carolina* 321, 324, *available at* https://docsouth.unc.edu/csr/index.php/document/csr11-0189. And so the framers did create two chambers, and we have maintained that division to this day. *See* N.C. Const. of 1776, § 1; N.C. Const. art. II, § 1.

¶ 125 Despite these protections, the primacy of the Declaration of Rights suggests that our framers did not believe that division of power alone would be sufficient to protect their civil and political rights and prevent tyranny. Accordingly, they enshrined their rights in the Declaration of Rights. They also created a state judiciary invested with the "judicial power." *See* N.C. Const. of 1776, § 1; N.C. Const. art. IV, § 1. This independent judiciary was another structural protection. In *Bayard*, we concluded that our courts have the power, and indeed the obligation, to review legislative enactments for compliance with the North Carolina Constitution and to strike down unconstitutional laws. 1 N.C. (Mart.) at 7. The Court reasoned that if we abdicated this power and obligation, legislators could make themselves "Legislators of the State for life" and insulate themselves from "any further election of the people." *Id.* Giving effect to the will of the people through popular sovereignty and the rights

protected by the Declaration of Rights, including the rights to free and frequent elections, were central to our recognition of the necessity of judicial review.

¶ 126 Having reviewed these structural and historical aspects of the Declaration of Rights, we now turn to the text to analyze whether plaintiffs' partisan gerrymandering claims have a discernible basis therein. Indeed, the very text of the Declaration of Rights calls us back time and again to itself, the source of constitutional meaning, by providing that "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art I, § 35.[11] In a leading case from Virginia, construing a cognate provision of the Virginia Declaration of Rights, Judge Roane defined "fundamental principles" as

> those great principles growing out of the Constitution, by the aid of which, in dubious cases, the Constitution may be explained and preserved inviolate; those landmarks, which it may be necessary to resort to, on account of the impossibility to foresee or provide for cases within the spirit, but without the letter of the Constitution.

Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 40 (1793); *see* Orth & Newby at 92 (discussing same). These "landmarks" serve as an important backdrop to aid in interpreting the "spirit" of the North Carolina Constitution and the scope of the

[11] By this text, "[a]ll generations are solemnly enjoined to return *ad fontes* (to the sources) and rethink for themselves the implications of the fundamental principles of self-government that animated the revolutionary generation." John V. Orth & Paul M. Newby, *The North Carolina Constitution* 91 (2d ed. 2013).

sweeping provisions of its Declaration of Rights.

¶ 127 North Carolina's Declaration of Rights as it exists today in article I was forged not only out of the revolutionary spirit of 1776 but also the reconstruction spirit of 1868. *See* John L. Sanders, *Our Constitutions: An Historical Perspective*, https://www.sosnc.gov/documents/guides/legal/North_Carolina_Constitution_Historical.pdf ("Drafted and put through the convention by a combination of native Republicans and a few carpetbaggers, . . . [f]or its time, [the Constitution of 1868] was a progressive and democratic instrument of government."); *id.* ("The Constitution of 1868 incorporated the 1776 Declaration of Rights into the Constitution as Article I and added several important guarantees."); *id.* ("[T]he Constitution of 1971 brought forward much of the 1868 language with little or no change."). Our Declaration of Rights begins with the declaration of two fundamental principles, the costly fruit paid in the blood of the Civil War and Revolutionary War, respectively: equality of persons and the democratic principle of popular sovereignty.[12] Article I, sections 1 and 2 provide:

> Section 1. The equality and rights of persons.
>
> We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

[12] Article I, section 1 originates from the 1868 constitution, while article I, section 2, originates from the 1776 constitution.

> Sec[tion] 2. Sovereignty of the people.
>
> All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

N.C. Const. art. I, §§ 1–2.

¶ 128 Under article I, section 1, equality logically precedes sovereignty, as equality is "self-evident." Article I, section 1 recognizes the self-evident fundamental principle of equality; however, that does not mean it is not a source of cognizable rights by its own terms as well. *See, e.g., Tully v. City of Wilmington*, 370 N.C. 527, 533, 536 (2018) (holding each person's "inalienable right" to the "enjoyment of the fruits of their own labor" protects the fundamental right to "pursue his chosen profession free from" unreasonable government interference). This section deliberately borrowed the language of the Declaration of Independence, which was quoted and expanded upon in the Gettysburg Address just a few years prior to the 1868 Reconstruction Convention. Article I, section 1's recognition of the first principle that "all persons are created equal" is universal.

¶ 129 Article I, section 2 locates the source of all "political power" under the Declaration of Rights in "the people." N.C. Const. art. I, § 2. It specifies that "all government of right" can only "originate[ ] from the people." *Id.* This "government of right" is only established when it is "founded upon [the people's] will only," and "instituted solely for the good of the whole." *Id.* Section 2 of the Declaration of Rights

can fruitfully be read together with the first clause of section 3. N.C. Const. art. I, § 3, cl. 1 ("The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof . . . ."). "These two sections contain both a general and a specific *assertion of democratic theory*." Orth & Newby at 48 (emphasis added). Section 2's declaration that "[a]ll political power is vested in and derived from the people" is an "abstract statement of principle." *Id.* Meanwhile, section 3's declaration that "the people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof," is "a specific local application of the general rule." *Id.* These sections "now serve as a fuller theoretical statement" of the core democratic principle: "the revolutionary faith in popular sovereignty." *Id.*; *see Thrift v. Bd. of Comm'rs*, 122 N.C. 31, 37 (1898) ("Our theory of government, *proceeding directly from the people, and resting upon their will*, is essentially different — at least, in principle — from that of England . . . ." (emphasis added)). Under popular sovereignty, the democratic theory of our Declaration of Rights, the "political power" of the people which is "vested in and derives from [them]," is channeled through the proper functioning of the democratic processes of our constitutional system to the people's representatives in government. N.C. Const. art. I, § 2. Only when those democratic processes function as provided by our constitution to channel the will of the people can government be said to be "founded upon their will only." *Id.*

¶ 130 The principle of equality and the principle of popular sovereignty are the two most fundamental principles of our Declaration of Rights. N.C. Const. art. I, §§ 1–2. The principle of equality, adopted into our Declaration of Rights from the Declaration of Independence and the Gettysburg Address, provides that "all persons are created equal." N.C. Const. art. I, § 1. Meanwhile, under the principle of popular sovereignty, the "political power" of the people is channeled through the proper functioning of the democratic processes of our constitutional system to the people's representatives in government. N.C. Const. art. I, § 2. While these are two separate fundamental principles under our present constitutional system, one cannot exist without the other. Equality, being logically as well as chronologically prior, is essential to popular sovereignty. *See* Abraham Lincoln, "On Slavery and Democracy," *I Speeches and Writings*, 484 (1989) ("As I would not be a *slave*, so I would not be a *master*. This expresses my idea of democracy. Whatever differs from this, to the extent of the difference, is no democracy."); "Address at Gettysburg, Pennsylvania," *II Speeches and Writings* at 536 (connecting "the proposition that all men are created equal" to "government of the people, by the people, for the people"). Consequently, sections 1 and 2 of our Declaration of Rights, when read together, declare a commitment to a fundamental principle of democratic and political equality. The principle of political equality, from the Halifax Resolves and the Declaration of Independence to Lincoln's Gettysburg Address and the Reconstruction Convention to our Declaration of Rights

today, can mean only one thing—to be effective, the channeling of "political power" from the people to their representatives in government through the democratic processes envisioned by our constitutional system must be done on equal terms. If through state action the ruling party chokes off the channels of political change on an unequal basis, then government ceases to "derive[ ]" its power from the people or to be "founded upon their will only," and the principle of political equality that is fundamental to our Declaration of Rights and our democratic constitutional system is violated. N.C. Const. art. I, §§ 1, 2; *see Bayard*, 1 N.C. (Mart.) at 7 (recognizing this principle in holding that judicial review is needed to prevent legislators from permanently insulating themselves from popular will); *see also* John Hart Ely, *Democracy and Distrust* 103 (1980) ("In a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove we can vote them out of office. Malfunction occurs when the *process* is undeserving of trust, when [ ] the ins are choking of the channels of political change to ensure that they will stay in and the outs will stay out.").

¶ 131 In *Dickson v. Rucho*, we held a partisan gerrymandering challenge that legislative reapportionment plans violated the "Good of the Whole" clause failed because that argument "is not based upon a justiciable standard." 368 N.C. 481, 534 (2015). Of course, the judgment in *Dickson* was vacated on federal law grounds, 137 S. Ct. 2186 (2017). However, taken as a valid proposition of state law, it does not

follow that sections 1 and 2 *in toto* provide no guidance for determining the constitutionality and justiciability of partisan gerrymandering or do not aid in construing other constitutional provisions. The principle of political equality which we have articulated is a fundamental principle of our Declaration of Rights. *See* N.C. Const. art. I, § 35. Such fundamental principles guide us in part through the light they throw on other constitutional provisions. Accordingly, interpreting article I, section 2, we have held that "[t]his is a government of the people, by the people, and for the people, founded upon the will of the people, and in which the will of the people, legally expressed, must control" and reasoned that "[i]n construing [other] provisions of the constitution, we should keep in mind" this fundamental principle. *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 428–29 (1897). While plaintiffs do not contend the enacted plans constitute partisan gerrymanders in violation of article I, sections 1 and 2, the fundamental principle of political equality underpinning those sections guides our interpretation of other provisions of the Declaration of Rights.

¶ 132 Plaintiffs allege Legislative Defendants' enacted plans violate the free elections clause under section 10, the free speech clause under section 14, the freedom of assembly clause under section 12, and the equal protection clause under section 19 of the Declaration of Rights as partisan gerrymanders. Along with guidance from the fundamental principles described above, in construing these provisions in the Declaration of Rights, we are mindful that:

> It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State. Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens. We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property.

Corum, 330 N.C. at 783 (cleaned up). More broadly, "a Constitution should generally be given, not essentially a literal, narrow, or technical interpretation, but one based upon broad and liberal principles designed to ascertain the purpose and scope of its provisions." *Elliott v. Gardner*, 203 N.C. 749, 753 (1932). In interpreting these provisions, we remain mindful of our "duty to follow a reasonable, workable, and effective interpretation that maintains the people's express wishes." *Stephenson v. Bartlett*, 355 N.C. 354, 382 (2002).

1. Free Elections Clause

¶ 133 Plaintiffs first argue that partisan gerrymandering violates the free elections clause in section 10 of our Declaration of Rights. The free elections clause has no analogue in the federal Constitution and is, accordingly, a provision that makes the state constitution "more detailed and specific than the federal Constitution in the protection of the rights of its citizens." *Corum*, 330 N.C. at 783. This clause provides, in laconic terms, "[a]ll elections shall be free." N.C. Const. art. I, § 10.

¶ 134 We turn to the history of the free elections clause. *See Sneed v. Greensboro City*

Bd. of Educ., 299 N.C. 609, 613 (1980) (noting in constitutional interpretation we consider "the history of the . . . provision and its antecedents"). The free elections clause was included in the 1776 Declaration of Rights. It was modeled on a nearly identical clause in Virginia's declaration of rights. *See* Va. Const. of 1776, Declaration of Rights, § 6 (1776); Earle H. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. Hist. Rev. 215, 221 (1929). The Virginia clause was derived from a clause in the English Bill of Rights of 1689, a product of the Glorious Revolution of 1688. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. Hist. Rev. at 221. That provision provided "election of members of parliament ought to be free." Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.). This provision of the 1689 English Bill of Rights was adopted in response to the king's efforts to manipulate parliamentary elections by diluting the vote in different areas to attain "electoral advantage," leading to calls for a "free and lawful parliament" by the participants of the Glorious Revolution. J.R. Jones, *The Revolution of 1688 in England* 148 (1972); Gary S. De Krey, *Restoration and Revolution in Britain: A Political History of the Era of Charles II and the Glorious Revolution* 241, 247–48, 250 (2007). Avoiding the manipulation of districts that diluted votes for electoral gain was, accordingly, a key principle of the reforms following the Glorious Revolution.

¶ 135 North Carolina's free elections clause was enacted following the passage of similar clauses in other states, including Pennsylvania and Virginia. *See* John V.

Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1797–98 (1992). Pennsylvania's free elections clause was enacted in response to laws that manipulated elections for representatives to Pennsylvania's colonial assembly. *League of Women Voters of Pa. v. Pennsylvania*, 645 Pa. 1, 178 A.3d 737, 804 (2018). Pennsylvania's version of the free elections clause was intended to end "the dilution of the right of the people of [the] Commonwealth to select representatives to govern their affairs," *League of Women Voters of Pa.*, 645 Pa. at 108, 178 A.3d 737 at 808, and to codify an "explicit provision[ ] to establish protections of the right of the people to fair and equal representation in the governance of their affairs[,]" *id.* at 104, 178 A.3d 737 at 806.

¶ 136 Under North Carolina law, our free elections clause was also intended for that purpose. This clause was enacted with the preceding clause requiring "frequent elections," which provides that "[f]or redress of grievances and for amending and strengthening the laws, elections shall be often held." N.C. Const. art. I, § 9. Construing these provisions *in pari materia*, it follows that the "elections" which the prefatory clause of section 9 calls for must be "free" as well as "frequent." As a matter of fundamental principle, these sections "concern[ ] the application of the principle of popular sovereignty, first stated in Section 2." Orth & Newby at 55. The free elections clause, accordingly, provides "free elections" as the most fundamental democratic process by which the principle of popular sovereignty is applied, and the government

"derive[s]" its power from the people and is "founded upon their will only." N.C. Const. art. I, § 2; *see also Quinn*, 120 N.C. at 426.

¶ 137 The free elections clause reflects the principle of the Glorious Revolution that those in power shall not attain "electoral advantage" through the dilution of votes and that representative bodies—in England, parliament; here, the legislature—must be "free and lawful." De Krey, *Restoration and Revolution in Britain* at 250. Legislative Defendants argue and the trial court concluded that the free elections clause could not be read to speak on partisan gerrymandering because Patrick Henry, one of the drafters of the Virginia free elections clause on which ours was based, engaged in the practice of partisan gerrymandering "to the detriment of James Madison" at the time of that clause's drafting.

¶ 138 We are unpersuaded by this evidence. First, the framers of our constitution did not establish fixed rules preemptively attempting to address every possible contingency. Thus, Legislative Defendants' attempt to fix the meaning of these provisions by sole reference to the practices thought permissible at the time they were enacted is not only inconsistent with hundreds of years of constitutional development, but it is also inconsistent with the intent of the people as expressed in their choice to espouse broad principles rather than narrow rules. Furthermore, the framers of North Carolina's constitution repeatedly articulated their intent to make the North Carolina Constitution responsive to the broader principles of the Glorious

Revolution.[13] The framers of North Carolina's constitution, such as James Iredell, believed that the American Revolution represented the fulfillment of the same principles vindicated by England's Glorious Revolution. *See generally* Speech by James Iredell to the Edenton District Superior Court Grand Jury (May 1778), *in* 13 *Colonial and State Records of North Carolina* 434–36, *available at* https://docsouth.unc.edu/csr/index.php/document/csr13-0498. And in 1775, prior to the drafting of the state constitution, North Carolina's delegates to the Continental Congress urged North Carolina to fight British attempts to infringe "those glorious Revolution principles." Circular letter from William Hooper, Joseph Hewes, and Richard Caswell to the inhabitants of North Carolina, *in* 10 *Colonial and State Records of North Carolina* 23. Finally, North Carolina's leaders demanded the election of delegates to the Provincial Congress "be free and impartial." Minutes of the North Carolina Council of Safety (Aug. 22, 1776), *in* 10 *Colonial and State Records of North Carolina* 702. These primary sources indicate that our founders did not hold the limited view that the only requirement for an election to be a "free" election was that those qualified had access to the ballot box, although that is also within the

[13] The trial court concluded the free elections clause in our Declaration of Rights "does not operate as a restraint on the General Assembly's ability to redistrict for partisan advantage," based in part on the history of the free elections clauses in the Virginia Declaration of Rights and the English Bill of Rights. But based on the history we have recounted, the perceived unfairness of drawing of borough lines for partisan advantage was a central concern of the Glorious Revolution, and the framers of the North Carolina Declaration of Rights and Constitution in 1776 expressed a strong commitment to the principles of the Glorious Revolution, including an insistence on elections being "impartial."

ambit of the clause; rather, they adhered to the broad principles of the Glorious Revolution—that all attempts to manipulate the electoral process, especially through vote dilution on a partisan basis, as in the "rotten boroughs" of England, would be prohibited. Such a reading is consonant with section 2, which adopts the principle of popular sovereignty in order that the government be "founded upon [the people's] will only." N.C. Const. art. I, § 2.

¶ 139 Moreover, the precise wording of the free elections clause has changed over time. It originally read, "[E]lections of Members to serve as Representatives in General Assembly ought to be free." In 1868, in concert with its adoption of the equality principle in section 1, the Reconstruction Convention amended the free elections clause to read "[a]ll elections ought to be free." In 1971, the present version was adopted, changing "ought to" to the command "shall." This change was intended to "make it clear" that the free elections clause, along with other "rights secured to the people by the Declaration of Rights[,] are commands and not mere admonitions to proper conduct on the part of government." *N.C. State Bar v. DuMont*, 304 N.C. 627, 639 (1982) (quoting John L. Sanders, "The Constitutional Development of North Carolina," in *North Carolina Manual* 87, 94 (1979)). Accordingly, though those in power during the early history of our state may have viewed the free elections clause as a mere "admonition" to adhere to the principle of popular sovereignty through elections, a modern view acknowledges this is a constitutional requirement.

¶ 140 Finally, from the earliest language, the framers evidenced an intent to enshrine a broad principle of "free" elections, and this language is a direct application of the principle of popular sovereignty in section 2. *See* N.C. Const. art. 1, § 2. Since the Reconstruction Convention of 1868, it must also be textually read in concord with—and as giving effect to—the fundamental principle of equality, that "all persons are created equal," announced in section 1. *See* N.C. Const. art. 1, § 1. Therefore, even if "free" originally meant the electoral process would be available for some, at least since 1868, it must also mean that voters must not be denied voting power on an equal basis in harmony with this fundamental principle. Although our understanding of what is required to maintain free elections has evolved over time, there is no doubt these fundamental principles establish that elections are not free if voters are denied equal voting power in the democratic processes which maintain our constitutional system of government. When the legislature denies to certain voters this substantially equal voting power, including when the denial is on the basis of voters' partisan affiliation, elections are not free and do not serve to effectively ascertain the will of the people. This violates the free elections clause as interpreted against the backdrop of the fundamental principles in our Declaration of Rights. Accordingly, for an election to be free and the will of the people to be ascertained, each voter must have substantially equal voting power and the state may not diminish or dilute that voting power on a partisan basis.

¶ 141 Thus, partisan gerrymandering, through which the ruling party in the legislature manipulates the composition of the electorate to ensure that members of its party retain control, is cognizable under the free elections clause because it can prevent elections from reflecting the will of the people impartially and by diminishing or diluting voting power on the basis of partisan affiliation. Partisan gerrymandering prevents election outcomes from reflecting the will of the people and such a claim is cognizable under the free elections clause.

2. Equal Protection Clause

¶ 142 Plaintiffs also argue that partisan gerrymandering is cognizable under the equal protection clause because partisan gerrymandering may violate every individual voter's fundamental right to vote on equal terms and the fundamental right to substantially equal voting power. We agree.

¶ 143 The equal protection clause provides that "[n]o person shall be denied the equal protection of the laws." N.C. Const. art. I, § 19. This clause was added to our Declaration of Rights with the adoption of the 1971 constitution. Although the language of this provision mirrors the federal Equal Protection Clause, "[i]t is beyond dispute that this Court 'ha[s] the authority to construe [the State Constitution] differently from the construction by the United States Supreme Court of the Federal Constitution, as long as our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision.' " *Stephenson*, 355 N.C. at 381 n.6

(second alteration in original) (quoting *State v. Carter*, 322 N.C. 709, 713 (1988)). Our state constitution provides greater protection of voting rights than the federal Constitution. *Blankenship v. Bartlett*, 363 N.C. 518, 522–24 (2009); *Stephenson*, 355 N.C. at 376, 380–81, 381 n.6.

¶ 144 The equal protection clause in section 19 of our Declaration of Rights requires that if a government classification "impermissibly interferes with the exercise of a fundamental right a strict scrutiny must be given the classification." *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746 (1990).

¶ 145 We have held that under our equal protection clause, "the right to vote on equal terms is a fundamental right." *Stephenson*, 355 N.C. at 378 (quoting *Northampton*, 326 N.C. at 747). In *Stephenson*, we further held that our equal protection clause protects "the fundamental right of each North Carolinian to substantially equal voting power." 355 N.C. at 379. Under our state constitution, the fundamental right to vote in elections, which is the central democratic process in our constitutional system through which the "political power" that inheres in the people under the fundamental principles of our Declaration of Rights is channeled to the people's representatives in government, encompasses "the principles of substantially equal voting power and substantially equal legislative representation." *Id.* at 382.

¶ 146 Accordingly, our state constitution's equal protection clause in article I, section 19 provides greater protections in redistricting cases than the federal constitution. In

Stephenson, we also held that the use of single-member and multi-member districts in a redistricting plan violated our state's equal protection clause. It did so because voters in multi-member districts had a greater opportunity to influence representatives, as "those living in [multi-member] districts may call upon a contingent of responsive Senators and Representatives to press their interests, while those in a single-member district may rely upon only one Senator or Representative." *Id.* at 379. This "classification of voters" between single-member districts and multi-member districts created an "impermissible distinction among similarly situated citizens[,]" implicated "the fundamental right to vote on equal terms," *id.* at 378, and restricted the right to "substantially equal voting power and substantially equal legislative representation[,]" *id.* at 382. Accordingly, the redistricting plan triggered strict scrutiny, not because the government drew a distinction on the basis of a protected classification, but because the distinction the government drew implicated a fundamental right. *Id.* at 378. Under *Stephenson*, the fundamental right to substantially equal voting power is more expansive than any analogous fundamental right under the Equal Protection Clause of the Fourteenth Amendment, since that provision does not prohibit the use of single-member and multi-member legislative districts in one map. *See Fortson v. Dorsey*, 379 U.S. 433, 437 (1965) (holding that the use of multi-member and single-member districts in the same legislative map did not violate the Equal Protection Clause where there was "no mathematical disparity"

between voters).

¶ 147 Furthermore, the equal protection clause in article I, section 19 applies in circumstances where the federal Equal Protection Clause is silent. In *Blankenship v. Bartlett*, we held that our state's equal protection clause "requires a heightened level of scrutiny of judicial election districts," because it implicates the fundamental "right to vote on equal terms in representative elections," although federal courts have held the one-person, one-vote standard of the federal Equal Protection Clause is inapplicable to state judicial elections. *Blankenship*, 363 N.C. at 522–23 (citing *Chisom v. Roemer*, 501 U.S. 380 (1991)).

¶ 148 We hold here that partisan gerrymandering claims are cognizable under the equal protection clause of our Declaration of Rights. "[T]he fundamental right to vote on equal terms[,]" *Stephenson*, 355 N.C. at 378, includes the right to "substantially equal voting power and substantially equal legislative representation[,]" *id.* at 382. This necessarily encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views. Designing districts in a way that denies voters substantially equal voting power by diminishing or diluting their votes on the basis of party affiliation deprives voters in the disfavored party of the opportunity to aggregate their votes to elect such a governing majority. Like the distinctions at issue in *Stephenson*, drawing distinctions between voters on the basis of partisanship when allocating voting power

diminishes the "representational influence" of voters. *Id.* at 377. Except, in the case of partisan gerrymandering, the effect on the representational influence is more severe because those who have been deprived equal voting power lack the same opportunity as those from the favored party to elect a governing majority, even when they vote in numbers that would garner voters of the favored party a governing majority. Accordingly, those voters have far fewer legislators who are "responsive" to their concerns and who can together "press their interests." *Id.* at 379.

¶ 149 Our reading of the equal protection clause is most consistent with the fundamental principles in our Declaration of Rights of equality and popular sovereignty—together, political equality. *See* N.C. Const. art. I, §§ 1, 2. Popular sovereignty requires that for a government to be "of right" it must be "founded upon [the people's] will only." N.C. Const. art. I, § 2. In a statewide election, ascertaining the will of the people is straightforward. But in legislative elections, voters only have equal "representational influence" if results fairly reflect the will of the people not only district by district, but in aggregate, and on equal terms. *See Stephenson*, 355 N.C. at 377 (examining the effect of single-member and multi-member districts across the state). Otherwise, the "will" on which the government "is founded" is not that of the people of this state but that of the ruling party.

¶ 150 We conclude that when on the basis of partisanship the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate

with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size—the General Assembly unconstitutionally infringes upon that voter's fundamental rights to vote on equal terms and to substantially equal voting power. Classifying voters on the basis of partisan affiliation so as to dilute their votes in this manner is subject to strict scrutiny because it burdens a fundamental right and is presumed unconstitutional unless narrowly tailored to a compelling governmental interest. *See Northampton*, 326 N.C. at 746 ("[I]f a classification impermissibly interferes with the exercise of a fundamental right a strict scrutiny must be given the classification. Under the strict scrutiny test the government must demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest.").

3. Free Speech Clause and Freedom of Assembly Clause

¶ 151 Finally, plaintiffs argue that partisan gerrymandering is cognizable under the free speech clause under section 14 and the freedom of assembly clause under section 12 of our Declaration of Rights. We agree.

¶ 152 Our free speech clause provides that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained." N.C. Const. art. I, § 14. Our freedom of assembly clause provides, in pertinent part, that "[t]he people have a right to assemble together to consult for their common good, to

instruct their representatives, and to apply to the General Assembly for redress of grievances." *Id.* § 12. These provisions textually differ from their federal analogues, and we have construed them to provide greater protection than those provisions.

¶ 153 In *Corum*, this Court construed the free speech clause in our Declaration of Rights. 330 N.C. at 781. The plaintiff alleged "retaliation against plaintiff for his exercise of certain free speech rights." *Id.* at 766. He brought a claim for, *inter alia*, a direct cause of action under article I, section 14 of the state constitution. *Id.* We reasoned that "[t]he words 'shall never be restrained' are a direct personal guarantee of each citizen's right of freedom of speech[,]" *id.* at 781; that this provision "is self-executing[,]" *id.* at 782; and, accordingly, "the common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right[,]" *id.* We observed concerning the free speech clause that

> [t]his great bulwark of liberty is one of the fundamental cornerstones of individual liberty and one of the great ordinances of our Constitution. Freedom of speech is equal, if not paramount, to the individual right of entitlement to just compensation for the taking of property by the State. Certainly, the right of free speech should be protected at least to the extent that individual rights to possession and use of property are protected. A direct action against the State for its violations of free speech is essential to the preservation of free speech.

Id. (cleaned up). Under the Court's decision in *Corum*, government action that burdens people because of disfavored speech or association violates the free speech clause. *Id.* at 766. The retaliation in *Corum* involved the allegation that government

actors conditioned the plaintiff's public employment (in that case, through demotion) on limitations upon the plaintiff's free speech and expression. *See id.* at 776. In essence, by allegedly conditioning a public right or benefit (the plaintiff's employment) on speech, the government accomplished indirectly what it could not have accomplished directly, and it penalized plaintiff's protected free speech rights based on his views.

¶ 154 In recognizing a direct cause of action for plaintiff's retaliation claim under the free speech clause, we construed the clause more expansively than the Supreme Court of the United States has construed the Free Speech Clause of the First Amendment, since that Court has not recognized a comparable direct constitutional claim under that provision for retaliation. Even when federal free speech principles are persuasive, we reserve the right to extend the reach of our free speech clause beyond the scope of the First Amendment. *See Libertarian Party v. State*, 365 N.C. 41, 47 (2011).

¶ 155 Free speech and freedom of assembly rights are essential to the preservation of our constitutional system. We have held that the "associational rights rooted in the free speech and assembly clauses" are "of utmost importance to our democratic system." *Libertarian Party*, 365 N.C. at 49. In *Libertarian Party*, we reasoned that "citizens form parties to express their political beliefs and to assist others in casting votes in alignment with those beliefs." *Id.* at 49.

¶ 156 The role of free speech is also central in our democratic system. As one scholar has noted:

> Once one accepts the premise of the Declaration of Independence—that governments derive 'their just powers from the consent of the governed'—it follows that the governed must, in order to exercise their right of consent, have full freedom of expression both in forming individual judgments and in forming the common judgment.

Thomas I. Emerson, *The System of Freedom of Expression* 7 (1970). Since 1776, the people of North Carolina have founded our constitutional system on the premise that "[a]ll political power is vested in and derived from the people" and that "government of right" must "originate[ ] from the people" and be "founded upon their will only." N.C. Const. art. I, § 2. Since 1868, they have recognized that "all persons are created equal." N.C. Const. art. I, § 1. And since 1971, they have recognized that "[f]reedom of speech" is one "of the great bulwarks of liberty" and therefore "shall never be restrained." N.C. Const. art. I, § 14.

¶ 157 Partisan gerrymandering violates the freedoms of speech and association and undermines their role in our democratic system. In *Corum*, we recognized that under the free speech clause, state officials may not penalize people for the exercise of their protected rights. But partisan gerrymandering does just that. When legislators apportion district lines in a way that dilutes the influence of certain voters based on their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here the fundamental right to equal voting

power on the basis of their views. When the General Assembly systematically diminishes or dilutes the power of votes on the basis of party affiliation, it intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny. *See State v. Petersilie*, 334 N.C. 169, 182 (1993). This practice subjects certain voters to disfavored status based on their views, undermines the role of free speech and association in formation of the common judgment, and distorts the expression of the people's will and the channeling of the political power derived from them to their representatives in government based on viewpoint.

4. The Declaration of Rights and the Law of Partisan Gerrymandering Summarized

¶ 158 In summary, the two most fundamental principles of our Declaration of Rights are equality and popular sovereignty. N.C. Const. art. I, §§ 1, 2. Together, they reflect the democratic theory of our constitutional system: the principle of political equality. The principle of political equality, from the Halifax Resolves and the Declaration of Independence to Lincoln's Gettysburg Address and the Reconstruction Convention to our Declaration of Rights today, can mean only one thing—to be effective, the channeling of "political power" from the people to their representatives in government through the democratic processes envisioned by our constitutional system must be done on equal terms. If through state action the ruling party chokes off the channels of political change on an unequal basis, then government ceases to "derive[ ]" its power from the people or to be "founded upon their will only," and the principle of

political equality that is fundamental to our Declaration of Rights and our constitutionally enacted representative system of government is violated.

¶ 159 This principle is reflected in various provisions of our Declaration of Rights. The free elections clause under section 10 guarantees the central democratic process by which the people's political power is transferred to their representatives. The equal protection clause prohibits government from burdening on the basis of partisan affiliation the fundamental right to equal voting power. And the free speech clause and the freedom of assembly clause prohibit discriminating against certain voters by depriving them of substantially equal voting power, which is a form of impermissible viewpoint discrimination and retaliation for engaging in protected political activity.

¶ 160 Partisan gerrymandering of legislative and congressional districts violates the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause, and the principle of democratic and political equality that reflects the spirits and intent of our Declaration of Rights. To comply with the constitutional limitations contained in the Declaration of Rights which are applicable to redistricting plans, the General Assembly must not diminish or dilute on the basis of partisan affiliation any individual's vote. The fundamental right to vote includes the right to enjoy "substantially equal voting power and substantially equal legislative representation." *Stephenson*, 355 N.C. at 382. The right to equal voting power encompasses the opportunity to aggregate one's vote with likeminded citizens

to elect a governing majority of elected officials who reflect those citizens' views. When, on the basis of partisanship, the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for individuals because of their party affiliation to elect a governing majority than individuals in a favored party of equal size—the General Assembly deprives on the basis of partisan affiliation a voter of his or her right to equal voting power.

¶ 161 This diminution or dilution of a voter's voting power on the basis of his or her views can be measured either by comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect, or by comparing the relative chances of voters from each party electing a supermajority or majority of representatives under various possible electoral conditions. Similarly, the diminution or dilution of voting power based of partisan affiliation in this way suffices to show a burden on that voter's speech and associational rights. Accordingly, such a plan is subject to strict scrutiny and is unconstitutional unless the General Assembly can demonstrate that the plan is "narrowly tailored to advance a compelling governmental interest." *Stephenso*n, 355 N.C. at 377. Achieving partisan advantage incommensurate with a political party's level of statewide voter support is neither a compelling nor a legitimate governmental

interest, as it in no way serves the government's interest in maintaining the democratic processes which function to channel the people's will into a representative government as secured in the above provisions in the Declaration of Rights.

¶ 162 Here, the partisan gerrymandering violation is based on the redistricting plan as a whole, not a finding with regard to any individual district.[14] Certainly it is possible, as the plaintiffs and the trial court demonstrated, to identify which individual districts in the state legislative maps ignore traditional redistricting principles to achieve a partisan outcome that otherwise would not occur. It is possible to identify the most gerrymandered individual districts. But here the violation is statewide because of the evidence that on the whole, the districts have been drawn such that voters supporting one political party have their votes systematically devalued by having less opportunity to elect representatives to seats, compared to an equal number of voters in the favored party. The effect is stark and even more severe than what this Court identified in *Stephenson* as the equal protection clause violation arising from the use of both single-member and multi-member districts in a redistricting plan. *See Stephenson*, 355 N.C. at 379–82.

¶ 163 We do not believe it prudent or necessary to, at this time, identify an exhaustive set of metrics or precise mathematical thresholds which conclusively

[14] This is not to rule out the possibility that under an equal protection theory or a free speech theory there may be a circumstance where a single district is a partisan gerrymander but that is not the situation here.

demonstrate or disprove the existence of an unconstitutional partisan gerrymander. *Cf. Reynolds v. Sims*, 377 U.S. 533, 578 (1964) ("What is marginally permissible in one [case] may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of . . . apportionment."). As in *Reynolds*, "[l]ower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation." *Id.* However, as the trial court's findings of fact indicate, there are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander. In particular, mean-median difference analysis; efficiency gap analysis; close-votes, close-seats analysis; and partisan symmetry analysis may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew necessarily results from North Carolina's unique political geography.[15] If some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across

[15] Further, while adherence to neutral districting criteria primarily goes to whether the map is justified by a compelling governmental interest, the disregarding of neutral criteria such as compactness, contiguity, and respect for political subdivisions, particularly when the effect of the map subordinates those criteria to pursuit of partisan advantage, may also be some evidence a map burdens the fundamental right to equal voting power.

the plan, then the plan is presumptively constitutional.

¶ 164 To be sure, the evidence in this case and in prior partisan gerrymandering cases provides ample guidance as to possible bright-line standards that could be used to distinguish presumptively constitutional redistricting plans from partisan gerrymanders. There is such a thing as a plan that creates a level playing field for all voters. Indeed, historically, there is evidence indicating that most redistricting plans actually have provided for partisan fairness instead of partisan advantage. *See, e.g., Common Cause v. Rucho*, 318 F. Supp. 3d 777, 886–87 (M.D.N.C. 2018), *rev'd on other grounds* 139 S. Ct. 2484 (2019) (finding that North Carolina's efficiency gap of 19.4% was the largest of all states studied and that between 1972 and 2016, the distribution of efficiency gaps centered on zero "meaning that, on average, the districting plans in [t]his sample did not tend to favor either party"). Those who deny such standards exist ignore what the public sees and experiences and what political scientists have demonstrated.

¶ 165 Several possible bright-line standards have emerged in the political science literature and in the parties' briefing before this Court. For example, Dr. Duchin testified at the trial to having analyzed North Carolina historical election data over a period of years, by using a simple overlay method, overlaying the maps onto data from all 52 of the statewide elections since 2012 to determine whether "close votes" resulted in "close seats," as one would see in all of the alternative maps to the enacted

plans. Under this method, which Dr. Duchin has written about extensively, a plan which persistently resulted in the same level of partisan advantage to one party when the vote was closer than 52%, could be considered presumptively unconstitutional. As Dr. Duchin noted, "I don't think you get that large and durable [an effect of partisan skew] by accident."

¶ 166 Second, at the trial court below, Dr. Daniel Magleby presented a report in rebuttal of the testimony of Dr. Barber, in which he proposed using the measurement of the mean-median difference to determine the degree of partisan skew in a particular instance. His report described the method as follows:

> One of the simplest measures of symmetry we can apply to redistricting scenarios is the median-mean difference (see Katz, King and Rosenblatt 2020; MacDonald and Best 2015; Best et al. 2017) . . . We find [the median-mean difference] by taking the mean (average) of the district-level vote share and comparing it to the median district-level vote-share, the district-level vote share for which there are an equal number of districts with higher vote shares as there are districts with lower vote shares. When the median and mean are equal, the distribution of districts is symmetrical and the map will treat the parties with symmetry. If the median-mean is not zero, it means the map will not treat vote cast for the parties equally.

Thus, based on Dr. Magelby's testimony, any mean-median difference that is not zero could be treated as presumptively unconstitutional. However, using the actual mean-median difference measure, from 1972 to 2016 the average mean-median difference in North Carolina's congressional redistricting plans was 1%. *Common Cause*, 318 F.

Supp. 3d at 893. That measure instead could be a threshold standard such that any plan with a mean-median difference of 1% or less when analyzed using a representative sample of past elections is presumptively constitutional.

¶ 167 With regard to the efficiency gap measure, courts have found "that an efficiency gap above 7% in any districting plan's first election year will continue to favor that party for the life of the plan." *Whitford v. Gill,* 218 F. Supp. 3d 837, 905 (W.D. Wis. 2016) *rev'd on other grounds* 138 S. Ct. 1916 (2018). It is entirely workable to consider the seven percent efficiency gap threshold as a presumption of constitutionality, such that absent other evidence, any plan falling within that limit is presumptively constitutional. The efficiency gap, like other measures of partisan symmetry, "is not premised on strict proportional representation, but rather on the notion that the magnitude of the winner's bonus should be approximately the same for both parties." *Common Cause*, 318 F. Supp. 3d at 889.

¶ 168 Other manageable standards appear in the evidence before the trial court as well. Legislative Defendants' own expert witness proposed using computer simulations to draw redistricting plans solely on the basis of traditional redistricting criteria, with any adopted redistricting plan with a partisan bias that fell within the middle 50% of simulation results being presumptively constitutional. It was also suggested that the legislature could be required to draw districts "within 5% of the median outcome expected from nonpartisan redistricting criteria, at a statewide

level, across a range of electoral circumstances." The development of such metrics in this and future cases is precisely the kind of reasoned elaboration of increasingly precise standards the United States Supreme Court utilized in the one-person, one-vote context. *See, e.g., Brown v. Thomson,* 462 U.S. 835, 842–43 (1983) ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State." (citations omitted)).

¶ 169 There may be other standards the parties wish to suggest to the trial court. These are primarily questions of what evidence might be relevant to prove a redistricting plan's discriminatory effect under the free elections and equal protection clauses and a discriminatory burden to a right or benefit on the basis of protected political activity amounting to viewpoint discrimination and retaliation under the free speech and freedom of assembly clauses of the state constitution. Because this is not a strict proportionality requirement, there is no magic number of Democratic or Republican districts that is required, nor is there any constitutional requirement that a particular district be competitive or safe. To be clear, the fact that one party commands fifty-nine percent of the statewide vote share in a given election does not entitle the voters of that party to have representatives of its party comprise fifty-nine percent of the North Carolina House, North Carolina Senate, or North Carolina

congressional delegation. But those voters are entitled to have substantially the same opportunity to electing a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised fifty-nine percent of the statewide vote share in that same election. What matters here, as in the one-person, one-vote context, is that each voter's vote carries roughly the same weight when drawing a redistricting plan that translates votes into seats in a legislative body.

¶ 170 Once a plaintiff shows that a map infringes on their fundamental right to equal voting power under the free elections clause and equal protection clause or that it imposes a burden on that right based on their views such that it is a form of viewpoint discrimination and retaliation based on protected political activity under the free speech clause and the freedom of assembly clause, the map is subject to strict scrutiny and is presumptively unconstitutional and "the government must demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest." *Northampton*, 326 N.C. at 746. As noted above, partisan advantage—that is, achieving a political party's advantage across a map incommensurate with its level of statewide voter support—is neither a compelling nor a legitimate governmental interest, as it in no way serves the government's interest in maintaining the democratic processes which function to channel the people's will into a representative

government.[16] Rather, compelling governmental interests in the redistricting context include the traditional neutral districting criteria expressed in article II, sections 3 and 5 of the North Carolina Constitution. Incumbency protection may ordinarily be a permissible governmental interest if it is applied evenhandedly, is not perpetuating a prior unconstitutional redistricting plan, and is consistent with the equal voting power requirements of the state constitution; however, incumbency protection is not a compelling governmental interest that justifies the denial to a voter of the fundamental right to substantially equal voting power under the North Carolina Constitution. Other widely recognized traditional neutral redistricting criteria, such as compactness of districts and respect for other political subdivisions, may also be compelling governmental interests. If the General Assembly has created a map that infringes on individual voter's fundamental right to equal voting power and cannot show that the map is narrowly tailored to a compelling governmental interest, courts must conclude the map is unconstitutional and forbid its use.

¶ 171 The dissent contends that the partisan gerrymandering claims we recognize as violating both fundamental principles and particular provisions of our Declaration of Rights are not cognizable claims under that document. Our fundamental

[16] Political fairness, or the effort to apportion to each political party a share of seats commensurate with its level of statewide support, is a permissible redistricting criterion. *See Gaffney*, 412 U.S. at 736. However, achieving such a goal involves a government's prioritization of, rather than diminution and dilution of, each person's right to substantially equal voting power.

disagreement stems in one respect from a difference in method. Here, we have "recurre[d]" to those "fundamental principles" by which "[a]ll generations are solemnly enjoined 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." Orth & Newby, at 91. In this light, the dissenters insist that the only way to discern the meaning of provisions of the North Carolina Constitution is to adhere to their own assessment of historical practice. In so doing, they interpret the state constitution in a manner the Framers and the constitution they enacted firmly rejected. If constitutional provisions forbid only what they were understood to forbid at the time they were enacted, then the free elections clause has nothing to say about slavery and the complete disenfranchisement of women and minorities. In short, the majority's view compels the conclusion that there is no constitutional bar to denying the right to vote to women and black people. Fortunately, the Framers and the people of North Carolina chose to adopt a constitution containing provisions which "provide[s] the elasticity which ensures the responsive operation of government." *State ex rel. Martin v. Preston*, 325 N.C. 438, 458 (1989).

¶ 172 Second, our disagreement with the dissenting opinion is compelled in part by our divergent views of the role of the courts in conducting judicial review for constitutionality. The justification for judicial review in North Carolina is motivated

by the concern for securing both the fundamental rights contained in our Declaration of Rights and our constitution, and for ensuring the effective functioning of the democratic system of government established by the same. In North Carolina, we presume the legislature has complied with the constitution. Where legislation does not violate a particular constitutional limitation, and particularly where it does not violate the rights protected by the Declaration of Rights, the presumption that the issue will be resolved through the ordinary political process is justified, and legislation will be upheld if there is a rational basis supporting it. However, in *Bayard v. Singleton* and since, we have identified two circumstances justifying judicial review by this Court. First, we will protect constitutional rights and, although they are by no means the only enforceable provisions of our constitution, the "civil rights guaranteed by the Declaration of Rights in Article I of our Constitution," in particular. *Corum*, 330 N.C. at 782. "The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State," including the General Assembly. *Id.* at 783. Accordingly, "[w]e give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property." *Id.* Fundamentally, "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of [its people]; this obligation

to protect the fundamental rights of individuals is as old as the State." *Id.* Indeed, we have recognized this duty since *Bayard*, where we held that legislation violated the right to a trial by jury. 1 N.C. (Mart.) at 7. *Bayard* justified review of all such rights on the ground that any erosion of rights endangered other rights. *See id.* (justifying review of "right to a decision of his property by a trial by jury" on the grounds that "if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all").

¶ 173 Further this court has recognized an even greater justification for judicial review of acts that restrict the democratic processes through which the "political power" is channeled to the people's representatives, and which undermine the very democratic system created by our constitution. In *Bayard*, this Court justified judicial review of acts of the coordinate branches not only because without it they might violate fundamental rights, but also on the grounds of an even greater harm that without judicial review "the members of the General Assembly . . . might with equal authority, . . . render themselves the Legislators of the State for life, without any further election of the people." *Id.* Just as it is the duty of this Court under *Bayard* to guarantee constitutional rights protecting liberty, person, and property, it is the duty of this Court under *Bayard* to protect the democratic processes through which the

"political power" of the people is exercised, and that each person's voice is heard on "equal" terms through the vote. N.C. Const. art. I, §§ 2, 1; *see, e.g., Stephenson* 355 N.C. at 379 (recognizing "the fundamental right of each North Carolinian to substantially equal voting power"); *Northampton*, 326 N.C. at 747 (holding the "right to vote on equal terms is a fundamental right"); *People ex rel. Van Bokkelen,* 73 N.C. at 225 (holding it to be "too plain for argument" that the General Assembly's malapportionment of election districts "is a plain violation of fundamental principles"); Ely, *Democracy and Distrust* at 103 ("Malfunction occurs when the *process* is undeserving of trust, when [ ] the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out.").

¶ 174 Partisan gerrymandering claims do not require the making of "policy choices and value determinations." *Bacon*, 353 N.C. at 717. As we have discussed, such claims are discernable under the North Carolina Constitution and precedent. Moreover, we have described several manageable standards for evaluating the extent to which districting plans dilute votes on the basis of partisan affiliation. Accordingly, we hold partisan gerrymandering claims are justiciable in North Carolina courts under the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of the Declaration of Rights.

E. Legislative Defendants' Elections Clause Argument

¶ 175 Legislative Defendants also argue that "the federal constitution bars

plaintiffs['] claims against the congressional plan" under the Elections Clause, U.S. Const. art. I, § 4, cl. 1, because the word "Legislature" in that clause forbids state courts from reviewing a congressional districting plan violates the state's own constitution. We disagree. This argument, which was not presented at the trial court, is inconsistent with nearly a century of precedent of the Supreme Court of the United States affirmed as recently as 2015. It is also repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts, and would produce absurd and dangerous consequences.

¶ 176 First, this theory contradicts the holding of *Rucho*, where the Supreme Court of the United States, in an opinion authored by Chief Justice Roberts, said that "[p]rovisions in . . . *state constitutions* can provide standards and guidance for *state courts* to apply" in a case addressing the justiciability of partisan gerrymandering claims in *congressional* plans. 139 S. Ct. at 2507 (emphases added).

¶ 177 Second, a long line of decisions by the Supreme Court of the United States confirm the view that state courts may review state laws governing federal elections to determine whether they comply with the state constitution. *See Smiley v. Holm*, 285 U.S. 355, 368 (1932) (holding the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the *Constitution of the state* has provided" (emphasis added)). The state legislature's enactment of election laws reflects an exercise of the lawmaking power;

accordingly, the legislature must comply with all of "the conditions which attach to the making of state laws," *id.* at 365, including "restriction[s] imposed by state Constitutions upon state Legislatures when exercising the lawmaking power," *id.* at 369; *see also Ariz. State Leg. v. Ariz. State Indep. Redistricting Comm'n*, 576 U.S. 787, 817–18 (2015) ("Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution."); *Growe v. Emison*, 507 U.S. 25, 33–34 (1993) (emphasizing "[t]he power of the judiciary of a State to require valid reapportionment" of congressional districts and rejecting the federal district court's "mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts").

F. The 2021 Enacted Plans Violate the Declaration of Rights as Partisan Gerrymanders

¶ 178 Now, we must apply these legal principles to the 2021 enacted plans in order to determine if the current maps constitute partisan gerrymanders in violation of the North Carolina Constitution's Declaration of Rights. We conclude that they do and therefore enjoin the enacted plans from use in any future elections and, in accordance with N.C.G.S. § 120-2.4(a), provide the General Assembly the opportunity to submit new redistricting plans that satisfy all provisions of the North Carolina Constitution.

¶ 179 As discussed above, the General Assembly triggers strict scrutiny under the free elections clause and the equal protection clause of the North Carolina

Constitution when, on the basis of partisan affiliation, it deprives a voter of his or her fundamental right to substantially equal voting power. This fundamental right encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views. When on the basis of partisanship the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size—the General Assembly infringes upon that voter's fundamental right to vote. Similarly, this action is subject to strict scrutiny under the free speech clause and freedom of assembly clause because it burdens voters on the basis of protected political activity.

¶ 180 To trigger strict scrutiny, a party alleging that a redistricting plan violates this fundamental right must demonstrate that the plan makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters, thus diminishing or diluting the power of that person's vote on the basis of his or her views. Such a demonstration can be made using a variety of direct and circumstantial evidence, including but not limited to: median-mean difference analysis; efficiency gap analysis; close-votes-close seats analysis, partisan symmetry analysis; comparing the number of representatives that a group of voters of one partisan affiliation can

plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect; and comparing the relative chances of groups of voters of equal size who support each party of electing a supermajority or majority of representatives under various possible electoral conditions. Evidence that traditional neutral redistricting criteria were subordinated to considerations of partisan advantage may be particularly salient in demonstrating an infringement of this right.

¶ 181 The right to vote on equal terms is a fundamental right in this state and thus when a challenging party demonstrates that a redistricting plan, on the basis of partisan affiliation, infringes upon his or her fundamental right to substantially equal voting power, strict scrutiny is the appropriate standard for reviewing that act. *See Stephenson*, 355 N.C. at 377 ("Strict scrutiny . . . applies when the classification impermissibly interferes with the exercise of a fundamental right . . . ." (cleaned up)). Strict scrutiny is "this Court's highest tier of review." *Id*. "Under strict scrutiny, a challenged governmental action is unconstitutional if the State cannot establish that it is narrowly tailored to advance a compelling governmental interest." *Id*. Within the redistricting context, compliance with traditional neutral districting principles, including those enumerated in article II, sections 3 and 5 of the North Carolina Constitution, may constitute a compelling governmental interest. Partisan advantage, however, is not a compelling governmental interest.

¶ 182 Here, we apply this standard to each of the three 2021 enacted maps: the congressional map, the North Carolina House map, and the North Carolina Senate map. As noted previously, we have adopted in full the extensive and detailed factual findings of the trial court summarized above and have attached the maps themselves to this opinion.

1. Congressional Map

¶ 183 First, we apply this constitutional standard to the 2021 congressional map. Based on the trial court's factual findings, we conclude that the 2021 congressional map constitutes partisan gerrymandering that, on the basis of partisan affiliation, violates plaintiffs' fundamental right to substantially equal voting power.

¶ 184 Numerous factual findings compel this conclusion. For instance, based on Dr. Mattingly's ensemble analysis, the trial court found "that the Congressional Map is the product of intentional, pro-Republican partisan redistricting. Indeed, the court found that

> [a]cross [the] 80,000 simulated nonpartisan plans, not a single one had the same or more Democratic voters packed into the three most Democratic districts—*i.e.*, the districts Democrats would win no matter what—in comparison to the enacted plan. And not a single one had the same or more Republican voters in the next seven districts—i.e., the competitive districts—in comparison to the enacted plan.

¶ 185 Accordingly, the court found that "[t]he Congressional map is 'an extreme outlier' that is 'highly non-responsive to the changing opinion of the electorate.' " The

court found that this high non-responsiveness was a product of "cracking Democrats from the more competitive districts and packing them into the most heavily Republican and heavily Democratic districts," which the court described as "the key signature of intentional partisan redistricting."

¶ 186 Based on Dr. Cooper's analysis, the court observed that "[a]lthough North Carolina gained an additional congressional seat as a result of population growth that came largely from the Democratic-leaning Triangle (Raleigh-Durham-Chapel Hill) and the Charlotte metropolitan areas, the number of anticipated Democratic seats under the enacted map actually decreases, with only three anticipated Democratic seats, compared with the five seats that Democrats won in the 2020 election." This decrease, the court observed, is enacted "by splitting the Democratic-leaning counties of Guilford, Mecklenburg, and Wake among three congressional districts each." The court further noted that "[t]here was no population-based reason" for these splits.

¶ 187 Based on Dr. Pegden's analysis, the court found "that the enacted congressional plan is more favorable to Republicans than 99.9999% of the [billions or trillions of] comparison maps his algorithm generated." Accordingly, the court determined that "the enacted congressional map is more carefully crafted to favor Republicans than at least 99.9999% of all possible maps of North Carolina satisfying the nonpartisan constraints imposed in [Dr. Pegden's] algorithm."

¶ 188 Based on Dr. Duchin's analysis, the trial court found "that the political

geography of North Carolina today does not lead only to a district map with partisan advantage given to one political party." Rather, the court determined, "[t]he Enacted Plans behave as though they are built to resiliently safeguard electoral advantage for Republican candidates."

¶ 189 Based on Dr. Cooper's close-votes-close-seats analysis, the trial court found that individual congressional districts were drawn to favor certain current or future Republican representatives. For instance, the court found that the congressional map "places the residences of an incumbent Republican representative and an incumbent Democratic representative within a new, overwhelmingly Republican district, NC-11, 'virtually guaranteeing' that the Democratic incumbent will lose her seat." Similarly, the court observed that "[t]he 2021 Congressional Plan includes one district where no incumbent congressional representative resides . . . [which] 'overwhelmingly favors' the Republican candidate based on the district's partisan lean."

¶ 190 The trial court found that the congressional map constituted a statistical partisan outlier on the regional level, as well. Specifically, the court found that "that the enacted congressional plan[s] districts in each region examined exhibit[ed] political bias when compared to the computer-simulated districts in the same regions."

¶ 191 More broadly, though, the trial court found that "[t]he congressional district map is best understood as a single organism given that the boundaries drawn for a

particular congressional district in one part of the state will necessarily affect the boundaries drawn for the districts elsewhere in the state." Accordingly, the court found "that the 'cracking and packing' of Democratic voters in [larger urban] counties has 'ripple effects throughout the map.' "

¶ 192 The trial court considered several different types of statistical analysis in confirming that the "extreme partisan outcome" of the congressional map that "cannot be explained by North Carolina's political geography or by adherence to Adopted Criteria." These included: (1) "mean-median difference" analysis; (2) "efficiency gap" analysis; (3) "the lopsided margins test"; and (4) "partisan symmetry" analysis.

¶ 193 In sum, the trial court found "that the 2021 Congressional Plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation." The court found that the enacted congressional map "fails to follow and subordinates the Adopted Criteria's requirement[s]" regarding splitting counties and VTDs. Further, the court found "that the enacted congressional plan fails to follow, and subordinates, the Adopted Criteria's requirement to draw compact districts. The [c]ourt [found] that the enacted congressional districts are less compact than they would be under a map-drawing process that adhered to the Adopted Criteria and prioritized the traditional districting criteria of compactness." Ultimately, the court "concluded based upon a

careful review of all the evidence that the [congressional map is] a result of intentional, pro-Republican partisan redistricting."

¶ 194 Based on these findings and numerous others, it is abundantly clear and we so conclude that the 2021 congressional map substantially diminishes and dilutes on the basis of partisan affiliation plaintiffs' fundamental right to equal voting power, as established by the free elections clause and the equal protection clause, and constitutes viewpoint discrimination and retaliation burdening the exercise of rights guaranteed by the free speech clause and the freedom of assembly clause of the North Carolina Constitution. The General Assembly has substantially diminished the voting power of voters affiliated with one party on the basis of partisanship—indeed, in this case, the General Assembly has done so intentionally. Accordingly, we must review the congressional map under strict scrutiny.

¶ 195 Defendants have not shown the 2021 congressional map is narrowly tailored to a compelling governmental interest, and therefore the map fails strict scrutiny. As noted above, partisan advantage is neither a compelling nor a legitimate governmental interest. Rather, given an infringement of plaintiffs' fundamental right to substantially equal voting power, the General Assembly must show that the map is narrowly tailored to meet traditional neutral districting criteria, including those expressed in article II, sections 3 and 5 of the North Carolina Constitution, those expressed in the General Assembly's own Adopted Criteria, or other articulable

neutral principles. Here, the General Assembly has failed to make that showing. Indeed, the trial court explicitly found that the congressional maps demonstrate a *subordination* of traditional neutral criteria, including compactness and minimizing county and VTD splits, in favor of partisan advantage. We conclude that the General Assembly has not demonstrated that the congressional map, *despite* its extreme partisan bias, is nevertheless carefully calibrated toward advancing some compelling neutral priority. Accordingly, the congressional map fails strict scrutiny and must be rejected.

2. State House Map

¶ 196 Next, we apply this constitutional standard to the 2021 North Carolina State House map. Based on the trial court's factual findings, we conclude that the 2021 State House map constitutes partisan gerrymandering that, on the basis of partisan affiliation, violates plaintiffs' fundamental right to substantially equal voting power.

¶ 197 Numerous factual findings compel this conclusion. For instance, based on Dr. Mattingly's ensemble analysis, the trial court found that

> [t]he North Carolina House maps show that they are the product of an intentional, pro-Republican partisan redistricting over a wide range of potential election scenarios. Elections that under typical maps would produce a Democratic majority in the North Carolina House give Republicans a majority under the enacted maps. Likewise, maps that would normally produce a Republican majority under nonpartisan maps produce a Republican supermajority under the enacted maps. Among every possible election that Dr. Mattingly analyzed, the

> partisan results were more extreme than what would be seen from nonpartisan maps.

¶ 198 Indeed, the court found that "the enacted plan shows a systematic bias toward the Republican party, favoring Republicans in every single one of the 16 elections [Dr. Mattingly] considered." The court determined that the state House "map is also especially anomalous under elections where a non-partisan map would almost always give Democrats the majority in the House because the enacted map denied Democrats that majority. The probability that this partisan bias arose by chance, without an intentional effort by the General Assembly, is 'astronomically small.' " Further, the court found that the mapmakers' selective failure to preserve municipalities in the House map, when they did preserve them in the Senate map, was based solely on considerations of partisan advantage.

¶ 199 Based on Dr. Pegden's analysis, the court found that "the enacted House map was more favorable to Republicans than 99.99999% of the comparison maps generated by his algorithm making small random changes to the district boundaries." Accordingly, the court found "that the enacted map is more carefully crafted for Republican partisan advantage than at least 99.9999% of all possible maps of North Carolina satisfying [the nonpartisan] constraints."

¶ 200 Based on Dr. Cooper's analysis, the trial court found that "Legislative Defendants' exercise of . . . discretion in the . . . House 2021 Plans resulted in . . . House district boundaries that enhanced the Republican candidates' partisan

advantage, and this finding is consistent with a finding of partisan intent."

¶ 201 Based on Dr. Duchin's close-votes-close-seats analysis, the court found that the House map is "designed to systematically prevent Democrats from gaining a tie or a majority in the House. In close elections, the Enacted House Plan always gives Republicans a substantial House majority. That Republican majority is resilient and persists even when voters clearly express a preference for Democratic candidates." "As with the Enacted Congressional Plan . . . , the [c]ourt [found] that the Enacted House Plan achieves this resilient pro-Republican bias by the familiar mechanisms of packing and cracking Democratic voters . . . ."

¶ 202 Based on Dr. Magleby's median-mean differential analysis, the trial court found "that the level of partisan bias in seats in the House maps went far beyond expected based on the neutral political geography of North Carolina." Specifically, the court determined "that the median-mean bias in the enacted maps was far more extreme than expected in nonpartisan maps." In fact, the court found, "[n]o randomly generated map had such an extreme median-mean share—meaning that . . . no simulated map . . . was as extreme and durable in terms of partisan advantage."

¶ 203 Finally, based on all of the evidence presented, the trial court found that the following North Carolina House district groupings minimized Democratic districts and maximized safe Republican districts through the "packing" and "cracking" of Democratic voters as the "result of intentional, pro-Republican partisan

redistricting": the Guilford House County Grouping; the Buncombe House County Grouping; the Mecklenburg House County Grouping; the Pitt House County Grouping; the Durham-Person House County Grouping; the Forsyth-Stokes House County Grouping; the Wake House County Grouping; the Cumberland House County Grouping; and the Brunswick-New Hanover House County Grouping. Ultimately, the court "conclude[d] based upon a careful review of all the evidence that the [House map is] a result of intentional, pro-Republican partisan redistricting."

¶ 204 Based on these findings and numerous others, it is abundantly clear and we so conclude that the 2021 North Carolina House map substantially diminishes and dilutes on the basis of partisan affiliation plaintiffs' fundamental right to equal voting power, as established by the free elections clause and the equal protection clause, and constitutes viewpoint discrimination and retaliation burdening the exercise of rights guaranteed by the free speech clause and the freedom of assembly clause of the North Carolina Constitution. Accordingly, we review the House map under strict scrutiny.

¶ 205 Defendants have not shown the 2021 House map is narrowly tailored to a compelling governmental interest, and therefore the map fails strict scrutiny. As noted already, partisan advantage is neither a compelling nor a legitimate governmental interest. Rather, the General Assembly must show that the map is narrowly tailored to meet traditional neutral districting criteria, including those expressed in article II, sections 3 and 5 of the North Carolina Constitution, those

expressed in the General Assembly's own Adopted Criteria, or other articulable neutral principles. Here, as with the congressional map above, the General Assembly has failed to make that showing. Given the breadth and depth of the evidence that partisan advantage predominated over any traditional neutral districting criteria in the creation of the House map, the General Assembly has not demonstrated that the House map, *despite* its extreme partisan bias, is nevertheless carefully calibrated toward advancing some neutral priority. Indeed, the evidence establishes that the General Assembly subordinated these neutral priorities, such as preserving municipalities, in favor of partisan advantage. Accordingly, the North Carolina House map fails strict scrutiny and must be rejected.

3. State Senate Map

¶ 206 Third and finally, we apply this constitutional standard to the 2021 North Carolina State Senate map. Based on the trial court's factual findings, we conclude that the 2021 State Senate map constitutes partisan gerrymandering that, on the basis of partisan affiliation, violates plaintiffs' fundamental right to substantially equal voting power.

¶ 207 As with the two previous maps, numerous factual findings compel our conclusion. For instance, based on Dr. Cooper's analysis, the court found that "Legislative Defendants' exercise of . . . discretion in the Senate . . . Plans resulted in . . . district boundaries that enhanced the Republican candidates' partisan advantage,

and this finding is consistent with a finding of partisan intent."

¶ 208 Based on Dr. Mattingly's ensemble analysis, the court found "that the State . . . Senate plans are extreme outliers that 'systematically favor the Republican Party to an extent which is rarely, if ever, seen in the non-partisan collection of maps.' " The court found that this intentional partisan redistricting in the Senate "is especially effective in preserving Republican supermajorities in instances in which the majority or the vast majority of plans in Dr. Mattingly's ensemble would have broken it." Specifically, the court found that the Senate plan "is an outlier or extreme outlier in elections where Democrats win a vote share between 47.5% and 50.5%. This range is significant because many North Carolina elections have this vote fraction, and this is the range where the non-partisan ensemble shows that Republicans lose the super-majority."

¶ 209 Based on Dr. Pegden's analysis, the court determined "that the enacted Senate map was more favorable to Republicans than 99.9% of comparison maps." Accordingly, the court found "that the enacted Senate map is more carefully crafted for Republican partisan advantage than at least 99.9% of all possible maps of North Carolina satisfying [the nonpartisan] constraints."

¶ 210 Based on Dr. Duchin's close-votes-close-seats analysis, the court found that

> [t]he Enacted Senate Plan effectuates the same sort of partisan advantage as the Enacted Congressional Plan. The Enacted Senate Plan consistently creates Republican majorities and precludes Democrats from winning a

> majority in the Senate even when Democrats win more votes. Even in an essentially tied election or in a close Democratic victory, the Enacted Senate Plan gives Republicans a Senate majority, and sometimes even a veto-proof 30-seat majority. And that result holds even when Democrats win by larger margins.

"As with the Enacted Congressional Plan, the [c]ourt [found] that the Enacted Senate Plan achieves its partisan goals by packing Democratic voters into a small number of Senate districts and then cracking the remaining Democratic voters by splitting them across other districts . . . ."

¶ 211 Finally, based on all of the evidence presented at trial, the trial court found that the following North Carolina Senate district groupings minimized Democratic districts and maximized safe Republican districts through the "packing" and "cracking" of Democratic voters as the "result of intentional, pro-Republican partisan redistricting": the Granville-Wake Senate County Grouping; the Cumberland-Moore Senate County Grouping; the Guilford-Rockingham Senate County Grouping; the Forsyth-Stokes Senate County Grouping; the Iredell-Mecklenburg Senate County Grouping; the Northeastern Senate County Grouping (Bertie County, Camden County, Currituck County, Dare County, Gates County, Hertford County, Northampton County, Pasquotank County, Perquimans County, Tyrrell County, Carteret County, Chowan County, Halifax County, Hyde County, Martin County, Pamlico County, Warren County, and Washington County); and the Buncombe-Burke-McDowell Senate County Grouping. The trial court did not find any of the

Senate district groupings it considered to not be the result of intentional, pro-Republican redistricting through packing and cracking. Ultimately, the court "concluded based upon a careful review of all the evidence that the [Senate map is] a result of intentional, pro-Republican partisan redistricting.

¶ 212 Based on these findings and numerous others, it is abundantly clear and we so conclude that the 2021 North Carolina Senate map substantially diminishes and dilutes on the basis of partisan affiliation plaintiffs' fundamental right to equal voting power, as established by the free elections clause and the equal protection clause, and constitutes viewpoint discrimination and retaliation burdening the exercise of rights guaranteed by the free speech clause and the freedom of assembly clause of the North Carolina Constitution. Accordingly, we review the Senate map under strict scrutiny.

¶ 213 Conducting that review, we conclude that defendants have not shown the 2021 Senate map is narrowly tailored to a compelling governmental interest and therefore the map fails strict scrutiny. Partisan advantage is not a compelling governmental interest. Rather, the General Assembly must show that the Senate map is narrowly tailored to meet traditional neutral districting criteria, including those expressed in article II, sections 3 and 5 of the North Carolina Constitution, those expressed in the General Assembly's own Adopted Criteria, or other articulable neutral principles. Here, as with the congressional and House maps above, the General Assembly has failed to make that showing. Given the breadth and depth of the evidence that

partisan advantage predominated over any traditional neutral districting criteria in the creation of the Senate map, the General Assembly has not demonstrated that the Senate map, *despite* its extreme partisan bias, is nevertheless carefully calibrated toward advancing some compelling neutral priority. To the contrary, the evidence demonstrates that the Senate map prioritized considerations of partisan advantage above traditional neutral districting principles. Accordingly, the North Carolina Senate map fails strict scrutiny and must be rejected.

G. Compliance with *Stephenson* requirements

¶ 214 Finally, we further hold that under *Stephenson*, the General Assembly was required to conduct a racially polarized voting analysis prior to drawing district lines. Notably, the General Assembly's responsibility to conduct a racially polarized voting analysis arises from our state constitution and decisions of this Court, including primarily *Stephenson*, and not from the VRA itself, or for that matter from any federal law. In *Stephenson*, this Court sought to harmonize several sections of our state constitution—namely the whole county provision of article II, sections 3(3) and 5(3) and the supremacy clause of article I, section 3— in light of the federal requirements established by Section 5 and Section 2 of the VRA. 355 N.C. at 359. Of course, since the 2013 decision of the Supreme Court of the United States in *Shelby County v. Holder*, 570 U.S. 529 (2013), in which it held that the coverage formula for the preclearance requirement under Section 5 of the VRA was no longer justified under

the Fourteenth Amendment and held that section was unconstitutional, North Carolina has not been subject to that preclearance requirement.

¶ 215 Nevertheless, the *Stephenson* Court ruling relied exclusively on interpretation of the North Carolina Constitution. Indeed, after the *Stephenson* defendants initially removed the case to federal district court, the district court remanded the case, stating that "the redistricting process was a matter primarily within the province of the states, that plaintiffs have challenged the 2001 legislative redistricting plans solely on the basis of state constitutional provisions, that the complaint 'only raises issues of state law,' and that defendants' removal of th[e] suit from state court was inappropriate." *Stephenson*, 355 N.C. at 358. Further, when the *Stephenson* defendants "subsequently filed a notice of appeal from the District Court's order with the United States Court of Appeals for the Fourth Circuit[,] . . . [t]he Fourth Circuit denied defendants' motion to stay the District Court's order of remand." *Id.*

¶ 216 Here, as in *Stephenson*, plaintiffs' claims arise under the same provisions of the North Carolina Constitution implicated in *Stephenson*—namely article I, sections 3 and 5 and article II, sections 3 and 5. Here, as in *Stephenson*, this Court serves as the highest and final authority in interpreting those state constitutional provisions. And here, as in *Stephenson*, we hold that compliance with those provisions, when read in harmony, requires the General Assembly to conduct racially polarized voting analysis within their decennial redistricting process in order to assess whether any

steps must be taken to avoid the dilution of minority voting strength.

III. Conclusion

¶ 217 Article I, section 2 of the North Carolina Constitution establishes that "[a]ll political power is vested in and derived from the people," that "all government of rights originates from the people," and "is founded upon their will only." N.C. Const. art I, § 2. Furthermore, article I, section 1 of the constitution provides that "all persons are created equal." N.C. Const. art I, § 1. Subsequent constitutional provisions within the Declaration of Rights, including the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause, protect fundamental rights of the people in order to ensure, among other things, that their government is indeed "founded upon their will only." *See id.*

¶ 218 When North Carolinians claim that acts of their government violate these fundamental rights, and particularly when those acts choke off the democratic processes that channel political power from the people to their representatives, it is the solemn duty of this Court to review those acts to enforce the guarantees of our constitution. *See Corum*, 330 N.C. at 783. Such judicial review ensures that despite present day challenges our constitution's most fundamental principles are preserved. Indeed, "[a] frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art I, § 35.

¶ 219 Today, this Court recurs to those fundamental principles. Specifically, we have

considered whether partisan gerrymandering claims present a justiciable question, whether constitutional provisions supply administrable standards, and whether, having applied these standards, the General Assembly's 2021 enacted plans constitute such a violation of plaintiffs' constitutional rights.

¶ 220 First, we hold that claims of partisan gerrymandering are justiciable under the North Carolina Constitution. Although the primary responsibility for redistricting is constitutionally delegated to the General Assembly, this is not a delegation of unlimited power; the exercise of this power is subject to restrictions imposed by other constitutional provisions, including the Declaration of Rights. Further, as demonstrated through our analysis of the constitutional provisions at issue and the extensive factual findings of the trial court, claims of partisan gerrymandering can be carefully discerned and governed by manageable judicial standards.

¶ 221 Second, we hold that the General Assembly infringes upon voters' fundamental rights when, on the basis of partisan affiliation, it deprives a voter of his or her right to substantially equal voting power, as established by the free elections clause and the equal protection clause in our Declaration of Rights. We hold it also constitutes viewpoint discrimination and retaliation based on protected political activity in violation of the free speech clause and the freedom of assembly clause in our Declaration of Rights. When a redistricting plan creates such an infringement of fundamental rights, strict scrutiny must be applied to determine whether the plan is

nevertheless narrowly tailored to advance a compelling governmental interest.

¶ 222 Here, we hold that the General Assembly's 2021 enacted plans are partisan gerrymanders that on the basis of partisan affiliation substantially infringe upon plaintiffs' fundamental right to equal voting power. Finally, we hold that the enacted plans fail strict scrutiny and must therefore be struck down.

¶ 223 We reverse the trial court's judgment and remand this case to that court to oversee the redrawing of the maps by the General Assembly or, if necessary, by the court. In accordance with our 4 February 2022 order and our decision today, the General Assembly shall now have the opportunity to submit new congressional and state legislative districting plans that satisfy all provisions of the North Carolina Constitution.[17] It is the sincere hope of this Court that these new maps ensure that the channeling of "political power" from the people to their representatives in government through elections, the central democratic process envisioned by our constitutional system, is done on equal terms so that ours is a "government of right" that "originates from the people" and speaks with their voice.

REVERSED AND REMANDED.

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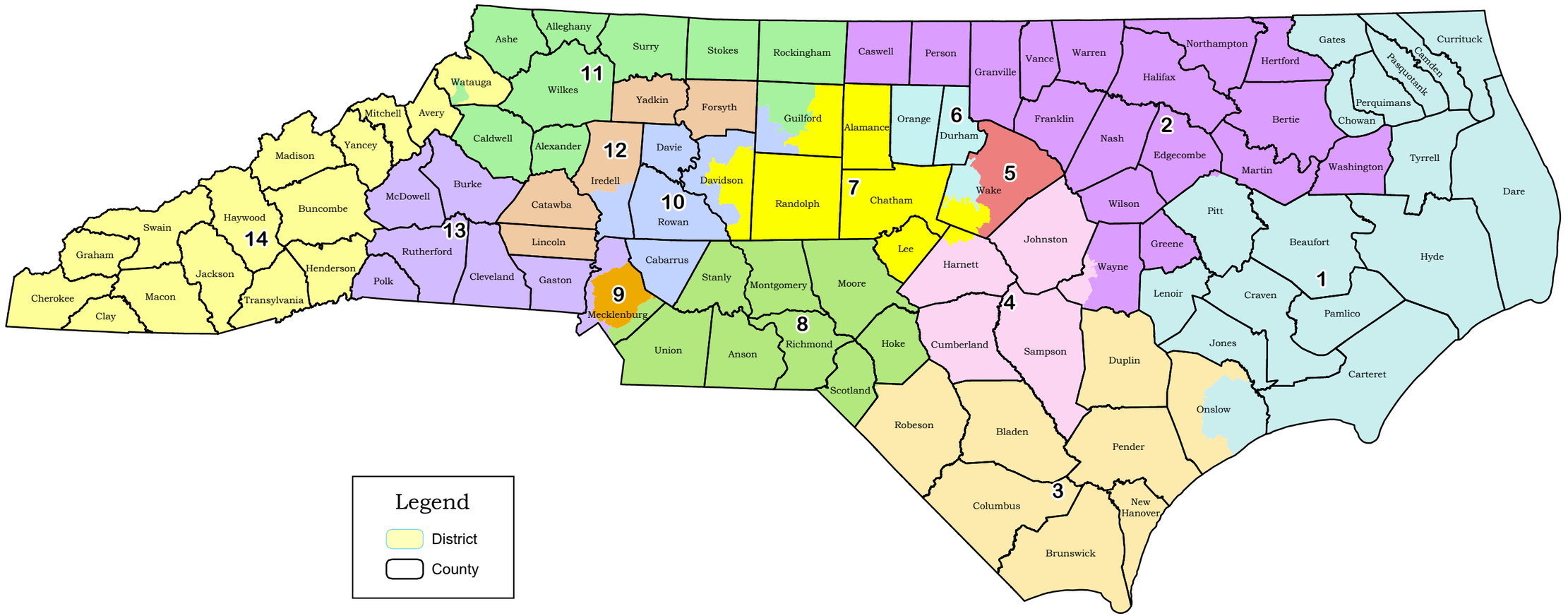
[17] In doing so, we hold they must also conduct racially polarized voting analysis to comply with the constitutional requirements under *Stephenson*. As we have reversed the judgment of the trial court based on its conclusions about the partisan gerrymandering claims, we decline to determine whether NCLCV Plaintiffs could also prevail on their minority vote dilution claim or whether plaintiff Common Cause could prevail on its intentional racial discrimination claim at this time.

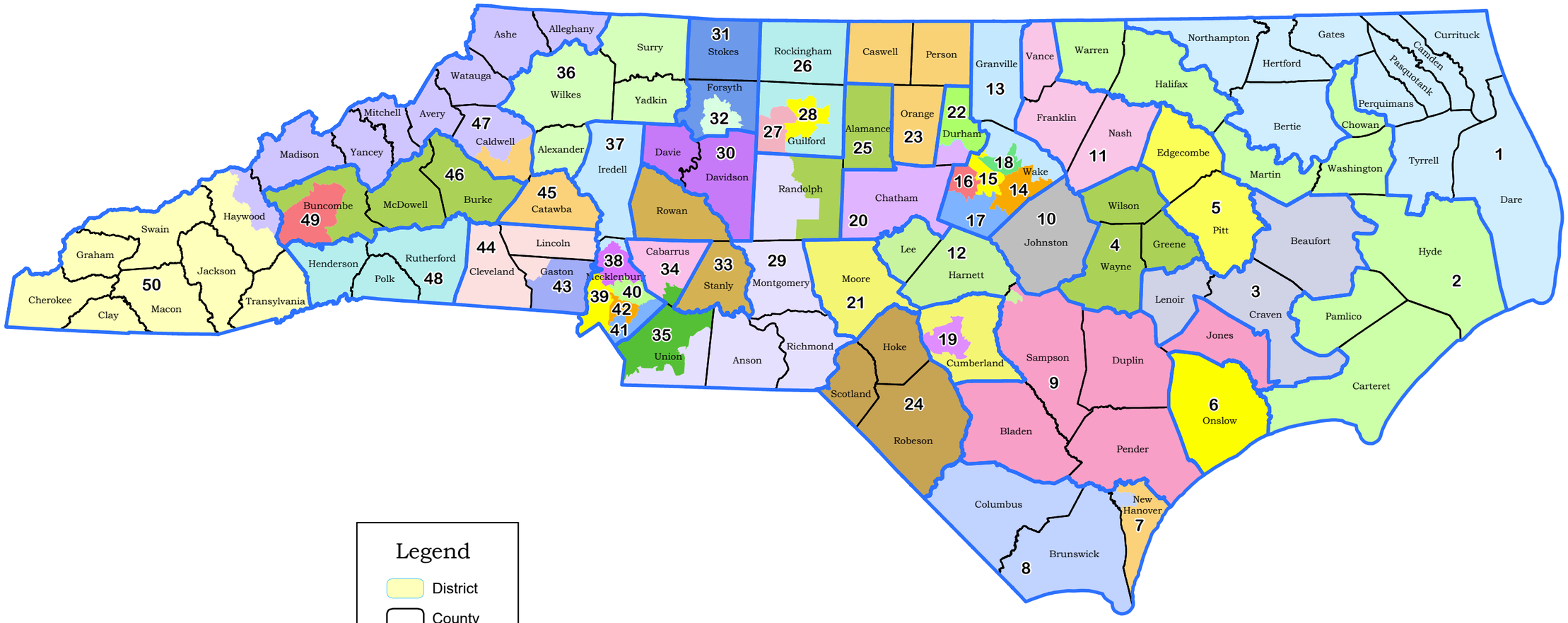
S.L. 2021-174 Congress



SL 2021-174 Congress

Printed by the NC General Assembly, November 4, 2021

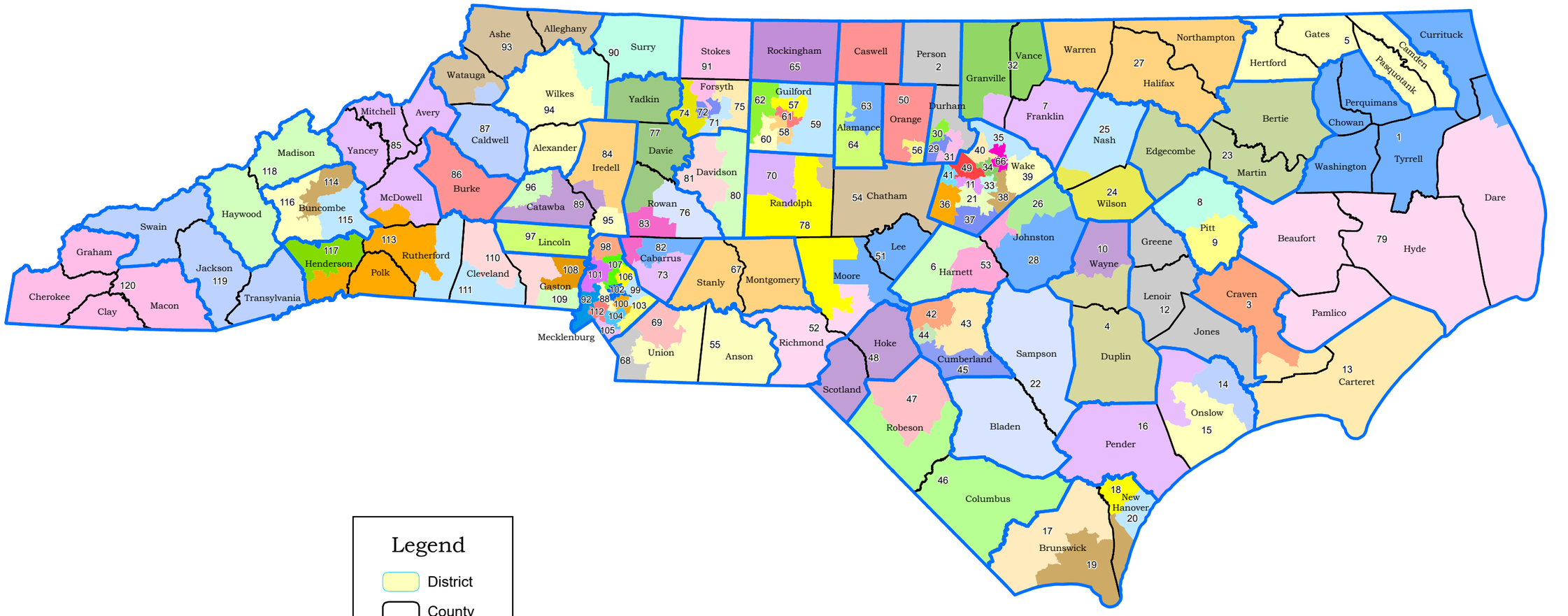
S.L. 2021-173 Senate



Source: SL 2021-173 Senate

Printed by the NC General Assembly, November 4, 2021

S.L. 2021-175 House



Source: SL 2021-175 House

Printed by the NC General Assembly, November 4, 2021

Justice MORGAN concurring.

¶ 224 While I fully join my learned colleagues in my agreement with the majority opinion in this case, in my view the dispositive strength of the Free Elections Clause warrants additional observations in light of the manner in which it has been postured and addressed. The substantive construction of the constitutional provision is buttressed by the contextual construction of the brief, yet potent, directive.

¶ 225 The entirety of article I, section 10 of the North Carolina Constitution states: "All elections shall be free." N.C. Const. art. I, § 10. The dissenting view of this Court, the order of the trial court, and the presentations of Legislative Defendants have largely declined the opportunity to address the manner in which the term "free" should be interpreted as compared to plaintiffs' significant reliance on the applicability of the Free Elections Clause. In this regard, plaintiffs' invocation of the constitutional provision has either been cast as inapplicable to this case or relegable to a diminished role. To the extent that the word "free" in article I, section 10 has been construed here by Legislative Defendants, they conflate the right to a free election with the right to be free to participate in the election process, stating "there is no barrier between any voter and a ballot or a ballot box, no restriction on the candidates the voter may select, and no bar on a person's ability to seek candidacy for any office" and also citing the proposition that "[t]he meaning [of North Carolina's Free Elections Clause] is plain: free from interference or intimidation," quoting John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 56 (2d ed.

2013). And curiously, instead of focusing on how elections *must* be free, the dissent chooses to focus on how the General Assembly should be free to create legislative election maps admittedly based on politically partisan considerations.

¶ 226 In my view, a free election is uninhibited and unconstrained in its ability to have the prevailing candidate to be chosen in a legislative contest without the stain of the outcome's predetermination. Commensurate with the General Assembly's constitutional authority to draw legislative maps is one's constitutional right to participate in legislative elections which shall be free of actions—such as the General Assembly's creation of the legislative redistricting maps here—which are tantamount to the predetermination of elections and, hence, constitute constitutional abridgement.

Justice EARLS joins in this concurring opinion.

Chief Justice NEWBY dissenting.

¶ 227 How should a constitution be interpreted? Should its meaning be fixed or changing? If changing, to whom have the people given the task of changing it? When judges change the meaning of a constitution, does this undermine public trust and confidence in the judicial process? Traditionally, honoring the constitutional role assigned to the legislative branch, this Court has stated that acts of the General Assembly are presumed constitutional and deserving of the most deferential standard of review: To be unconstitutional, an act of the General Assembly must violate an explicit provision of our constitution beyond a reasonable doubt. We have recognized that our constitution allows the General Assembly to enact laws unless expressly prohibited by its text. This approach of having a fixed meaning and a deferential standard of review ensures a judge will perform his or her assigned role and not become a policymaker.

¶ 228 With this decision, unguided by the constitutional text, four members of this Court become policymakers. They wade into the political waters by mandating their approach to redistricting. They change the time-honored meaning of various portions of our constitution by inserting their interpretation to reach their desired outcome. They justify this activism because their understanding of certain constitutional provisions has "evolved over time." They lament that the people have not placed a provision in our constitution for a "citizen referendum" and use the absence of such a provision to justify their judicial activism to amend our constitution. The majority

says courts must protect constitutional rights. This is true. Courts are not, however, to judicially amend the constitution to create those rights. As explicitly stated in our constitution, the people alone have the authority to alter our foundational document, and the people have the final say.

¶ 229 In its analysis, the majority misstates the history, the case law of this Court, and the meaning of various portions of our Declaration of Rights. In its remedy the majority replaces established principles with ambiguity, basically saying that judges alone know which redistricting plan will be constitutional and accepted by this Court based on analysis by political scientists. This approach ensures that the majority now has and indefinitely retains the redistricting authority, thereby enforcing its policy preferences.

¶ 230 Generally, the majority takes a sweeping brush and enacts its own policy preferences of achieving statewide proportionality as determined by political scientists and approved by judges. While mentioning traditional, neutral redistricting criteria, its primary focus is instead on the final partisanship analysis to achieve statewide parity.

¶ 231 The majority requires the General Assembly to finalize corrected maps within two weeks of the 4 February 2022 order along with an accompanying political science analysis. The majority invites others, who have not been elected by the people, to provide alternative maps without that same required analysis, thus inviting private

parties to usurp legislative authority to make the laws with respect to redistricting without explanation. The majority forces this directive into an artificial timeline which could support the majority's adopting its own maps.

¶ 232 A recent opinion poll found that 76% of North Carolinians believe judges decide cases based on partisan considerations. N.C. Comm'n on the Admin. of L. & Just., *Final Report* 67 (2017). Today's decision, which dramatically departs from our time-honored standard of requiring proof that an explicit provision of the constitution is violated beyond a reasonable doubt, will solidify this belief.[1]

¶ 233 The people speak through the express language of their constitution. They have assigned specific tasks to each branch of government. When each branch stays within its lane of authority, the will of the people is achieved. When a branch grasps a task assigned to another, that incursion violates separation of powers and thwarts the will of the people. This decision, with its various policy determinations, judicially amends the constitution. Furthermore, it places redistricting squarely in the hands of four justices and not the legislature as expressly assigned by the constitution. The

[1] It does not help public confidence that in an unprecedented act, a member of the majority used social media to publicize this Court's initial order when it was released, despite the fact that the case was still pending. *See* Anita Earls (@Anita_Earls), Twitter (Feb. 4, 2022, 6:28 PM), https://twitter.com/Anita_Earls/status/1489742665356910596 ("Based on the trial court's factual findings, we conclude that the congressional and legislative maps . . . are unconstitutional beyond a reasonable doubt." (alteration in original)).

majority's determinations violate the will of the people, making us a government of judges, not of the people. I respectfully dissent.

I. Standard of Review

¶ 234 The question presented here is whether the enacted plans violate the North Carolina Constitution. While the standard of review is significant in all cases, it is particularly important in cases challenging the constitutionality of a statute.

> The idea of one branch of government, the judiciary, preventing another branch of government, the legislature, through which the people act, from exercising its power is the most serious of judicial considerations. *See Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 8 (1833) ("[T]he exercise of [judicial review] is the gravest duty of a judge, and is always, as it ought to be, the result of the most careful, cautious, and anxious deliberation."), *overruled in part on other grounds by Mial v. Ellington*, 134 N.C. 131, 162, 46 S.E. 961, 971 (1903); *Trs. of Univ. of N.C. v. Foy*, 5 N.C. (1 Mur.) 58, 89 (1805) (Hall, J., dissenting) ("A question of more importance than that arising in this case [the constitutionality of a legislative act] cannot come before a court. . . . [W]ell convinced, indeed, ought one person to be of another's error of judgment . . . when he reflects that each has given the same pledges to support the Constitution."). Since its inception, the judicial branch has exercised its implied constitutional power of judicial review with "great reluctance," *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6 (1787), recognizing that when it strikes down an act of the General Assembly, the Court is preventing an act of the people themselves, *see Baker v. Martin*, 330 N.C. 331, 336–37, 410 S.E.2d 887, 890 (1991).

State ex rel. McCrory v. Berger, 368 N.C. 633, 650, 781 S.E.2d 248, 259 (2016) (Newby, J., concurring in part and dissenting in part) (footnote omitted).

¶ 235 All political power resides in the people, N.C. Const. art. I, § 2, and the people act through the General Assembly, *Baker*, 330 N.C. at 337, 410 S.E.2d at 891. Unlike the United States Constitution, the North Carolina Constitution "is in no matter a grant of power." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) (quoting *Lassiter v. Northampton Cnty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958), *aff'd*, 360 U.S. 45, 79 S. Ct. 985 (1959)). Rather, "[a]ll power which is not limited by the Constitution inheres in the people." *Id.* at 515, 119 S.E.2d at 891 (quoting *Lassiter*, 248 N.C. at 112, 102 S.E.2d at 861). Because the General Assembly serves as "the agent of the people for enacting laws," *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989), the General Assembly has plenary power, and a restriction on the General Assembly is in fact a restriction on the people themselves, *Baker*, 330 N.C. at 338–39, 410 S.E.2d at 891–92. Therefore, this Court presumes that legislation is constitutional, and a constitutional limitation upon the General Assembly must be (1) express and (2) proved beyond a reasonable doubt. *Id.* at 334, 410 S.E.2d at 889. When this Court looks for constitutional limitations on the General Assembly's authority, it looks to the plain text of the constitution.[2]

[2] Furthermore, "[i]ssues concerning the proper construction of the Constitution of North Carolina 'are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.' " *State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 510 (2004) (quoting *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d

¶ 236 This standard of review is illustrated by the landmark case of *Bayard v. Singleton*, the nation's first reported case of judicial review. The majority cites *Bayard* in an effort to support its contention that judicial interference is necessary here "to prevent legislators from permanently insulating themselves from popular will." But *Bayard*, rightly understood, was simply about the authority of the Court to declare unconstitutional a law which violated an *express* provision of the constitution. It was not about limiting the General Assembly's authority to make discretionary political decisions within its express authority. *Bayard* involved a pointed assault on a clearly expressed and easily discernible *individual* right in the 1776 constitution, the right to a trial by jury "in all controversies at Law respecting Property." N.C. Const. of 1776, § XIV. There the court weighed the General Assembly's ability to enact a statute that abolished the right to a jury trial for property disputes—for some citizens in some instances—in direct contradiction of the express text of the constitution, the fundamental law of the land:

> That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all: that if the members of the General

473, 478 (1989)). "In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere." *Id.* (quoting *Preston*, 325 N.C. at 449, 385 S.E.2d at 479).

> Assembly could do this, they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

Bayard, 1 N.C. at 7. Thus, the holding of *Bayard v. Singleton* is easily understood: A statute cannot abrogate an express provision of the constitution because the constitution represents the fundamental law and express will of the people; it is the role of the judiciary to perform this judicial review. The *Bayard* holding, however, does not support the proposition that this Court has the authority to involve itself in a matter that is both constitutionally committed to the General Assembly and lacking in manageable legal standards. Thus, plainly stated and as applied to this case, the uncontroverted standard of review asks whether plaintiffs have shown that the challenged statutes, presumed constitutional, violate an express provision of the constitution beyond a reasonable doubt.

II. Justiciability

¶ 237 The Supreme Court of the United States has explained that "as essentially a function of the separation of powers," courts must refuse to review issues that are better suited for the political branches; these issues are nonjusticiable.

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is

> found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962); *see also Bacon v. Lee*, 353 N.C. 696, 716–17, 549 S.E.2d 840, 854 (2001). Thus, respect for separation of powers requires a court to refrain from entertaining a claim if any of the following are shown: (1) a textually demonstrable commitment of the matter to another political department; (2) a lack of judicially discoverable and manageable standards; (3) the impossibility of deciding a case without making a policy determination of a kind clearly suited for nonjudicial discretion; or (4) the impossibility of a court's undertaking independent resolution of a matter without expressing lack of the respect due to a coordinate branch of government. Often the second, third, and fourth factors are collectively referred to as lacking a manageable standard.

A. Manageable Standards

¶ 238 In addressing the manageable standards analysis, the Supreme Court recently held that partisan gerrymandering claims present nonjusticiable political questions, and it warned of the pitfalls inherent in such claims. *See Rucho v. Common Cause*,

139 S. Ct. 2484, 2506–07 (2019).[3] In *Rucho* "[v]oters and other plaintiffs in North Carolina and Maryland challenged their States' congressional districting maps as unconstitutional partisan gerrymanders." *Id.* at 2491. "The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2, of the Constitution." *Id.* As such, the Supreme Court was tasked with deciding "whether claims of excessive partisanship in districting are 'justiciable'—that is, properly suited for resolution by the federal courts." *Id.*

¶ 239 In seeking to answer this question, the Court provided the following historical background:

> Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. . . .
>
> . . . .
>
> . . . The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. As Alexander Hamilton explained, "it will . . . not be denied that a discretionary power over

[3] It should be noted that several of the attorneys in *Rucho* are also litigating this case. Similar claims are presented here and similar remedies requested, only this time based on our state constitution, not the Federal Constitution. Neither the Federal Constitution nor the state constitution have explicit provisions addressing partisan gerrymandering. Likewise, some of the plaintiffs' experts in *Rucho* are the same experts as used here.

> elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." The Federalist No. 59, p. 362 (C. Rossiter ed. 1961). At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

Id. at 2494–96 (alteration in original). The Court then noted that "[i]n two areas—[equal voting power defined as] one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts." *Id.* at 2495–96. It specified, however, that

> [p]artisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering." *Hunt v. Cromartie*, 526 U.S. 541, 551, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999) (citing *Bush v. Vera*, 517 U.S. 952, 968, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996); *Shaw v. Hunt*, 517 U.S. 899, 905, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (*Shaw II*); *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995); *Shaw* [*v. Reno*], 509 U.S. [630,] 646, 113 S.Ct. 2816[, 125 L.Ed. 2d 511 (1993)]). *See also Gaffney v. Cummings*, 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) (recognizing that "[p]olitics and political considerations are inseparable from districting and apportionment").

Id. at 2497 (last alteration in original). Thus, the Court reasoned that

> [t]o hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." *Vieth* [*v. Jubelirer*], 541 U.S. [267,] 296, 124 S.Ct. 1769 [(2004)] (plurality opinion). *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006) (*LULAC*) (opinion of Kennedy, J.) (difficulty is "providing a standard for deciding how much partisan dominance is too much").

Id. The Court then highlighted its "mindful[ness] of Justice Kennedy's counsel in *Vieth*: Any standard for resolving such claims must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.' 541 U.S. at 306–308, 124 S.Ct. 1769 (opinion concurring in judgment)." *Id.* at 2498. The Court further clarified that

> [a]n important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." [*Davis v.*] *Bandemer*, 478 U.S. [109,] 145, 106 S.Ct. 2797 [(1986)] (opinion of O'Connor, J.). *See Gaffney*, 412 U.S. at 749, 93 S.Ct. 2321 (observing that districting implicates "fundamental 'choices about the nature of representation' " (quoting *Burns v. Richardson*, 384 U.S. 73, 92, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966))). An expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process," *Vieth*, 541 U.S. at 306, 124 S.Ct. 1769 (opinion of Kennedy, J.).

Id. (first alteration in original). As such, the Supreme Court concluded that "[i]f federal courts are to 'inject [themselves] into the most heated partisan issues' by adjudicating partisan gerrymandering claims, *Bandemer*, 478 U.S. at 145, 106 S.Ct. at 2797 (opinion of O'Connor, J.), they must be armed with a standard that can reliably differentiate unconstitutional from 'constitutional political gerrymandering.' " *Id.* at 2499 (second alteration in original) (quoting *Cromartie*, 526 U.S. at 551, 119 S. Ct. at 1545).

¶ 240 The Court also explained that partisan gerrymandering claims are effectively requests for courts to allocate political power based upon a principle of proportionality:

> Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." [*Bandemer*, 478 U.S. at 159, 106 S.Ct. 2797.] "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id.*, at 130, 106 S.Ct. 2797 (plurality opinion). See *Mobile v. Bolden*, 446 U.S. 55, 75–76, 100 S.Ct. 1490, 1504, 64 L.Ed.2d 47 (1980) (plurality opinion) ("The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization.").
>
> The Founders certainly did not think proportional representation was required. For more than 50 years after

> ratification of the Constitution, many States elected their congressional representatives through at-large or "general ticket" elections. Such States typically sent single-party delegations to Congress. See E. Engstrom, Partisan Gerrymandering and the Construction of American Democracy 43–51 (2013). That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. The Whigs in Alabama suffered that fate in 1840: "their party garnered 43 percent of the statewide vote, yet did not receive a single seat." *Id.*, at 48. When Congress required single-member districts in the Apportionment Act of 1842, it was not out of a general sense of fairness, but instead a (mis)calculation by the Whigs that such a change would improve their electoral prospects. *Id.*, at 43–44.
>
> Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably 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 2499. The Court thus determined that "federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so." *Id.* (quoting *Vieth*, 541 U.S. at 291, 124 S.Ct. 1769 (plurality opinion) (stating that: " 'Fairness' does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.")).

¶ 241 The Court also explained that the Federal Constitution is devoid of any metric for measuring political fairness:

> Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

Id. at 2501. The Court then turned to the shortcomings of the political science-based tests that the plaintiffs proposed for determining the permissibility of partisan gerrymandering:

> The appellees assure us that "the persistence of a party's advantage may be shown through sensitivity testing: probing how a plan would perform under other plausible electoral conditions." Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time. In our two leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong. In 1981, Republicans controlled both houses of the Indiana Legislature as well as the governorship. Democrats challenged the state legislature districting map enacted by the Republicans. This Court in *Bandemer* rejected that challenge, and just months later the Democrats increased their share of House seats in the 1986 elections. Two years later the House was split 50–50 between Democrats and

> Republicans, and the Democrats took control of the chamber in 1990. Democrats also challenged the Pennsylvania congressional districting plan at issue in *Vieth*. Two years after that challenge failed, they gained four seats in the delegation, going from a 12–7 minority to an 11–8 majority. At the next election, they flipped another Republican seat.
>
> Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

Id. at 2503–04 (citations omitted).

¶ 242 The Supreme Court concluded "that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions." *Id.* at 2506–07. The Court's discussion in *Rucho* of its previous decision in *Bandemer*, especially its reference to Justice O'Connor's concurring opinion, serves as a cautionary tale for the dangers that loom when a court thrusts

itself into the political thicket guided by nothing more than a "nebulous standard." *Bandemer*, 478 U.S. at 145, 106 S. Ct. at 2817 (O'Connor, J., concurring). The Supreme Court did state that some state constitutions might provide the explicit guidance necessary to adjudicate partisan gerrymandering claims.

¶ 243 For specific guidance, the Court mentioned a case in which "the Supreme Court of Florida struck down that State's congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution." *Rucho,* 139 S. Ct. at 2507 (citing *League of Women Voters of Florida v. Detzner*, 172 So. 3d 363, 416 (Fla. 2015)). Notably, in *Detzner* the state court was directed by the following express constitutional provision:

> In establishing congressional district boundaries:
>
> (a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.
>
> (b) Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.
>
> (c) The order in which the standards within subsections (a) and (b) of this section are set forth shall not

> be read to establish any priority of one standard over the other within that subsection.

Fla. Const. art. III, § 20 (footnotes omitted). When the Supreme Court referenced the use of state constitutions to address claims of partisan gerrymandering, it was referring to explicit prohibitions found in state constitutions, not to those created by judges as this Court does today. When asked by the dissent why the majority did not follow the Florida court's lead, the majority said, "The answer is that there is no 'Fair Districts Amendment' to the Federal Constitution." *Rucho*, 139 S. Ct. at 2507.

¶ 244 Here the majority opinion confirms the truth of all the warnings given by the Supreme Court that there is no manageable standard for adjudicating claims of partisan gerrymandering. The will of the people of Florida is fully and clearly expressed in their constitution. Like the Federal Constitution, there is no provision in our state constitution remotely comparable to this express provision in the Florida Constitution. As the Supreme Court said, with an express provision, states are better "armed with a standard that can reliably differentiate" between constitutional and unconstitutional political gerrymandering. *See Rucho,* 139 S. Ct. at 2499. Instead, the majority inexplicably takes the Court's statement that the "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply," *id.* at 2507, as an unrestricted license to judicially amend our constitution. In doing so, the majority wholly ignores the fact that the Court in *Rucho* identified several state constitutional provisions and statutes that are clear, manageable, and

express as examples of workable standards for assessing political gerrymandering. *See id.* at 2507–08.

¶ 245 The North Carolina Constitution could have a provision like the Florida Constitution. But, to do so properly requires the amendment process authorized in the constitution itself, allowing the people to determine the wisdom of this new policy. Instead of following the constitutionally required process for properly amending the constitution, the majority now does so by judicial fiat, effectively placing in the constitution that any redistricting plan cannot "on the basis of partisan affiliation . . . deprive[ ] a voter of his or her fundamental right to substantially equal voting power" as determined by certain political science tests. Would the people have adopted this constitutional amendment? We do not know, and the majority does not care.

¶ 246 The plaintiffs in *Rucho* presented arguments and evidence similar to what was presented here—that the use of certain political science theories could provide a manageable standard. The Supreme Court disagreed. *See id.* at 2503–04. Here the majority's new constitutional standard requires litigants and courts to utilize those rejected approaches to predict the electoral outcomes that various proposed plans would produce. In doing so, the majority adopts various policies. First, the majority makes the initial policy determination that the constitution mandates a statewide proportionality standard. Next, it determines that the constitution requires the use of political science tests to adhere to this standard and designates which political

science tests should be used. But, the majority refuses to identity how the standard can be met: "We do not believe it prudent or necessary to, at this time, identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." "[B]asing [its] constitutional holdings on unstable ground outside judicial expertise," *Rucho*, 139 S. Ct. at 2504, the majority's decision effectively results in the creation of a redistricting commission comprised of selected political scientists and judges.

¶ 247 The majority simply fails to recognize that its political science-based approach involves policy decisions and that these are the same policy determinations about which the Supreme Court warned in *Rucho*. *See id.* at 2503–04; *id.* at 2504 ("For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise."). Why did the majority choose this approach and these specific tests instead of others? The expert witnesses in this case looked to selected past statewide elections results for data, and the majority approves such a practice. Left unanswered is which past elections' results are germane to predicting future ones. Moreover, what if the experts approved by the majority tend to favor one political party over the other as shown by their trial testimony in various cases? Could such experts be considered politically neutral?

¶ 248 As found by the trial court, "[t]he experts' analysis does not inform the Court of how far the Enacted Maps are from what is permissible partisan advantage. Accordingly, these analyses do not inform the Court of how much of an outlier the Enacted Maps are from what is actually permissible." The trial court also found that the "statewide races [used by plaintiffs' experts] have one thing in common, that is, the elected positions have very little in common with the legislative and congressional races except that they all occur in North Carolina."

¶ 249 The majority inserts a requirement of "partisan fairness" into our constitution. Under the majority's newly created policy, any redistricting that diminishes or dilutes an individual's vote on the basis of partisanship is unconstitutional. This outcome results, as predicted by the Court in *Rucho*, in a statewide proportionality standard. According to the majority, when groups of voters of "equal size" exist within a state, elections should result in an equal amount of representatives. Again, this vague notion of fairness does not answer how to measure whether groups of voters are of equal size or how to predict the results an election would produce.

¶ 250 The majority also bases its reasoning on several false assumptions. First, plaintiffs' experts and now the majority appear to assume that voters will vote along party lines in future elections. This assumption is especially troubling considering that in 2020 over eight percent of North Carolinians voted for both a Republican candidate for president and a Democratic candidate for governor on the same ballot.

Though individuals self-select their party affiliation, the views can often differ from one individual to another within that affiliation. Second, in equating partisan affiliation to an immutable characteristic and then elevating its protection to strict scrutiny, the majority also fails to consider that party affiliation can change at any point or be absent altogether. How can the General Assembly forecast the appropriate protections for the unaffiliated voter, a group growing by rapid number in the state? What is the standard for that group's fair representation? The majority certainly provides no answer for these important questions.

¶ 251 Third, the majority's policy decision erroneously assumes that a voter's interests can never be adequately represented by someone from a different party. Representative government is grounded in the concept of geographic representation. Though partisanship may influence the representative's attention to certain political issues, the representative is likely to attend to numerous other issues important to the shared community interests that affect his or her constituents. The constitution cannot guarantee that a representative will have the same political objectives as a given constituent because it is an impossible requirement. Representatives are *individuals* with their own beliefs and who pursue their own motivations, often in opposition to other members of their own party. As the trial court correctly found, plaintiffs' experts, and now the majority, treat candidates and representatives "as inanimate objects in that they do not consider the personality or qualifications of each

candidate, any political baggage each candidate may carry, as well as a host of other considerations that voters use to select a candidate." Not only does the majority assume that voters will vote along party lines, but it also likewise transforms the individual representatives into partisan robots. Such reasoning is divorced from reality but nonetheless is the expected result when a court involves itself in a "policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217, 82 S. Ct. at 710. As in this case, the plaintiffs in *Rucho* argued that addressing concerns of partisan gerrymandering was comparable to the process used in the one-person, one-vote legal analysis. Again, the Supreme Court of the United States disagreed. *See Rucho*, 139 S. Ct. at 2501. The one-person, one-vote rule is just "a matter of math." *Id.* But the Constitution does not provide an "objective measure" of how to determine if a political party is treated "fairly." *Id.* Again, rejecting the Supreme Court's guidance, the majority holds that one-person, one-vote and partisan gerrymandering use comparable assessments and even asserts that violations related to partisan gerrymandering are more egregious than violations of one-person, one-vote. In sum, there is no judicially discernible manageable standard. As thoroughly discussed in *Rucho*, the majority's approach is replete with policy determinations. Thus, the case is nonjusticiable.

B. Textual Commitment

¶ 252 In addition to the fact that partisan gerrymandering claims are lacking in manageable standards, the issue is textually committed to the General Assembly. Under our state constitution, the General Assembly possesses plenary power as well as responsibilities explicitly recognized in the text. *McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891–92. Both the Federal Constitution and the North Carolina Constitution textually assign redistricting authority to the legislature. The Federal Constitution commits the drawing of congressional districts to the state legislatures subject to oversight by the Congress of the United States. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. Our constitution also plainly commits redistricting responsibility to the General Assembly. *See* N.C. Const. art. II, § 3 ("The General Assembly . . . *shall* revise the senate districts and the apportionment of Senators among those districts . . . ." (emphasis added)); *id.* § 5 ("The General Assembly . . . *shall* revise the representative districts and the apportionment of Representatives among those districts . . . ." (emphasis added)). The governor has no role in the redistricting process because the

constitution explicitly exempts redistricting legislation from the governor's veto power. *Id.* § 22(5)(b)–(d).

¶ 253 The role of the judiciary through judicial review is to decide challenges regarding whether a redistricting plan violates the objective limitations in Article II, Sections 3 and 5 of our constitution or a provision of federal law. Under our historic standard of review, the Court should not venture beyond the express language of the constitution. This Court is simply not constitutionally empowered nor equipped to formulate policy or develop standards for matters of a political, rather than legal, nature.

¶ 254 Our constitution places only the following four enumerated objective limitations on the General Assembly's redistricting authority:

> (1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Senator represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district;
>
> (2) Each senate district shall at all times consist of contiguous territory;
>
> (3) No county shall be divided in the formation of a senate district;
>
> (4) When established, the senate districts and the apportionment of Senators shall remain unaltered until the return of another decennial census of population taken by order of Congress.

Id. § 3; *see id.* § 5 (setting the same limitations for the state House of Representatives). These express limitations neither restrict nor prohibit the General Assembly's presumptively constitutional discretion to engage in partisan gerrymandering. *See Preston*, 325 N.C. at 448–49, 385 S.E.2d at 478. The majority seriously errs by suggesting the General Assembly needs an express grant of authority to redistrict for partisan advantage. Under our state constitution, the opposite is true; absent an express prohibition, the General Assembly can proceed.

¶ 255 In a landmark case this Court considered the explicit limitations in Article II, Sections 3 and 5 and concluded that these objective restraints remain valid and can be applied consistently with federal law. In *Stephenson* the plaintiffs challenged the 2001 state legislative redistricting plans as unconstitutional in violation of the Whole County Provisions (WCP) of Article II, Sections 3 and 5. *Stephenson v. Bartlett*, 355 N.C. 354, 358, 562 S.E.2d 377, 381 (2002). The defendants argued that "the constitutional provisions mandating that counties not be divided are wholly unenforceable because of the requirements of the Voting Rights Act [(VRA)]." *Id.* at 361, 562 S.E.2d at 383–84. Thus, before addressing whether the 2001 redistricting plans violated the Whole County Provisions, this Court first had to address "whether the WCP is now entirely unenforceable, as [the] defendants contend, or, alternatively, whether the WCP remains enforceable throughout the State to the extent not

preempted or otherwise superseded by federal law." *Id.* at 369, 562 S.E.2d at 388. In doing so, we explained that

> an inflexible application of the WCP is no longer attainable because of the operation of the provisions of the VRA and the federal "one-person, one-vote" standard, as incorporated within the State Constitution. This does not mean, however, that the WCP is rendered a legal nullity if its beneficial purposes can be preserved consistent with federal law and reconciled with other state constitutional guarantees.
>
> . . . . The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, *see Gaffney v. Cummings*, 412 U.S. 735, [93 S. Ct. 2321,] 37 L. Ed. 2d 298 (1973), but it must do so in conformity with the State Constitution. To hold otherwise would abrogate the constitutional limitations or "objective constraints" that the people of North Carolina have imposed on legislative redistricting and reapportionment in the State Constitution.

Id. at 371–72, 562 S.E.2d at 389–90. Thus, we referred to the Whole County Provisions and the other explicit limitations of Article II, Sections 3 and 5 as the "objective constraints" that the people have imposed upon the General Assembly's redistricting authority. We then concluded that "the WCP remains valid and binding upon the General Assembly during the redistricting and reapportionment process . . . except to the extent superseded by federal law." *Id.* at 372, 562 S.E.2d at 390. Having decided that the Whole County Provisions remained enforceable to the extent not preempted or otherwise superseded by federal law, we held that the 2001

redistricting plans violated the Whole County Provisions because "the 2001 Senate redistricting plan divide[d] 51 of 100 counties into different Senate Districts," and "[t]he 2001 House redistricting plan divide[d] 70 out of 100 counties into different House districts." *Id.* at 371, 562 S.E.2d at 390.

¶ 256 Having found that the maps violated the still valid Whole County Provisions, out of respect for the legislative branch, we then sought to give the General Assembly detailed criteria for fashioning remedial maps. The plaintiffs "contend[ed] that remedial compliance with the WCP requires the formation of multi-member legislative districts in which all legislators would be elected 'at-large.' " *Id.* at 376, 562 S.E.2d at 392. As such, we "turn[ed] to address the constitutional propriety of such districts, in the public interest, in order to effect a comprehensive remedy to the constitutional violation which occurred in the instant case." *Id.* at 377, 562 S.E.2d at 393. In doing so, we noted that "[t]he classification of voters into both single-member and multi-member districts . . . necessarily implicates the fundamental right to vote on equal terms." *Id.* at 378, 562 S.E.2d at 393. We explained that

> voters in single-member legislative districts, surrounded by multi-member districts, suffer electoral disadvantage because, at a minimum, *they are not permitted to vote for the same number of legislators* and may not enjoy the same representational influence or "clout" as voters represented by a slate of legislators within a multi-member district.

Id. at 377, 562 S.E.2d at 393 (emphasis added). Thus, we concluded that the use of both single-member and multi-member districts within the same redistricting plan

infringes upon "the fundamental right of each North Carolinian to substantially equal voting power." *Id.* at 379, 562 S.E.2d at 394. In other words, "substantially equal voting power" meant that each legislator should represent a similar number of constituents. This is an application of the one-person, one-vote concept. Here the majority changes the concept of "substantially equal voting power" of one-person, one-vote to apply now to "party affiliation."

¶ 257 We did not discuss the political party of the constituents in *Stephenson* but provided the following remedial directive:

> [T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. The USDOJ precleared the 2001 legislative redistricting plans, and the VRA districts contained therein, on 11 February 2002.[4] This administrative determination signified that, in the opinion of the USDOJ, the 2001 legislative redistricting plans had no retrogressive effect upon minority voters. In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP, as herein established for all redistricting plans and districts throughout the State.

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[4] North Carolina is no longer subject to this requirement of Section 5 of the Voting Rights Act. *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 215–16 (4th Cir. 2016) ("[I]n late June 2013, the Supreme Court issued its opinion in *Shelby County*. In it, the Court invalidated the preclearance coverage formula, finding it based on outdated data. *Shelby* [*Cnty. v. Holder*], [570 U.S. 529, 556–57,] 133 S. Ct. [2612,] 2631 [(2013)]. Consequently, as of that date, North Carolina no longer needed to preclear changes in its election laws.").

In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements.

In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district falling at or within plus or minus five percent deviation from the ideal population consistent with "one-person, one-vote" requirements, the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.

When two or more non-VRA legislative districts may be created within a single county, which districts fall at or within plus or minus five percent deviation from the ideal population consistent with "one-person, one-vote" requirements, single-member non-VRA districts shall be formed within said county. Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.

In counties having a non-VRA population pool which cannot support at least one legislative district at or within plus or minus five percent of the ideal population for a legislative district or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the at or within plus or minus five percent "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping; provided, however, that the resulting interior county lines created by

> any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. The intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined, and communities of interest should be considered in the formation of compact and contiguous electoral districts.
>
> Because multi-member legislative districts, at least when used in conjunction with single-member legislative districts in the same redistricting plan, are subject to strict scrutiny under the Equal Protection Clause of the State Constitution, multi-member districts shall not be used in the formation of legislative districts unless it is established that such districts are necessary to advance a compelling governmental interest.
>
> Finally, we direct that any new redistricting plans, including any proposed on remand in this case, shall depart from strict compliance with the legal requirements set forth herein only to the extent necessary to comply with federal law.

Id. at 383–84, 562 S.E.2d at 396–97.

¶ 258 The majority attempts to analogize the classification of voters in *Stephenson* that were placed into both single and multi-member districts to the classification of voters based upon partisan affiliation. It does so by concluding, without any citation or other reference to legal support or any explanation, that the right to vote on equal terms "necessarily encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those

citizens' views." The majority thus reasons that "[l]ike the distinctions at issue in *Stephenson*, drawing distinctions between voters on the basis of partisanship when allocating voting power diminishes the 'representational influence' of voters" because "those voters have far fewer legislators who are 'responsive' to their concerns and who can together 'press their interests.' "

¶ 259 The majority, however, fails to recognize that at least some partisan considerations are permitted under *Stephenson*. *Id.* at 371, 562 S.E.2d at 390 ("The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, but it must do so in conformity with the State Constitution." (internal citation omitted)); *Rucho*, 139 S. Ct. at 2497 (recognizing that legislators must be permitted to take some "partisan interests into account when drawing district lines"). Furthermore, our *Stephenson* decision thus directs that the Whole County Provisions of Article II, Sections 3 and 5 are still enforceable to the extent that they are compatible with the VRA and one-person, one-vote principles. When understanding *Stephenson* in context, it becomes clear that the Court's statement—that the General Assembly's practice of partisan gerrymandering must still conform with the constitution—refers to the express objective limitations present in Article II, Sections 3 and 5. The Court in *Stephenson* did not identify any other restrictions on the General Assembly's redistricting

authority arising from the state constitution; the Court only recognized the express limitations, which deal exclusively with geographic and population-based measures.

¶ 260 The majority's misunderstanding of *Stephenson* is further expressed through its requirement from the 4 February 2022 order that "[t]he General Assembly must first assess whether, using current election and population data, racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African-American voters."[5] Contrarily, *Stephenson* in no way requires the General Assembly to conduct an independent analysis under Section 2 of the VRA before enacting a redistricting plan. Similarly, federal precedent does not have this requirement.[6]

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[5] Interestingly, the language in the majority's opinion now attempts to contextualize this requirement, noting that "the General Assembly's responsibility to conduct a racially polarized voting analysis arises from our state constitution and decisions of this Court, including primarily *Stephenson*, and not from the VRA itself, or for that matter from any federal law." But this attempted contextualization is senseless considering the directive from the majority's order specifically instructed the General Assembly to apply the federal VRA.

[6] "The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans." *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017). Thus, absent a "sufficient justification," a state is prevented from "separat[ing] its citizens into different voting districts on the basis of race." *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (alteration in original) (quoting *Miller v. Johnson*, 515 U.S. 900, 911, 115 S. Ct. 2475, 2486 (1995)). A plaintiff must first "prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.' That entails demonstrating that the legislature 'subordinated' other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to 'racial considerations.' " *Cooper*, 137 S. Ct. at 1463–64 (citation omitted) (quoting *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488).

¶ 261 In *Stephenson* we explained that "Section 2 of the VRA generally provides that states or their political subdivisions may not impose any voting qualification or prerequisite that impairs or dilutes, on account of race or color, a citizen's opportunity to participate in the political process and to elect representatives of his or her choice." *Stephenson*, 355 N.C. at 363, 562 S.E.2d at 385 (first citing 42 U.S.C. §§ 1973a, 1973b (1994); and then citing *Thornburg v. Gingles*, 478 U.S. 30, 43, 106 S. Ct. 2752, 2762 (1986)). We then stated that "[o]n remand, to ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts." *Id.* at 383, 562 S.E.2d at 396–97. We provided this approach to alleviate the tension between the Whole County Provisions and the VRA because the legislative defendants in *Stephenson* argued that "the constitutional provisions mandating that counties not be divided are wholly unenforceable because of the requirements of the Voting Rights Act." *Id.* at 361, 562 S.E.2d at 383–84. Thus, the Court in *Stephenson* was not forcing the legislative defendants to conduct a VRA analysis. Rather, the Court was merely stating that if Section 2 requires VRA districts, those districts must be drawn first so that the remaining non-VRA districts can be drawn in compliance with the Whole County Provisions.

¶ 262 Legislative defendants here made the decision not to draw any VRA districts. As the trial court correctly noted, "[i]f the [l]egislative [d]efendants are incorrect that no VRA Districts are required, [p]laintiff Common Cause has an adequate remedy at

law and that is to bring a claim under Section 2 of the VRA." There is no requirement under the North Carolina Constitution or federal law that the General Assembly must conduct a racially polarized voting analysis before enacting a redistricting plan. Here the trial court found that there was no showing that race was the predominant factor in drawing the districts. Similarly, the trial court concluded that the state legislative district plans did not violate the Whole County Provisions because the plans contained the minimum number of county traversals necessary to comply with one-person, one-vote principles and because the traversals were done predominantly in pursuit of traditional redistricting principles. Since the trial court formed these conclusions based upon findings of fact supported by competent evidence, its conclusions should be upheld.

¶ 263 Similar to our holding in *Stephenson* is *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198 (1875). There the General Assembly divided the City of Wilmington into three wards, with three aldermen elected in each ward. While the first and second wards each had about 400 voters, the third ward had 2800. *Id.* at 225. While the first and second wards each consisted of one precinct for registration and voting, the third ward had four precincts divided by a "meets and bounds" description which omitted a portion of the city. *Id.* at 223. To be eligible to vote, voters needed to register to vote in their assigned precincts. Lastly, the act required a ninety-day residency in the ward, whereas the constitution provided for thirty days. *Id.* at 216, 221. The Court

held that these obstacles to voting amounted to "the disfranchisement of the voters." *Id.* at 223. Furthermore, it observed that the great disparity of voters in the third ward as compared to the others meant that a third ward voter's vote was not equal. *Id.* at 225. The vote in the two wards "counts as much as seven votes in the third ward." *Id.* This malapportionment was "a plain violation of fundamental principles." *Id.* The "fundamental principle" is that representation shall be apportioned to the popular vote as near as may be. In other words, the Court recognized a basic one-person, one-vote principle. This case has no application to partisan gerrymandering. Notably, for the more than one hundred years since this case was decided, it has never been cited for the proposition for which the majority seeks to use it here.

¶ 264 Since 1776 this Court has exercised restraint absent an express limitation on the authority of the General Assembly. Moreover, this Court has long recognized that responsibilities reserved for the legislature are not reviewable by this Court because they raise political questions. In *Howell v. Howell*, 151 N.C. 575, 66 S.E. 571 (1909), the board of education in Haywood County created a school district and then held a vote to enable those in the district to determine whether a special tax should be imposed. *Id.* at 575–76, 66 S.E. at 572. A majority of the qualified voters in the newly drawn district voted in favor of the tax. *Id.* at 576, 66 S.E. at 572. The plaintiffs, who were taxpayers within that district, brought an action to annul creation of the special-tax school district and to enjoin collection of the tax. *Id.* at 575, 66 S.E. at 572. The

plaintiffs argued that the district was neither compact nor convenient, indicating to them that the district had been gerrymandered based on political views to ensure that a majority would vote in favor of the tax. *Id.* at 575–76, 66 S.E. at 572.

¶ 265 This Court, however, recognized that the creation of a special-tax school district was a legislative task, which at that time the legislature had delegated to local boards of education by a special act. *Id.* at 581, 66 S.E. at 572; *see also* Atwell C. McIntosh, *Special Tax School Districts in North Carolina*, 1 N.C. L. Rev. 88, 88–89 (1922). As such, the Court noted that the board's creation of the district was "no more subject to review than the act of the Legislature itself." *Howell,* 151 N.C. at 581, 66 S.E. at 574. Because "questions of compactness and convenience must be addressed to somebody's judgment and discretion," and because the duty to create districts at that time was "unequivocally delegate[d] . . . to the county board of education," the plaintiffs' challenge to the district's creation and composition raised a political question. *Id.* at 578, 66 S.E. at 573. The Court also noted that "[f]or the courts to undertake to pass upon such matters would be manifestly unwise." *Id.* at 578, 66 S.E. at 573. Moreover, the Court stated: "There is no principle better established than that *the courts will not interfere* to control the exercise of discretion on the part of any officer to whom has been legally delegated the right and duty to exercise that discretion." *Id.* at 578, 66 S.E. at 573 (emphasis added).

¶ 266 The Court expressed its concern about the politically motivated gerrymandering of special-tax districts to produce a favorable result and commented that perhaps "the overzealous overstep[ped] the limitations of prudence." *Id.* at 582, 66 S.E. at 574. Nonetheless, the Court recognized that a question about the creation of districts, even when a court disagrees with the district's creation, raises a political question "to be fought out on the hustings"—or, through the political process—not through the judiciary. *Id.* at 581, 66 S.E. at 574. In recognition of the constitutionally assigned authority to the General Assembly, the Court held it was prohibited from interfering.

¶ 267 In sum, a matter is nonjusticiable if the constitution expressly assigns responsibility to one branch of government or there is not a manageable standard by which to decide it, including whether the matter involves a policy determination. Both elements are present here. In addition to the legislature's plenary power, the constitution expressly assigns the General Assembly redistricting authority subject only to express limitations. The decision to implement a political fairness requirement in the constitution without explicit direction from the text inherently requires policy choices and value determinations and does not result in a neutral, manageable standard. Here this Court's intrusion is a violation of separation of powers. By striking down the enacted plans as unconstitutional partisan gerrymanders, the majority today wholeheartedly ushers this Court into a new

chapter of judicial activism, severing ties with over two hundred years of judicial restraint in this area. The majority seizes this opportunity to advance its agenda by grafting a prohibition of partisan gerrymandering onto several provisions of the Declaration of Rights. A review of these provisions, however, demonstrates that none specifically address redistricting. They are designed to protect only "individual and personal rights" rather than a group's right to have a party's preferred candidate placed in office. The majority seems to concede that there is no express provision of the constitution which addresses partisan gerrymandering. Undeterred, it untethers itself from history and case law in this case to apply an evolving understanding to these rights.

III. Declaration of Rights

¶ 268 To properly understand what the drafters meant when they included various rights in the Declaration of Rights, and particularly the application, if any, they may have in structuring voting districts, the historical context of our apportionment and elections process is significant. As recognized by the trial court, North Carolina has had some form of elected, representative body since 1665.[7] Leading up to the

[7] As early as 1663, the Lords Proprietors could enact laws in consultation with the freeman settled in their province. Charter Granted by Charles II, King of England to the Lords Proprietors of Carolina (Mar. 24, 1663), *in* 1 *Colonial and State Records of North Carolina* 23 (William L. Sanders ed., 1886). In 1665 certain "concessions" by the Lords Proprietors allowed for the formation of the predecessor to the General Assembly and the election of freeman representatives. Concessions and Agreement Between the Lords Proprietors of Carolina and William Yeamans, et al. (Jan. 7, 1665), *in* 1 *Colonial and State*

enactment of the 1776 constitution, in 1774 the delegates of the First Provincial Congress were elected by geographic location, by county or town. *See* Henry G. Connor & Joseph B. Cheshire, Jr., *The Constitution of North Carolina Annotated* xii–xiv (1911). The text of the 1776 constitution established the General Assembly as the Senate and the House of Commons. N.C. Const. of 1776, § I. Senators were elected annually by county without regard to the population size of that county, *id.* § II, and representatives were also elected annually but with two representatives per county or specified town, *id.* § III. Only certain towns were included in the representation, *id.* but other towns were later added.[8] This apportionment was done at the same time certain Declaration of Rights provisions, namely the popular sovereignty provision, N.C. Const. of 1776, Declaration of Rights, § I, the free elections clause, *id.* at § VI,

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Records of North Carolina 81 (William L. Sanders ed., 1886). The 1669 Fundamental Constitutions of Carolina divided those representatives into counties, divided again into precincts. The Fundamental Constitutions of Carolina (Mar. 1, 1669), *in* 1 *Colonial and State Records of North Carolina* 188 (William L. Sanders ed., 1886). The assembly met every two years and stood for election every two years. *Id.* at 199–200. Thus, long before the 1776 constitution, the people in Carolina were electing their representatives in districts.

Later under the Royal Governor, the bicameral assembly consisted of an upper house to advise the Royal Governor and a lower house that represented the people and their interests. *See* Charles Lee Raper, *North Carolina, A Study in English Colonial Government* 71–100 (1904) [hereinafter *English Colonial Government*]. The lower house consisted of freeman elected by county and certain towns. *Id.* at 89–91.

[8] The towns represented initially were Edenton, New Bern, Wilmington, Salisbury, Hillsborough, and Halifax, while others were added over the years. John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1769 (1992) (discussing Article III of the 1776 constitution and including that Fayetteville, for example, was added to that list in 1789).

and the right to assembly and petition, *id.* at § XVIII, were enacted. Given the apportionment provisions, clearly these clauses did not mean "equal voting power," even based on population. Furthermore, partisan gerrymandering was well known to the framers, yet none of these provisions were crafted to address it. *See Rucho*, 139 S. Ct. at 2496.

¶ 269 Through the years, the population of the state shifted radically from the east to the piedmont and west. John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1770–71 (1992). Nonetheless, the eastern region received additional representation. *Id.* at 1770. The General Assembly created smaller counties in the east and larger ones in the piedmont and west, tipping the numbers of representatives in favor of the east despite population growth trends in other areas. *Id.* at 1770–71. This county-town approach, combined with the power of the General Assembly to divide existing counties to create new ones, resulted in superior political power in the east despite the shift in population. *See id.* This malapportionment led to civil unrest and a crisis which culminated with the 1835 constitutional convention. John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 3, 13 (2d ed. 2013) [hereinafter *State Constitution*]. No one argued that the provisions of the Declaration of Rights made the legislative apportionment acts unconstitutional.

¶ 270 In 1835 a constitutional convention met to, among other things, adjust the representative system to better address differences in population. *See id.* That

convention resulted in amendments that required senatorial districts to be drawn by the General Assembly based on the taxes paid by each county, N.C. Const. of 1776, amends. of 1835, art. I, § 1, and included the predecessor of the Whole County Provisions, *see* N.C. Const. art. II, § 3(3), that prohibited a county from being divided to create the senatorial districts, N.C. Const. of 1776, amends. of 1835, art. I, § 1. House seats were allotted based on population, allowing the more populated counties to have additional representatives. *Id.* art. I, § 2. Like today, the General Assembly was instructed to reconsider the apportionment of the counties based on population according to the census taken by order of Congress. *Id.* art. I, § 3. Each county was required to have at least one House representative. *Id.* art. I, § 2. Likewise, the convention implemented other changes to representation such as lengthening legislative terms from one year to two years, *id.* art. I, §§ 1–2, and allowing the voters to elect the governor, *id.* art. II, § 1.

¶ 271 The constitutional convention of 1868 placed the Declaration of Rights in Article I, the forefront of the constitution. *See* N.C. Const. of 1868, art. I. The convention added Article I, Section 1, incorporating the provision from the Declaration of Independence that acknowledged our God-given, equal rights. *See id.* art. I, § 1. Significant here, the Senate became apportioned by population. *Id.* art. II, § 5. Along with the express limitation imposed by the Whole County Provisions, the 1868 amendments required senatorial districts to be contiguous and only be redrawn

in connection with the decennial census. *Id.* The convention lengthened the term of the governor to four years, *id.* art. III, § 1, and constitutionally created a separate judicial branch, *see id.* art. IV, with judges being elected by the voters for eight-year terms, *id.* art. IV, § 26.

¶ 272 For almost one hundred years, apportionment remained unchanged until the 1960s. During that time, the Speaker of the House received the authority to apportion the House districts. N.C. Const. of 1868, amends. of 1961, art. II, § 5. Also, to comply with a federal lawsuit and the decision in *Baker v. Carr*, the constitution was amended in 1968 to reflect the one-person, one-vote requirement. *State Constitution* 31. This change affected the structure of the House of Representatives in particular. *Id.* Significantly, the number of House members remained at 120, but the representatives were no longer apportioned by county; instead, the 120 representatives were allotted among districts now drawn based on equal population. N.C. Const. of 1868, amends. of 1961, art. II, § 5. By the end of the 1960s, the same criteria for proper districts—equal population, contiguous territory, the Whole County Provisions, and reapportionment in conjunction with the decennial census—applied to both Senate and House districts. *See* N.C. Const. of 1868, amends. of 1967, art. II, §§ 4, 6.

¶ 273 The current version of our constitution, ratified by the people at the ballot box in 1971 along with five new amendments, came about as a "good government

measure," *State Constitution* 32–33, or, in other words, an attempt to consolidate the 1868 constitution and its subsequent amendments along with editorial and organizational revisions and amendment proposals. *See, e.g.*, N.C. State Constitution Study Comm'n, *Report of the North Carolina State Constitution Study Commission* 8–12 (1968).

¶ 274 Based upon our history and the constitutional structure, when the people had concerns about ineffective political representation, they addressed those concerns by amending the constitution itself, rather than relying on judicial amendment through litigation. Each of the provisions relevant to the claims here have existed since 1971, with some dating back to the 1776 constitution. They are all housed in Article I of our constitution, the Declaration of Rights. None of those clauses have been interpreted as a restriction on partisan considerations in redistricting—even after hundreds of years of apportionments and decades of redistricting litigation—until today.

¶ 275 The Declaration of Rights is an expressive yet nonexhaustive list of protections afforded to *individual* citizens against government intrusion, along with "the ideological premises that underlie the structure of government." *State Constitution* 46. The Declaration of Rights sets out "[b]asic principles, such as popular sovereignty and separation of powers," which are "given specific application in later articles." *Id.* As such, each provision within the Declaration of Rights must be considered with the related, more specific provisions of the constitution that outline the practical

workings for governance. That understanding comports with the general principles for interpreting all legal documents, treating statutes and constitutional text alike.[9]

¶ 276 The frequent elections provision provides a classic example of when a general principle set forth in the Declaration of Rights is practically developed by other constitutional text. Article I, Section 9 states: "For redress of grievances and for amending and strengthening the laws, elections shall be often held." N.C. Const. art. I, § 9. This provision appeared in the original Declaration of Rights, *see* N.C. Const. of 1776, Declaration of Rights, § XX, and in 1776 "often" meant annual elections, *see, e.g.*, N.C. Const. of 1776, §§ V, VI, XV. The frequency of elections changed in 1835 through amendments providing for biannual legislative elections. N.C. Const. of 1776, amends. of 1835, art. I, §§ 1, 2. Even though it changed the frequency of elections from one to two years, this constitutional amendment did not violate the stated goal to have frequent elections as a timely means of holding accountable an unresponsive elected legislature. The concept of frequent elections remained embodied in the biannual election cycle.

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[9] *Compare Piedmont Publ'g Co. v. City of Winston-Salem*, 334 N.C. 595, 598, 434 S.E.2d 176, 177–78 (1993) ("One canon of construction is that when one statute deals with a particular subject matter in detail, and another statute deals with the same subject matter in general and comprehensive terms, the more specific statute will be construed as controlling."), *with Preston*, 325 N.C. at 449, 385 S.E.2d at 478 ("Issues concerning the proper construction of the Constitution of North Carolina 'are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.' " (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953))).

¶ 277 Similarly, the 1868 constitution for the first time set the three branches on different election cycles. For example, in recognition of its policymaking authority, the General Assembly stayed on a biannual election cycle, *see* N.C. Const. of 1868, art. II, §§ 3, 6; however, the executive officers received four-year terms, *id.* art. III, § 1, and the Justices of the Supreme Court received eight-year terms, *id.* art. IV, § 26. Did this change violate the frequent elections provision? The answer is no—the principle of "often" elections in the Declaration of Rights is defined by other provisions of the constitution.

¶ 278 This Court recently read a provision of the Declaration of Rights in Article I, Section 15 together with a more specific and applicable provision in Article IX, Section 2. *Deminski ex rel. C.E.D. v. State Bd. of Educ.*, 377 N.C. 406, 2021-NCSC-58, ¶ 14. Article I, Section 15 acknowledges the "right to the privilege of education" and the State's duty "to guard and maintain that right." N.C. Const. art. I, § 15. Placed in the working articles of the constitution, Article IX, entitled "Education," *see id.* art. IX, actually "implements the right to education as provided in Article I," *Deminski*, ¶ 14. This Court explained that "these two provisions work in tandem," *id.* in that

> "Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." *Leandro* [*v. State*], 346 N.C. [336], 347, 488 S.E.2d [249,] 255 [(1997).] . . . .
>
> Further, Article I, Section 15 places an affirmative duty on the government "to guard and maintain that

> right." N.C. Const. art. I, § 15. Taken together, Article I, Section 15 and Article IX, Section 2 require the government to provide an opportunity to learn that is free from continual intimidation and harassment which prevent a student from learning. In other words, the government must provide a safe environment where learning can take place.

Id. ¶¶ 14–15. Thus, to arrive at a proper and harmonious interpretation of the constitutional text, the Court read the principles regarding the privilege of education enshrined in our Declaration of Rights in conjunction with the specific application given to education in a later article. As done in *Deminiski*, this Court should construe the general provisions of the Declaration of Rights in harmony with the more specific provisions addressing redistricting.

¶ 279 Moreover, "[t]he civil rights guaranteed by the Declaration of Rights in Article I of our Constitution *are individual and personal rights* entitled to protection against state action." *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) (emphasis added); *id.* at 783, 413 S.E.2d at 290 ("Having no other remedy, our common law guarantees *plaintiff* a direct action under the State Constitution for alleged violations of *his* constitutional freedom of speech rights." (emphases added)).

¶ 280 Finding no explicit constitutional provision prohibiting partisan gerrymandering, the majority creatively attempts to mine the Declaration of Rights to find or create some protection for a political group's right to their preferred form of representation and a "fair" share of the "voting power." The majority seems to say

that this entitlement is based on the political party registrants associated with that group. Under a *Corum* analysis, however, an *individual* plaintiff has a direct cause of action against state officials who, acting in their official capacity, violate his constitutional rights as protected by the Declaration of Rights. *Id.* at 783–84, 413 S.E.2d at 290; *see Deminski*, ¶¶ 16–18 (outlining the *Corum* framework as the legal mechanism for bringing a proper claim under the Declaration of Rights).[10] Even when considering a self-identified class of individuals, such as self-selection of political affiliation, the Court has concluded that the Declaration of Rights protects the individual's rights, not the political group's rights. *Libertarian Party of N.C. v. State*, 365 N.C. 41, 49, 707 S.E.2d 199, 204–05 (2011) (explaining that casting votes in alignment with political beliefs implicates "*individual* associational rights" (emphasis added)). This principle rings true even when alleging a violation of an associational right such as those implicated in the free speech and assembly clauses. *Id.* at 49, 707 S.E.2d at 204–05 ("In North Carolina, statutes governing ballot access by political parties implicate *individual* associational rights rooted in the free speech and assembly clauses of the state constitution." (emphasis added) (citing N.C. Const. art. I, §§ 12, 14)). Nonetheless, in the majority's view, "political equality" based on a

[10] The holdings in *Corum* and *Deminiski* did not expand the role of the Court in remedying violations of constitutional rights as protected by the Declaration of Rights. Rather, like in *Bayard*, those cases involved the Court's interpretation of express provisions within the text of the constitution.

group's party affiliation is a fundamental, albeit unwritten, principle of the Declaration of Rights akin to an immutable characteristic that deserves the highest form of protection under the state constitution.

¶ 281 Contrary to the majority's assertion, even a cursory review of the applicable history and case law supports the basic understanding that the Declaration of Rights protects individual rights such as the freedom of an individual to vote his conscience in an election which is free from fraud. The individual right to participate in a "free election" does not include the right to have one's preferred candidate elected or a political group's right to proportional representation. Moreover, because "a constitution cannot violate itself," *Leandro*, 346 N.C. at 352, 488 S.E.2d at 258, this Court must construe Article II, Sections 3 and 5 and the provisions that the majority relies upon—Article I, Sections 10, 12, 14, and 19—harmoniously. We address each provision in turn.

A. Free Elections Clause

¶ 282 Article I, Section 10 states that "[a]ll elections shall be free." N.C. Const. art. I, § 10. The clause first appears in the 1776 constitution, providing that "[t]he election of members, to serve as representatives, ought to be free." N.C. Const. of 1776, Declaration of Rights, § VI.[11] The 1868 constitution restated the free elections clause

[11] Under the 1776 constitution, the members of the General Assembly were the only elected officials. The General Assembly thus had the exclusive power to: (1) elect the

as "[a]ll elections ought to be free." N.C. Const. of 1868, art. I, § 10. Even though the word "ought" in both the 1776 and 1868 constitutions was changed to "shall" in the 1971 constitution, this change is not a substantive revision to the free elections clause. *See Report of the North Carolina State Constitution Study Commission* 73–75; *see also Smith v. Campbell*, 10 N.C. (3 Hawks) 590, 598 (1825) (declaring that "ought" is synonymous with "shall," noting that "the word *ought*, in this and other sections of the [1776 constitution], should be understood imperatively"). "Free" means having political and legal rights of a personal nature or enjoying personal freedom, a "free citizen," or having "free will" or choice, as opposed to compulsion, force, constraint, or restraint. *See Free*, *Black's Law Dictionary* (11th ed. 2019). As a verb, "free" means to liberate or remove a constraint or burden. *Id.* Therefore, giving the provision its plain meaning, "free" means "free from interference or intimidation." *State Constitution* 56.[12]

¶ 283 While the provision protects the voter, it also protects candidates; however, there are limits. The terms "elections" and "free," N.C. Const. art. I, § 10, must be

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Governor, N.C. Const. of 1776, § XV; (2) appoint the Attorney-General, *id.* § XIII; (3) appoint Judges of the Supreme Courts of Law and Equity and Judges of Admiralty, *id.*; (4) appoint the general and field officers of the militia, *id.* § XIV; (5) elect the council of State, *id.* § XVI; (6) appoint a treasurer or treasurers of the State, *id.* § XXII; (7) appoint the Secretary of State, *id.* § XXIV; and (8) recommend the appointment of Justices of the Peace to the Governor who shall commission them accordingly, *id.* § XXXIII.

[12] The full text of the Virginia Declaration of Rights, from which the North Carolina free elections clause was taken, provides a clearer idea of the intention behind the text.

read, for example, in the context of Article VI, entitled "Suffrage and Eligibility to Office," *see id.* art. VI. Even though "elections shall be free," they are nonetheless restricted in certain ways in Article VI. *See, e.g.*, N.C. Const. art. VI, § 1 (requiring a North Carolina voter to be a citizen of the United States and at least 18 years old); *id.* § 2(1)–(2) (placing residency requirements on voters); *id.* § 2(3) (placing restrictions on felons' voting rights); *id.* § 3 (allowing for conditions on voter registration as prescribed by statute); *id.* § 5 (requiring that votes by the people be by ballot); *id.* § 7 (requiring public officials to take an oath before assuming office); *id.* § 8 (outlining certain disqualifications from holding public office); *id.* § 9 (prohibiting dual office holding); *id.* § 10 (allowing an incumbent to continue in office until a successor is chosen and qualified).

¶ 284 Based on our constitution's plain language and history, the framers had a specific meaning of the free elections clause. With respect to the history of the clause, the trial court found that inclusion of the clause was intended to protect against

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> That elections of members to serve as representatives of the people, in Assembly ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage and cannot be taxed or deprived of their property for public uses without their own consent or that of their representatives so elected, nor bound by any law to which they have not, in like manner, assented for the public good.

Va. Const. of 1776, Declaration of Rights, § 6.

abuses of executive power, not to protect the people from their representatives who frequently face election by the people.[13] For the same reason, the 1776 constitution

[13] The trial court found in part:

> . . . [T]he words as originally used in the English Bill of Rights ([1689]) were crafted in response to abuses and interference by the Crown in elections for members of parliament which included changing the electorate in different areas to achieve electoral advantage. J.R. Jones, *The Revolution of 1688 in England*, 148 (1972). . . . Examining the North Carolina Free Elections Clause in a greater context gives a complete understanding to its meaning.
>
> . . . At the time of the Glorious Revolution, King James II embarked on a campaign to pack Parliament with members sympathetic to him in an attempt to have laws that penalized Catholics and criminalized the practice of Catholicism repealed. After failing in his attempt to pack parliament, King James II was ultimately overthrown and fled England, paving the way for King William and Queen Mary to rule together. As a condition of King William and Queen Mary's assumption of the throne, they were required to sign the English Declaration of Rights which resulted in limiting the powers of the Crown and an increase in power to Parliament, most notably in the House of Commons.
>
> . . . The Glorious Revolution and the resulting English Bill of Rights were the beginning of a constitutional monarchy. While the English Bill of Rights, in part, sought to address the Crown's interference with the affairs of Parliament, there is no indication that the English Free Election Clause was directed at anyone but the Crown, much less a restriction on the power of Parliament. In fact, the opposite seems true. The English Bill of Rights reflected a shift in power from the Crown, who generally acted to protect its own interest, to the House of Commons in Parliament, whose members were elected by the people. Because the English Bill of Rights did not abolish the monarchy, provisions were necessary to provide protection to the elected members of parliament from interference by the Crown.

> . . . By the time the Virginia Declaration of Rights and the North Carolina Declaration of Rights and Constitution were passed, the Glorious Revolution had been over for almost a century. It is safe to say that none of the drafters of the 1776 Constitution were alive during the Glorious Revolution or the establishment of the English Bill of Rights and their experiences and concerns did not arise from direct interactions with the Crown, but instead from direct interactions with the Royal Governors and their Council who represented the interests of the Crown. Moreover, the Royal Governors were representatives of a constitutional monarch, unlike the monarchs who claimed the throne through divine right before and up to the signing of the English Bill of Rights.
>
> . . . Under colonial rule, the North Carolina Royal Governor had veto power, as no law could be passed without his consent. While his instructions did not allow him to determine the manner of electing members to the House of Burgesses or set the number of members, they did allow him to dissolve the House of Burgesses. [*English Colonial Government*], at 35. The instructions to the Royal Governor also allowed him to issue charters of incorporation for towns and counties from which representatives would be elected.
>
> . . . No doubt there were tensions between the House of Burgesses and the Governor from 1729 to 1776. In 1746, in an effort to give equal representation to each county, as the newer counties were given fewer representatives in the House of Burgesses, the Royal Governor moved the legislature to Wilmington where representatives of the larger counties would not travel, giving the smaller counties effective control of the lower house. As a result, the legislature passed legislation giving each county two representatives in the assembly. This remained in effect until 1754 when the legislation was repealed by the Crown. [*English Colonial Government*, at] 90–91.
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> . . . .
>
> . . . At times, the House of Burgesses refused to seat new members from counties created by the Governor. The dispute was not necessarily that the Governor did not have the authority, but the House believed they had a role in the process in the creation of counties. [*English Colonial Government*,] at

allowed the General Assembly to elect the Governor. N.C. Const. of 1776, § XV. The trial court found in part:

> Upon the adoption of the 1776 Constitution, the Royal Governor, who represented and protected the interest of the Crown, was replaced by a Governor chosen by the General Assembly. N.C. Const. of 1776, § XV. . . .
>
> . . . The circumstances under which the English Free Election Clause was written were far different than those which caused the same language to be used in the 1776 Constitution.
>
> . . . .
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> . . . Any argument that the Free Elections Clause placed limits on the authority of the General Assembly to apportion seats flies in the face of the overwhelming authority given to the General Assembly in the 1776 Constitution. . . .
>
> . . . Much like the English Bill of Rights, the 1776 Constitution shifted power to the elected representatives of the people.

As noted by the trial court, under the 1776 constitution, voters did not vote for any executive branch members, including the governor, nor did voters elect judges. The General Assembly selected the members of the executive and judicial branches. *See* N.C. Const. of 1776, §§ XIII, XV, XXII, XXIV. Despite the existence of the free

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89–90.

As the trial court found, aside from disputes over representation, the lower house fought the Royal Governor over a myriad of issues, including the right to establish a quorum for the legislature and, most seriously, over fiscal matters and the appointment of judges.

elections clause, under this constitutional structure, the voter did not have the right to vote for these offices at all and certainly was not entitled to see his *preferred* candidate in office.

¶ 285 Because of its plain meaning, this Court has issued few opinions interpreting the free elections clause though it has been part of our constitution since 1776. The first instance was in *State ex rel. Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746 (1937), in which the plaintiff, a candidate who ostensibly lost an election for the office of county commissioner of Wilkes County, brought a quo warranto action, alleging that the Wilkes County Board of Elections fraudulently deprived him of the office by altering the vote count. *Id.* at 700–01, 191 S.E. at 746. In response, the defendant argued the plaintiff's complaint failed to state facts sufficient to constitute a cause of action. *Id.* at 701, 191 S.E. at 746. After the trial court rejected the defendant's argument, the defendant appealed, arguing that it was the sole duty of the County Board of Elections, rather than the judiciary, "to judicially determine the result of the election from the report and tabulation made by the precinct officials." *Id.* at 701, 191 S.E.2d at 747. In affirming the trial court's decision, we provided the following rationale:

> One of the chief purposes of *quo warranto* or an information in the nature of *quo warranto* is to try the title to an office. This is the method prescribed for settling a controversy between rival claimants when one is in possession of the office under a claim of right and in the exercise of official functions or the performance of official duties; and the

> jurisdiction of the Superior Court in this behalf has never been abdicated in favor of the board of county canvassers or other officers of an election.
>
> In the present case fraud is alleged. The courts are open to decide this issue in the present action. In Art. I, sec. 10, of the Constitution of North Carolina, we find it written: "All elections ought to be free." Our government is founded on the consent of the governed. A free ballot and a fair count must be held inviolable to preserve our democracy. In some countries the bullet settles disputes, in our country the ballot.

Id. at 702, 191 S.E. at 747 (internal citations omitted) (quoting N.C. Const. of 1868, art. I, § 10). Therefore, we interpreted "free" to mean the right to an honest vote count, free from fraud.

¶ 286 The next time we addressed the merits of a free election claim was in *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964). The plaintiff in *Clark* challenged a statute that required voters wishing to change their party affiliation to first take an oath with the following language: "I will support the nominees of the party to which I am now changing my affiliation in the next election and the said party nominees thereafter until I shall, in good faith, change my party affiliation in the manner provided by law." *Id.* at 140, 134 S.E.2d at 169. We held that the provision in the statute requiring certain provisions of the oath was invalid, explaining that:

> Any elector who offers sufficient proof of his intent, in good faith, to change his party affiliation cannot be required to bind himself by an oath, the violation of which, if not sufficient to brand him as a felon, would certainly be sufficient to operate as a *deterrent to his exercising a free*

> *choice among available candidates at the election*—even by casting a write-in ballot. His membership in his party and his right to participate in its primary may not be denied because he refuses to take an oath to vote in a manner which violates the constitutional provision that elections shall be free. Article I, Sec. 10, Constitution of North Carolina.
>
> When a member of either party desires to change his party affiliation, the good faith of the change is a proper subject of inquiry and challenge. Without the objectionable part of the oath, ample provision is made by which the officials may strike from the registration books the names of those who are not in good faith members of the party. The oath to support future candidates violates the principle of *freedom of conscience*. It denies a free ballot—*one that is cast according to the dictates of the voter's judgment*. We must hold that the Legislature is without power to shackle a voter's conscience by requiring the objectionable part of the oath as a price to pay for his right to participate in his party's primary.

Id. at 142–43, 134 S.E.2d at 170 (emphases added) (citing N.C. Const. of 1868, art. I, § 10). Thus, we interpreted "free" to mean freedom to vote one's conscience. Nonetheless, an inquiry into the sincerity of one's desire to change parties did not violate the clause.

¶ 287 The majority judicially amends the free elections clause to read "elections shall be free from depriving a voter of substantially equal voting power on the basis of party affiliation" with the voting power to be measured by modern political science analysis. To believe that the framers of this provision in 1776 or the people who ultimately adopted it in subsequent constitutions had even a vague notion that the clause had

this unbounded meaning is absurd. The mandated political science methods did not even exist. Our hundreds of years of constitutional history confirms that this creative idea has no support in our history or case law.

¶ 288 Based upon this Court's precedent with respect to the free elections clause, a voter is deprived of a "free" election if (1) the election is subject to a fraudulent vote count, *see Poplin*, 211 N.C. at 702, 191 S.E. at 747, or (2) a law prevents a voter from voting according to one's judgment, *see Clark*, 261 N.C. at 142, 134 S.E.2d at 170. Therefore, the free elections clause must be read in harmony with other constitutional provisions such as Article VI, that limits who can vote and run for office. Free elections must be absent of fraud in the vote tabulation. The free elections clause was not meant to restrict the General Assembly's presumptively constitutional ability to engage in partisan gerrymandering.

B. Equal Protection Clause

¶ 289 Next, the majority claims its decision is supported by the equal protection clause. Article I, Section 19 provides, in relevant part, that "[n]o person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin." N.C. Const. art. I, § 19. With respect to the history of this clause, the trial court found as follows:

> The Equal Protection Clause came into existence as part of the ratification of the 1971 Constitution . . . . The addition

> of the Equal Protection Clause, while a substantive change, was not meant to "bring about a fundamental change" to the power of the General Assembly. Report of Study Comm'n at 10.

This Court reviews claims brought under the equal protection clause as follows:

> Traditionally, courts employ a two-tiered scheme of analysis when an equal protection claim is made.
>
> When a governmental act classifies persons in terms of their ability to exercise a fundamental right, or when a governmental classification distinguishes between persons in terms of any right, upon some "suspect" basis, the upper tier of equal protection analysis is employed. Calling for "strict scrutiny", this standard requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest.
>
> When an equal protection claim does not involve a "suspect class" or a fundamental right, the lower tier of equal protection analysis is employed. This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest.
>
> For strict scrutiny to be properly applied in evaluating an equal protection claim, it is necessary that there be a preliminary finding that there is a suspect classification or an infringement of a fundamental right. It has been held that a class is deemed "suspect" when it is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command particular consideration from the judiciary. The underlying rationale of the theory of suspect classification is that where legislation or governmental action affects discrete and insular minorities, the presumption of constitutionality fades because the traditional political processes may have broken down.

Texfi Indus., Inc. v. City of Fayetteville, 301 N.C. 1, 10–11, 269 S.E.2d 142, 149 (1980) (internal citations omitted).

¶ 290 Classification based upon affiliation with one of the two major political parties in the United States—especially the Democratic Party in North Carolina[14]—does not trigger heightened scrutiny because neither party has historically been relegated to a position of political powerlessness. Allegations of partisan gerrymandering likewise do not trigger heightened scrutiny because the practice of partisan gerrymandering alone does not constitute "an infringement of a fundamental right." *Id.* at 11, 269 S.E.2d at 149.

¶ 291 This Court has explained that "[t]he right to vote *on equal terms* is a fundamental right." *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747, 392 S.E.2d 352, 356 (1990) (emphasis added). The fundamental right to vote on equal terms simply means that each vote should have the same weight. This is a simple mathematical calculation. *Rucho*, 139 S. Ct. at 2501. The historic understanding of equal voting power is stated in Article II, Sections 3(1) and 5(1), requiring that legislators "represent, as nearly as may be, an equal number of inhabitants." Party affiliation is not mentioned. This understanding of equal voting

[14] The trial court found that "[b]etween 1870 and 2010, the Democratic Party at all times controlled one or both houses of the General Assembly." This finding, which is binding on appeal, demonstrates that throughout North Carolina's history, members of the Democratic Party certainly have not been relegated to a position of political powerlessness.

power meaning one-person, one-vote is supported by our cases such as *Stephenson* and *Canaday*. To reach its approved application of the equal protection clause, the majority begins by radically changing the meaning of the fundamental right to vote. It takes this individual right and transforms it into a right to "substantially equal voting power on the basis of party affiliation" and then declares a right to statewide proportional representation. In its unparalleled distortion of the right to vote, it singles out equal representation based on political affiliation, i.e., the two major political parties. What about the unaffiliated voters or voters in "non-partisan," issue-focused groups organized for political influence? Of course, nothing about this approach is supported by the constitutional text or case law.

¶ 292 Only when a redistricting enactment infringes upon the "right to vote on equal terms for representatives" does heightened scrutiny apply. *See Stephenson*, 355 N.C. at 378, 562 S.E.2d at 393 ("The classification of voters into both single-member and multi-member districts within [the same redistricting plan] necessarily implicates the fundamental right to vote on equal terms, and thus strict scrutiny is the applicable standard."); *Blankenship v. Bartlett*, 363 N.C. 518, 518, 523–24, 681 S.E.2d 759, 763–64, 766 (2009) (applying heightened scrutiny where the plaintiffs showed a "gross disparity in voting power" because some judicial districts had five times the population of others). The "right to vote on equal terms" has been carefully defined in our case law.

¶ 293 In *Stephenson* this Court explained that "[t]he classification of voters into both single-member and multi-member districts [in the same redistricting plan] necessarily implicates the fundamental right to vote on equal terms." 355 N.C. at 378, 562 S.E.2d at 393. We reasoned that

> voters in single-member legislative districts, surrounded by multi-member districts, suffer electoral disadvantage because, at a minimum, *they are not permitted to vote for the same number of legislators* and may not enjoy the same representational influence or "clout" as voters represented by a slate of legislators within a multi-member district.

Id. at 377, 562 S.E.2d at 393 (emphasis added).

¶ 294 Likewise, in *Blankenship* the plaintiffs demonstrated a "gross disparity in voting power between similarly situated residents of Wake County" by making the following showing:

> In Superior Court District 10A, the voters elect one judge for every 32,199 residents, while the voters of the other districts in Wake County, 10B, 10C, and 10D, elect one judge per every 140,747 residents, 158,812 residents, and 123,143 residents, respectively. Thus, residents of District 10A have a voting power roughly five times greater than residents of District 10C, four and a half times greater than residents of District 10B, and four times greater than residents of District 10D.

363 N.C. at 527, 681 S.E.2d at 766. We explained that the above showing implicated the fundamental "right to vote on equal terms in representative elections—a one-person, one-vote standard," and we thus employed a heightened scrutiny analysis. *Id.* at 522, 681 S.E.2d at 762–63.

¶ 295 Unlike the classifications in *Stephenson* and *Blankenship*, partisan gerrymandering has no significant impact upon the right to vote on equal terms under the one-person, one-vote standard. In other words, an effort to gerrymander districts to favor a political party does not alter *voting power* so long as voters are permitted to (1) vote for the same number of representatives as voters in other districts and (2) vote as part of a constituency that is similar in size to that of the other districts. Therefore, because partisan gerrymandering does not infringe upon a fundamental right, rational basis review applies. As such, read in harmony with Article II, Sections 3 and 5, Article I, Section 19 only prohibits redistricting plans that fail to "bear some rational relationship to a conceivable legitimate governmental interest." *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149.[15] Our understanding of the equal protection clause has been informed by federal case law interpreting the Federal Equal Protection Clause. *See Rucho*, 139 S Ct. at 2506–07 (finding no manageable standards for assessing partisan considerations in redistricting despite claims that the federal Equal Protection Clause had been violated). The plan here does not violate the equal protection clause.

[15] Here the enacted plans pass rational basis review because they are rationally related to the General Assembly's legitimate purpose of redrawing the legislative districts after each decennial census.

C. Freedom of Assembly and Freedom of Speech Clauses

¶ 296 The majority also engrafts new meaning into Article I, Sections 12 and 14. These sections provide as follows:

> **Sec. 12. Right of assembly and petition.**
> The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated.
>
> . . . .
>
> **Sec. 14. Freedom of speech and press.**
> Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

N.C. Const. art. I, §§ 12, 14. The trial court made the following findings with respect to the history of these clauses:

> Like the Equal Protection Clause, the Free Speech Clause was added to the Freedom of the Press Clause as part of the 1971 Constitution . . . . The addition of the Free Speech Clause, while a substantive change, was not meant to "bring about a fundamental change" to the power of the General Assembly. Report of Study Comm'n at 10.
>
> . . . .
>
> . . . The Freedom of Assembly Clause first appeared in the Declaration of Rights set forth in the 1776 Constitution and provided that "the people have a right to assemble together, to consult for their common good, to instruct their Representatives, and to apply to the

> Legislature, for redress of grievances." 1776 Const. Decl. of Rights XVII. The Freedom of Assembly Clause was modified by the 1868 Constitution by deleting the first word of the clause "that." 1868 Const. art. I, § 26. Amendments were again made to the Freedom of Assembly Clause with the ratification of the 1971 Constitution . . . . The change to the Freedom of Assembly Clause was not meant as a substantive change, nor was it meant to "bring about a fundamental change" to the power of the General Assembly. Rept. of Study Comm'n at 10.

¶ 297 The right to free speech is violated when "restrictions are placed on the espousal of a particular viewpoint," *State v. Petersilie*, 334 N.C. 169, 183, 432 S.E.2d 832, 840 (1993), or where retaliation motivated by the contents of an individual's speech would deter a person of reasonable firmness from engaging in speech or association, *Toomer v. Garrett*, 155 N.C. App. 462, 477–78, 574 S.E.2d 76, 89 (2002) (explaining that the test for a retaliation claim requires a showing "that the plaintiff . . . suffer[ed] an injury that would likely chill a person of ordinary firmness from continuing to engage" in a "constitutionally protected activity," including First Amendment activities), *appeal dismissed and disc. rev. denied*, 357 N.C. 66, 579 S.E.2d 576 (2003); *see Evans v. Cowan*, 132 N.C. App. 1, 11, 510 S.E.2d 170, 177 (1999) (determining "there was no forecast of evidence" to support a retaliation claim).

¶ 298 Partisan gerrymandering plainly does not place any restriction upon the espousal of a particular viewpoint. Rather, redistricting enactments in North Carolina are subject to the typical policymaking customs of open debate and

compromise. *See Berger*, 368 N.C. at 653, 781 S.E.2d at 261 (noting that the structure of the legislature "ensures healthy review and significant debate of each proposed statute, the enactment of which frequently reaches final form through compromise"). As such, opponents of a redistricting plan are free to voice their opposition.

¶ 299 Moreover, partisan gerrymandering—and public disdain for the practice—has been ubiquitous throughout our state's history. *See Rucho*, 139 S. Ct. at 2494 ("Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution.") As such, it is apparent that a person of ordinary firmness would not refrain from expressing a political view out of fear that the General Assembly will place his residence in a district that will likely elect a member of the opposing party. *See Toomer*, 155 N.C. App. at 477–78, 574 S.E.2d at 89. It is plausible that an individual may be less inclined to voice his political opinions if he is unable to find someone who will listen. Article I, Sections 12 and 14, however, guarantee the rights to speak and assemble without government intervention, rather than the right to be provided a receptive audience. *See Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 286, 104 S. Ct. 1058, 1066 (1984) (stating that individuals "have no constitutional right as members of the public to a government audience for their policy views"); *Johnson v. Wisc. Elections Comm'n*, 967 N.W.2d 469, 487 (Wis. 2021) ("Associational rights guarantee

the freedom to *participate in* the political process; they do not guarantee a favorable outcome." (emphasis added)).

¶ 300 This Court and the Court of Appeals have interpreted speech and assembly rights in alignment with federal case law under the First Amendment. *See Petersilie*, 334 N.C. at 184, 432 S.E.2d at 841; *Feltman v. City of Wilson*, 238 N.C. App. 246, 252–53, 767 S.E.2d 615, 620 (2014); *State v. Shackelford*, 264 N.C. App. 542, 552, 825 S.E.2d 689, 696 (2019). As discussed at length in *Rucho*, the Supreme Court of the United States found no manageable standards for assessing partisan considerations in redistricting despite having the similar express protections of speech and assembly rights. *Rucho*, 139 S. Ct. at 2505–07. Therefore, when interpreted in harmony with Article II, Sections 3 and 5, it is clear that Article I, Sections 12 and 14 do not limit the General Assembly's presumptively constitutional authority to engage in partisan gerrymandering. As with the prior Declaration of Rights clauses, there is nothing in the history of the clauses nor the applicable case law that supports the majority's expanded use of them.

D. Summary

¶ 301 In summary, none of the constitutional provisions cited by plaintiffs prohibit the practice of partisan gerrymandering. Each must be read in harmony with the more specific provisions that outline the practical workings for governance. Notably, Article II, Sections 3 and 5 outline the practical workings of the General Assembly's

redistricting authority. These provisions contain only four express limitations on the General Assembly's otherwise plenary power, none of which address partisan gerrymandering. Therefore, because the constitution expressly assigns to the General Assembly the authority to redistrict, and this Court is without any satisfactory or manageable standards to assess redistricting decisions by the legislative branch, we should not and cannot adjudicate partisan gerrymandering claims. The claims here present a nonjusticiable political question, and this Court's intrusion violates separation of powers.

¶ 302 Recognizing that there is no explicit constitutional provision supporting its position, the majority resorts to an evolving understanding to support its expansive approach. The majority cites Article I, Sections 1 and 2 as supporting its statewide proportionality argument. *See* N.C. Const. art. I, § 1 ("We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness."); *id.* § 2 ("All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."). Undoubtedly, Article I, Sections 1 and 2, are bedrock constitutional principles, recognizing that all are created equal and endowed with God-given rights and acknowledging that all political power originates and is derived from the people.

Neither provision speaks expressly to limitations on the General Assembly's authority to redistrict. Undeterred, however, the majority reads into our constitution a proportionality requirement which appears to be more akin to the European parliamentary system, rather than the American system. Furthermore, the "will of the people" is expressed in the words of our constitution. The best way to honor the "will of the people" is to interpret the constitution as written and as the drafters intended. At no point in 1776, 1835, 1868, or 1971 did the drafters or refiners intend for the selected provisions of the Declaration of Rights to limit the legislature's authority to redistrict. The limitations the people placed upon the General Assembly regarding redistricting are expressly stated in Article II, Sections 3 and 5.

¶ 303 The people expressed their will in the 2020 election, which utilized constitutionally compliant maps. Knowing that the 2021 General Assembly would be tasked with redistricting, the people elected them. Nonetheless, the majority says it is simply "recur[ing] to fundamental principles." Its analysis and remedies, however, are new, not fundamental. Judicially modified constitutional provisions and judicial intrusion into areas specifically reserved for the legislative branch are not a "recurrence to fundamental principles." Rather, the decisions of the majority are a significant departure threatening "the blessings of liberty."

IV. Remedy

¶ 304 The majority's remedy mandates its approved political scientists and their approaches. Apparently, the majority's policy decisions guide these selections. The majority's required timeline is arbitrary and seems designed only to ensure this Court's continued direct involvement in this proceeding. Instead of following our customary process of allowing the trial court to manage the details of a case on remand, the majority mandates a May 2022 primary. No reason is given, nor does one exist for not allowing the trial court to manage the remand schedule, including, if necessary, further delaying the primary.

¶ 305 The majority defines "partisan advantage" as "achieving a political party's advantage across a map incommensurate with its level of statewide voter support." The majority also defines "political fairness" as "the effort to apportion to each political party a share of seats commensurate with its level of statewide support." These definitions demonstrate the majority's desire to judicially amend our constitution to include a requirement of statewide proportional representation. *See Proportional representation*, *Black's Law Dictionary* (11th ed. 2014) ("An electoral system that allocates legislative seats to each political group in proportion to its actual voting strength in the electorate.") Just as there is no proportionality requirement in our constitution, there is none in the Federal Constitution: "Our cases, however, clearly foreclose any claim that the Constitution requires proportional

representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Rucho*, 139 S. Ct. at 2499 (quoting *Bandemer*, 478 U.S. at 130, 106 S. Ct. at 2809).

¶ 306 The majority asserts that

> [i]f constitutional provisions forbid only what they were understood to forbid at the time they were enacted, then the free elections clause has nothing to say about slavery and the complete disenfranchisement of women and minorities. In short, the majority's [sic] view compels the conclusion that there is no constitutional bar to denying the right to vote to women and black people.

This claim is wholly unfounded. Slavery was officially abolished by the Thirteenth Amendment to the United States Constitution ratified in 1865. Article I, Section 17, of the 1868 state constitution explicitly prohibits slavery. N.C. Const. of 1868, art. I, § 17. Similarly, the Nineteenth Amendment to the United States Constitution gave women the right to vote. The state constitution was modified accordingly. *See* N.C. Const. art. VI, § 1. As discussed elsewhere, the free election and assembly clauses were enacted in 1776 and were never applied to voter qualifications. Free speech and equal protection clauses were added to the state constitution in 1971, after equal voting qualifications were established. In sum, the issues raised by the majority are specifically addressed in the Federal Constitution and the state constitution.

V. Conclusion

¶ 307 Historically, to prove an act of the General Assembly is unconstitutional we have required a showing that, beyond a reasonable doubt, an express provision of the constitution is violated. No express provision of our constitution has been violated here. Nonetheless, in the majority's view, it is the members of this Court, rather than the people, who hold the power to alter our constitution. Thus, the majority by judicial fiat amends the plain text of Article I, Sections 10, 12, 14, and 19, to empower courts to supervise the legislative power of redistricting when met with complaints of partisan gerrymandering. Such action constitutes a clear usurpation of the people's authority to amend their constitution. As explicitly stated in our constitution, the people alone have the authority to alter this foundational document. N.C. Const. art. I, § 3 ("The people of this State have the inherent, sole, and exclusive right of . . . altering . . . their Constitution . . . ."); *see also id.* art. XIII, § 2. Under our constitution's expressed process, the people have the final say. *Id.* art. XIII, §§ 3–4.

¶ 308 The majority asserts that its holding somehow adheres to "the principle of democratic and political equality that reflects the spirits and intent of our Declaration of Rights." It cannot point to any text or case law to support its deciphering of the "spirits and intent" of the document because there is nothing in the text of the constitution, its history, or our case law that supports the majority's position. The majority simply rules that the North Carolina Constitution now has a statewide

proportionality requirement for redistricting. In doing so, the conclusion magically transforms the protection of individual rights into the creation of a protected class consisting of members of a political party, thereby subjecting a redistricting plan to strict scrutiny review. The majority presents various general views about what constitutes unconstitutional partisan gerrymandering and provides a variety of observations about what the constitution requires. Absent from the opinion is what is meant by "substantially equal voting power on the basis of partisan affiliation." Any discretionary decisions constitutionally committed to the General Assembly in the redistricting process seem to have been transferred to the Court.

¶ 309 The vagaries within the opinion and the order only reinforce the holding of the Supreme Court in *Rucho* that there is no neutral, manageable standard. The four members of this Court alone will approve a redistricting plan which meets their test of constitutionality. This case substantiates the observations of the Supreme Court of the United States as to the many reasons why partisan gerrymandering claims are nonjusticiable. The Court observed that redistricting invariably involves numerous policy decisions. It noted that "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation," *Rucho*, 139 S. Ct. at 2499, and that "plaintiffs inevitably 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.* In

other words, plaintiffs ask the courts "to reallocate political power between the two major political parties." *Id.* at 2507. Despite these well-reasoned warnings, the majority of this Court proceeds, and in the process, proves the Supreme Court's point.

¶ 310 The Supreme Court also warned of the need for courts to provide a clear standard so legislatures could "reliably differentiate unconstitutional from 'constitutional political gerrymandering.' " *Id.* at 2499 (quoting *Cromartie*, 526 U.S. at 551, 119 S. Ct. at 1551). It observed that:

> "Fairness" does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.

Id. at 2499–500 (alteration in original) (quoting *Vieth*, 541 U.S. at 291, 124 S. Ct. at 1784 (opinion of Scalia, J.)). The majority ignores all these warnings, fails to articulate a manageable standard, and seems content to have the discretion to determine when a redistricting plan is constitutional. This approach is radically inconsistent with our historic standard of review, which employs a presumption that acts of the General Assembly are constitutional, requiring identification of an express constitutional provision and a showing of a violation of that provision beyond a reasonable doubt.

¶ 311 The Supreme Court cautioned that embroiling courts in cases involving partisan gerrymandering claims by applying an "expansive standard" would amount to an "unprecedented intervention in the American political process." *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306, 124 S. Ct. at 1793 (opinion of Kennedy, J.)). Sadly, the majority does just that. I respectfully dissent.

Justices BERGER and BARRINGER join in this dissenting opinion.