384 N.C.—No. 2 Pages 194-568

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JULY 20, 2023

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice

PAUL MARTIN NEWBY

Associate Justices

ROBIN E. HUDSON[1]
SAMUEL J. ERVIN IV[2]
MICHAEL R. MORGAN
ANITA EARLS

PHIL BERGER JR.
TAMARA PATTERSON BARRINGER
RICHARD D. DIETZ[3]
CURTIS H. ("TREY") ALLEN III[4]

Former Chief Justices

RHODA B. BILLINGS
JAMES G. EXUM JR.
BURLEY B. MITCHELL JR.
HENRY E. FRYE
SARAH PARKER
MARK D. MARTIN
CHERI BEASLEY

Former Justices

ROBERT R. BROWNING
J. PHIL CARLTON
WILLIS P. WHICHARD
JAMES A. WYNN JR.
FRANKLIN E. FREEMAN JR.
G. K. BUTTERFIELD JR.
ROBERT F. ORR

GEORGE L. WAINWRIGHT JR.
EDWARD THOMAS BRADY
PATRICIA TIMMONS-GOODSON
ROBERT N. HUNTER JR.
ROBERT H. EDMUNDS JR.
BARBARA A. JACKSON
MARK A. DAVIS

Clerk
GRANT E. BUCKNER

Librarian
THOMAS P. DAVIS

Marshal
WILLIAM BOWMAN

[1]Retired 31 December 2022. [2]Term ended 31 December 2022. [3]Sworn in 1 January 2023. [4]Sworn in 1 January 2023.

ADMINISTRATIVE OFFICE OF THE COURTS

Director

ANDREW HEATH[5]

RYAN S. BOYCE[6]

Assistant Director

DAVID F. HOKE[7]

RAGAN R. OAKLEY[8]

OFFICE OF APPELLATE DIVISION REPORTER

ALYSSA M. CHEN

JENNIFER C. PETERSON

NICCOLLE C. HERNANDEZ

[5]Resigned 3 April 2023. [6]Appointed 4 April 2023. [7]Retired 31 December 2022. [8]Appointed 13 January 2023.

SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 28 APRIL 2023

HEADNOTE INDEX

APPEAL AND ERROR

Appellate jurisdiction—discretion to issue writ of certiorari—not limited by Rules of Appellate Procedure—The Court of Appeals had jurisdiction to review the trial court's order terminating a mother's parental rights where, although the mother filed a pro se notice of appeal addressed to the Supreme Court rather than to the Court of Appeals, the intermediate appellate court and opposing parties received notice of the appeal and all parties filed briefs in the correct court. The Court of Appeals properly exercised its discretion pursuant to N.C.G.S. § 7A-32(c) in issuing a writ of certiorari in aid of its jurisdiction, which was not limited by the Rules of Appellate Procedure or by any statute. **In re R.A.F., 505.**

CONSTITUTIONAL LAW

Facial challenge—restoration of felon voting rights—Free Elections Clause—In a declaratory action challenging the facial constitutionality of N.C.G.S. § 13-1 (regarding felon voting rights, particularly for convicted felons on felony supervision), the trial court erred by concluding that the statute violated the Free Elections Clause (Article I, Section 10) of the state constitution by prohibiting a large number of people from voting. Since Article VI, Section 2(3) of the constitution prohibits felons from voting, the exclusion of felons whose voting rights have not been restored from the electoral process does not implicate the concerns that the Free Elections Clause was enacted to address. **Cmty. Success Initiative v. Moore, 194.**

Facial challenge—restoration of felon voting rights—property qualifications—In a declaratory action challenging the facial constitutionality of N.C.G.S. § 13-1 (regarding felon voting rights, particularly for convicted felons on felony supervision), the trial court erred by concluding that the statute violated the Property Qualifications Clause (Article I, Section 11) of the state constitution by conditioning felons' eligibility to vote on their ability to comply with the financial obligations of their sentences such as the payment of court costs, fines, or restitution. Since Article VI, Section 2(3) of the constitution prohibits felons from voting, the requirement of felons fulfilling the financial terms of their sentences before having their voting rights restored by statute does not implicate the Property Qualifications Clause, which affects how people may exercise their right to vote or seek office, nor does the requirement equate to a ban on requiring property ownership before exercising those rights. **Cmty. Success Initiative v. Moore, 194.**

Facial challenge—restoration of felon voting rights—wealth-based classification—standard of review—In a declaratory action challenging the facial

constitutionality of N.C.G.S. § 13-1 (regarding felon voting rights, in particular for convicted felons on felony supervision), the trial court erred by applying strict scrutiny to the question of whether the statute created an impermissible wealth classification in violation of the Equal Protection Clause (Article I, Section 19) of the state constitution by conditioning felons' eligibility to vote on their ability to comply with the financial obligations of their sentences such as the payment of court costs, fines, or restitution. Where the statute did not burden a fundamental right, since felons have no right to vote pursuant to Article VI, Section 2(3) of the constitution, or particularly burden a suspect class, the appropriate standard was rational basis review, under which the statute passed constitutional muster because the conditions placed on felons related to a legitimate government interest—ensuring that felons take responsibility for their crimes and exercise their voting rights responsibly. **Cmty. Success Initiative v. Moore, 194.**

North Carolina—equal protection—facial challenge to state law—analytical framework—A facial challenge to a state law under the Equal Protection Clause of the state constitution will overcome the presumptive validity of an act of the General Assembly only upon proof beyond a reasonable doubt that the legislature enacted the law with discriminatory intent and that the law actually produces a meaningful disparate impact along racial lines. **Holmes v. Moore, 426.**

North Carolina—equal protection—voter ID law—discriminatory intent—disparate impact—On rehearing of a facial challenge to a voter ID law, the trial court abused its discretion when it acted under a misapprehension of the law—by using an incorrect legal standard and improperly shifting the burden of proof of constitutional validity to the legislature—to conclude that the voter ID law was unconstitutional in that it violated the Equal Protection Clause of the state constitution. Under the proper framework for evaluating a facial challenge under the state constitution, plaintiffs did not provide sufficient evidence to meet their burden of proving beyond a reasonable doubt that the legislature enacted the law with discriminatory intent and that the law actually provides disparate impact along racial lines by disproportionately impeding black voters from voting; therefore, plaintiffs failed to overcome the presumption of validity that attaches to legislative acts. The prior opinion issued in this case was withdrawn, the trial court's order was reversed, and the matter was remanded for entry of an order dismissing plaintiffs' claim with prejudice. **Holmes v. Moore, 426.**

North Carolina—equal protection—voter ID law—presumption of legislative good faith—In a facial challenge to a voter ID law, the trial court erred by concluding that the law was unconstitutional on the basis that it was enacted with discriminatory intent and that it therefore violated the Equal Protection Clause of the state constitution, and by permanently enjoining implementation of the law. Although the trial court applied the federal framework set forth in *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), which is not binding on state courts interpreting the constitutionality of a state law under a state constitution, plaintiffs' claim failed under even this analysis because the trial court relied too heavily on past discrimination in the historical record and its own speculation regarding additional measures the legislature could have taken during the legislative process rather than on the presumption of legislative good faith, and thus improperly shifted the burden of proving constitutional validity to the General Assembly. **Holmes v. Moore, 426.**

North Carolina—facial challenge—felon voting rights statute—discriminatory intent—disparate impact—In a declaratory action challenging the facial constitutionality of N.C.G.S. § 13-1 (regarding felon voting rights, in particular for convicted felons on felony supervision), the trial court erred by failing to apply the presumption of legislative good faith and by assuming that past discrimination infected the legislative process that led to the enactment of the current law, which led it to erroneously conclude that the legislature enacted the law with discriminatory intent; therefore, the court's findings made under these misapprehensions of the law were not binding on appellate review. The trial court reached its decision by misapplying the analytical framework contained in *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), to determine whether the statute violated the Equal Protection Clause (Article I, Section 19) of the state constitution and by adopting unreliable statistical evidence regarding the alleged disparate impact of the law on African Americans. Where plaintiffs failed to carry their burden of overcoming the presumptive validity of section 13-1, the trial court should have entered judgment for defendants on this claim. **Cmty. Success Initiative v. Moore, 194.**

Right to be present at criminal trial—waiver—voluntariness of absence—suicide attempt—competency—The trial court's decision to proceed with a criminal trial in defendant's absence, without conducting further inquiry into defendant's capacity to proceed with the trial after defendant made an apparent suicide attempt partway through the trial by jumping off a balcony at the county jail, did not violate defendant's statutory protections with regard to competency to stand trial (pursuant to N.C.G.S. §§ 15A-1002 and 15A-1443) or his constitutional due process rights. Based on evidence taken by the trial court regarding the incident and defendant's mental health as well as arguments from defense counsel and the State, there was not substantial evidence that defendant may have lacked competency at the time of his apparent suicide attempt. The trial court's determination that defendant's absence from trial was voluntary because he committed an intentional act was supported by the court's prior colloquies with defendant (during which defendant waived his right to testify or to present evidence on his own behalf), the court's own direct observation of defendant's demeanor, and the court's review of evidence—including surveillance footage—of defendant's actions and demeanor at the time he jumped. **State v. Flow, 528.**

CONTRACTS

Separation settlement agreement—terms—naming of insurance policy beneficiaries—no ambiguity—In a declaratory judgment action regarding a separation settlement agreement—the terms of which defendant interpreted as requiring the proceeds from his deceased ex-wife's life insurance policy to be paid to him and not to her trust (which had been established for the benefit of their four children)—the Court of Appeals erred when it determined that the settlement agreement's terms regarding the ex-wife's ability to change the beneficiary of her life insurance policies were ambiguous. The agreement's plain language was clear and unambiguous; therefore, the trial court properly awarded summary judgment in favor of the trust. **Galloway v. Snell, 285.**

EASEMENTS

Bodies of water—permits to third parties—scope of authority—plain and unambiguous language—Based on the plain and unambiguous language of an easement purchased decades ago by Duke Power Company (Duke) in order to create Lake Norman (by constructing a dam and flooding the land), including language granting Duke "absolute water rights" and the right to "treat [the land] in any manner deemed necessary or desirable by Duke Power Company," Duke acted within the scope of its broad authority and discretion when it granted permits to third-party homeowners to build lake access structures and to use the lake for recreational purposes. Further, the easement's language was consistent with Duke's federal licensing obligations regarding the lake and the authority granted to Duke was confirmed by the parties' practice over many years in seeking permission from Duke to build shoreline structures over and into the submerged property. **Duke Energy Carolinas, LLC v. Kiser, 275.**

ELECTIONS

Legislative redistricting—claims of partisan gerrymandering—equal protection clause—not applicable—Plaintiffs' claims that partisan gerrymandering will diminish the electoral power of members of a particular political party did not implicate the equal protection clause in the state constitution's Declaration of Rights (Article I, Section 19). Partisan gerrymandering has no impact upon the right to vote on equal terms under the one-person, one-vote standard; therefore, partisan gerrymandering claims do not trigger review under the state's equal protection clause. **Harper v. Hall, 292.**

Legislative redistricting—claims of partisan gerrymandering—free elections clause—not applicable—The free elections clause in the state constitution's Declaration of Rights—"All elections shall be free." (Article I, Section 10)—does not limit or prohibit partisan gerrymandering, or even address redistricting at all. Based on its plain meaning, its historical context, and our Supreme Court's precedent, the free elections clause means that voters are free to vote according to their consciences without interference or intimidation. **Harper v. Hall, 292.**

Legislative redistricting—claims of partisan gerrymandering—free speech and freedom of assembly clauses—not applicable—The free speech and freedom of assembly clauses in the state constitution's Declaration of Rights (Article I, Sections 12 and 14) do not limit the General Assembly's presumptively constitutional authority to engage in partisan gerrymandering. Nothing in the history of the clauses or the applicable case law supported plaintiffs' expanded interpretation of them. **Harper v. Hall, 292.**

Legislative redistricting—claims of partisan gerrymandering—petition for rehearing—previous opinions overruled and withdrawn—It was proper for the Supreme Court to allow the legislative defendants' petition for rehearing pursuant to Appellate Procedure Rule 31 to revisit the issue of whether claims of partisan gerrymandering are justiciable under the state constitution, where the four-justice majority in *Harper v. Hall* (*Harper I*), 380 N.C. 317 (2022), expedited the consideration of the matter over the strong dissent of the other three justices, with no jurisprudential reason for doing so, and where *Harper I* and the same four-justice majority's opinion in *Harper v. Hall* (*Harper II*), 383 N.C. 89 (2022), were wrongly decided. Furthermore, *Harper I* did not meet any criteria for adhering to stare decisis. Upon rehearing, *Harper I* was overruled, and *Harper II* was withdrawn. **Harper v. Hall, 292.**

Legislative redistricting—claims of partisan gerrymandering—political questions—nonjusticiable—Claims of partisan gerrymandering present political questions and therefore are nonjusticiable under the state constitution. Plaintiffs' claims of partisan gerrymandering were nonjusticiable political questions because: The state constitution explicitly and exclusively commits redistricting authority to the General Assembly subject only to express limitations, leaving only a limited role for judicial review; the state constitution provides no judicially discernible or manageable standards for determining how much partisan gerrymandering is too much; and any attempt to adjudicate claims regarding partisan gerrymandering would require the judiciary to make numerous policy determinations for which the state constitution provides no guidance. Each factor on its own would be sufficient to render the claims nonjusticiable. Accordingly, the Supreme Court overruled *Harper v. Hall* (*Harper I*), 380 N.C. 317 (2022), withdrew *Harper v. Hall* (*Harper II*), 383 N.C. 89 (2022), and dismissed plaintiffs' claims with prejudice. **Harper v. Hall, 292.**

Legislative redistricting—claims of partisan gerrymandering—prior opinions overruled and withdrawn—racially polarized voting analysis—In a redistricting case, the Supreme Court overruled a prior opinion issued by a four-justice majority in *Harper v. Hall* (*Harper I*), 380 N.C. 317 (2022), and withdrew the same majority's subsequent opinion in *Harper v. Hall* (*Harper II*), 383 N.C. 89 (2022). The Court also specifically overruled the holding from *Harper I* that required the General Assembly to perform a racially polarized voting (RPV) analysis before drawing any legislative districts. **Harper v. Hall, 292.**

Legislative redistricting—claims of partisan gerrymandering—prior opinions overruled and withdrawn—remedy—Upon rehearing a redistricting case and concluding that plaintiffs' claims of partisan gerrymandering were nonjusticiable—thus overruling and withdrawing prior opinions in the matter—the Supreme Court addressed the appropriate remedy. The Court granted the legislative defendants the opportunity to enact a new set of legislative and congressional redistricting plans, guided by federal law, the objective constraints in the state constitution located in Sections 3 and 5 of Article II, and this opinion. Neither the original redistricting plans nor the remedial plans, which were created during the course of the litigation and used in the 2022 election cycle, were "established" within the meaning of Article II, Sections 3(4) and 5(4), because both plans were a product of a misapprehension of North Carolina law, and the original plans were never used in an election. **Harper v. Hall, 292.**

Legislative redistricting—standard of review—presumption of constitutionality—political question doctrine—Legislation passed by the General Assembly, which serves as the "agent of the people for enacting laws," is presumed constitutional, and the judiciary may declare an act of the General Assembly in violation of the state constitution only when the act directly conflicts with an express provision of the constitution. Therefore, when considering the constitutionality of redistricting plans drawn by the General Assembly, the judiciary must presume the plans' constitutionality and ask whether the plans violate an express provision of the constitution beyond a reasonable doubt. When the judiciary cannot locate an express textual limitation on the legislature, the issue may present a political question that is inappropriate for resolution by the judiciary. To respect the separation of powers, courts must refrain from adjudicating a claim where there is: a textually demonstrable commitment of the matter to another branch of government, a lack of judicially discoverable and manageable standards, or the impossibility of deciding the case without making a policy determination of a kind clearly suited for nonjudicial discretion. **Harper v. Hall, 292.**

parental rights to his daughter based on neglect or willful abandonment (N.C.G.S. § 7B-1111(a)(1), (7)) was affirmed where there was no record evidence demonstrating that respondent had previously neglected the child, that there was a likelihood of future neglect if she were to be placed in his care, or that respondent showed an intention to give up all parental rights to her, particularly where there was evidence that petitioner mother actively prevented respondent from forming a relationship with the child. **In re S.R., 516.**

Grounds for termination—willful failure to pay child support—sufficiency of findings—correct standard of review—In a private termination of parental rights action, the trial court's determination that grounds were not established to terminate respondent father's parental rights to his daughter based on willful failure to pay child support (N.C.G.S. § 7B-1111(a)(4)) was affirmed where the trial court made no findings that an order existed requiring respondent to pay support—despite evidence that respondent had paid support but that his payments stopped after petitioner mother elected to stop garnishment of his wages through centralized collections—or that respondent's failure to provide support was willful. The correct standard of review at the adjudication stage is whether the findings of fact are supported by clear, cogent, and convincing evidence, and whether the findings support the conclusions of law; to the extent the Court of Appeals' opinion affirming the trial court's decision could be read to instead apply the abuse of discretion standard, that portion of its opinion was modified. **In re S.R., 516.**

Parental right to counsel—failure of respondent to appear—dismissal of provisional counsel—statutory requirements met—The trial court acted in accordance with N.C.G.S. §§ 7B-1108.1(a)(1) and 7B-1101.1(a)(1) in a termination of parental rights matter when it dismissed respondent mother's provisional counsel after respondent failed to appear at a pretrial hearing. Respondent did not challenge the court's determination that all service and notice requirements had been met and did not argue that she lacked notice of the hearing in her arguments to the Court of Appeals, which erred by addressing the notice issue without first being presented with that issue. **In re R.A.F., 505.**

SCHEDULE FOR HEARING APPEALS DURING 2023

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 31
February 1, 2, 7, 8, 9
March 14, 15, 16
April 25, 26, 27
September 12, 13, 14, 19, 20, 21
October 31
November 1, 2, 7, 8, 9

CMTY. SUCCESS INITIATIVE v. MOORE

[384 N.C. 194 (2023)]

COMMUNITY SUCCESS INITIATIVE; JUSTICE SERVED NC, INC; WASH AWAY UNEMPLOYMENT; NORTH CAROLINA STATE CONFERENCE OF THE NAACP; TIMOTHY LOCKLEAR; DRAKARUS JONES; SUSAN MARION; HENRY HARRISON; ASHLEY CAHOON; AND SHAKITA NORMAN

v.

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; 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; KENNETH RAYMOND, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; AND DAVID C. BLACK, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS

No. 331PA21

Filed 28 April 2023

1. Jurisdiction—standing—facial constitutional challenge—felon voting rights statute—direct injury—redressability

In a declaratory action challenging the facial constitutionality of N.C.G.S. § 13-1 (regarding felon voting rights), the six individual plaintiffs—convicted felons who were unable to vote while on felony supervision—had standing to bring their action because they sufficiently alleged a direct injury and the redressability of the alleged violations if they were to prevail. Only one of the four nonprofit organization plaintiffs (N.C. NAACP), however, had standing to sue on behalf of its members, where the complaint alleged that some of its members were ineligible for re-enfranchisement under the law and that the interest of those members in regaining the franchise was tied to the organization's mission, and where the organization could obtain relief for those members without their participation in the lawsuit. The remaining three nonprofit organization plaintiffs did not allege that they had members who were directly injured by the statute but instead referenced vague harms such as the need to divert resources to educate members about how the law might affect their voting rights.

2. Constitutional Law—North Carolina—facial challenge—felon voting rights statute—discriminatory intent—disparate impact

In a declaratory action challenging the facial constitutionality of N.C.G.S. § 13-1 (regarding felon voting rights, in particular for convicted felons on felony supervision), the trial court erred by failing to apply the presumption of legislative good faith and by assuming that

past discrimination infected the legislative process that led to the enactment of the current law, which led it to erroneously conclude that the legislature enacted the law with discriminatory intent; therefore, the court's findings made under these misapprehensions of the law were not binding on appellate review. The trial court reached its decision by misapplying the analytical framework contained in *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), to determine whether the statute violated the Equal Protection Clause (Article I, Section 19) of the state constitution and by adopting unreliable statistical evidence regarding the alleged disparate impact of the law on African Americans. Where plaintiffs failed to carry their burden of overcoming the presumptive validity of section 13-1, the trial court should have entered judgment for defendants on this claim.

3. Constitutional Law—facial challenge—restoration of felon voting rights—wealth-based classification—standard of review

In a declaratory action challenging the facial constitutionality of N.C.G.S. § 13-1 (regarding felon voting rights, in particular for convicted felons on felony supervision), the trial court erred by applying strict scrutiny to the question of whether the statute created an impermissible wealth classification in violation of the Equal Protection Clause (Article I, Section 19) of the state constitution by conditioning felons' eligibility to vote on their ability to comply with the financial obligations of their sentences such as the payment of court costs, fines, or restitution. Where the statute did not burden a fundamental right, since felons have no right to vote pursuant to Article VI, Section 2(3) of the constitution, or particularly burden a suspect class, the appropriate standard was rational basis review, under which the statute passed constitutional muster because the conditions placed on felons related to a legitimate government interest—ensuring that felons take responsibility for their crimes and exercise their voting rights responsibly.

4. Constitutional Law—facial challenge—restoration of felon voting rights—property qualifications

In a declaratory action challenging the facial constitutionality of N.C.G.S. § 13-1 (regarding felon voting rights, particularly for convicted felons on felony supervision), the trial court erred by concluding that the statute violated the Property Qualifications Clause (Article I, Section 11) of the state constitution by conditioning felons' eligibility to vote on their ability to comply with the financial obligations of their sentences such as the payment of court costs,

fines, or restitution. Since Article VI, Section 2(3) of the constitution prohibits felons from voting, the requirement of felons fulfilling the financial terms of their sentences before having their voting rights restored by statute does not implicate the Property Qualifications Clause, which affects how people may exercise their right to vote or seek office, nor does the requirement equate to a ban on requiring property ownership before exercising those rights.

5. Constitutional Law—facial challenge—restoration of felon voting rights—Free Elections Clause

In a declaratory action challenging the facial constitutionality of N.C.G.S. § 13-1 (regarding felon voting rights, particularly for convicted felons on felony supervision), the trial court erred by concluding that the statute violated the Free Elections Clause (Article I, Section 10) of the state constitution by prohibiting a large number of people from voting. Since Article VI, Section 2(3) of the constitution prohibits felons from voting, the exclusion of felons whose voting rights have not been restored from the electoral process does not implicate the concerns that the Free Elections Clause was enacted to address.

Justice EARLS dissenting.

Justice MORGAN joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-27(b) from a final judgment and order entered on 28 March 2022 by a three-judge panel in Superior Court, Wake County, following transfer of the matter to the panel pursuant to N.C.G.S. § 1-267.1. On 4 May 2022, pursuant to N.C.G.S. § 7A-31(a) and (b)(2), the Supreme Court allowed plaintiffs' petition for discretionary review prior to determination by the Court of Appeals. Heard in the Supreme Court on 2 February 2023.

Forward Justice, by Daryl Atkinson, Whitley Carpenter, Kathleen F. Roblez, Ashley Mitchell, and Caitlin Swain; Arnold & Porter Kaye Scholer LLP, by R. Stanton Jones and Elisabeth S. Theodore; and Protect Democracy Project, by Farbod K. Faraji, for plaintiff-appellees.

Cooper & Kirk, PLLC, by Nicole J. Moss, David Thompson, Peter A. Patterson, Joseph O. Masterman, and William V. Bergstrom; and K&L Gates, by Nathan A. Huff, for defendant-appellants Legislative Defendants.

Tin, Fulton, Walker & Owen, PLLC, by Abraham Rubert-Schewel, for Cato Institute and Due Process Institute, amici curiae.

Poyner Spruill LLP, by Caroline P. Mackie; and Karl A. Racine, Attorney General for the District of Columbia, by Caroline S. Van Zile, Solicitor General, for the District of Columbia and the States of California, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, Rhode Island, and Washington, amici states.

Law Offices of F. Bryan Brice, Jr., by Anne M. Harvey; and Proskauer Rose LLP, by Lloyd B. Chinn and Joseph C. O'Keefe, for Institute for Innovation in Prosecution at John Jay College, amicus curiae.

North Carolina Justice Center, by Sarah Laws, Laura Holland, and Quisha Mallette, for the North Carolina Justice Center and Down Home NC, amici curiae.

Patterson Harkavy LLP, by Paul E. Smith and Burton Craige, for the Sentencing Project, the Lawyers' Committee for Civil Rights Under Law, and the Southern Poverty Law Center, amici curiae.

ALLEN, Justice.

Our state constitution ties voting rights to the obligation that all citizens have to refrain from criminal misconduct. Specifically, it denies individuals with felony convictions the right to vote unless their citizenship rights are restored "in the manner prescribed by law." N.C. Const. art. VI, § 2(3). No party to this litigation disputes the validity of Article VI, Section 2(3) of the North Carolina Constitution. This case is therefore not about whether disenfranchisement should be a consequence of a felony conviction. The state constitution says that it must be, and we are bound by that mandate.

This case involves instead challenges to N.C.G.S. § 13-1, the statute that sets out the criteria that felons must satisfy to be eligible for reenfranchisement. In the early 1970s, the General Assembly embarked on a series of reforms to section 13-1 and related statutory provisions. The first round of reforms eliminated the complicated petition-and-hearing procedure that had long hindered attempts by eligible felons to regain their rights. The second round left us with essentially the version

of section 13-1 in effect today, under which felons automatically regain the right to vote once they complete their sentences, including any periods of probation, parole, or post-release supervision to which they are subject.[1]

Nearly fifty years after the legislature rewrote section 13-1 to make re-enfranchisement automatic for all eligible felons, plaintiffs filed suit alleging equal protection and other state constitutional challenges to the requirement that felons complete their probation, parole, or post-release supervision before they regain their voting rights. In particular, plaintiffs alleged that the legislators who imposed this requirement intended to discriminate against African Americans. To prove this claim, plaintiffs introduced statistical evidence to show that African Americans constitute a disproportionate share of felons on probation, parole, or post-release supervision. Plaintiffs also argued that the requirement perpetuates the racist intent behind nineteenth century laws enacted to disenfranchise or suppress the votes of African Americans.

The trial court ruled in plaintiffs' favor and entered an order allowing all felons not in jail or prison to register and vote. In so doing, the trial court misapplied the law and overlooked facts crucial to its ruling. The statistical evidence relied on by the court does not establish that requiring felons to finish their sentences prior to re-enfranchisement disproportionately affects African American felons. Moreover, the trial court wrongly imputed the discriminatory views of nineteenth century lawmakers to the legislators who made it easier for eligible felons of all races to regain their voting rights. The changes to section 13-1 appear to have been undertaken in good faith.

The evidence does not prove that legislators intended their reforms to section 13-1 in the early 1970s to disadvantage African Americans, nor does it substantiate plaintiffs' other constitutional claims. It is not unconstitutional to insist that felons pay their debt to society as a

---

1. "Probation" refers to a term of court-ordered supervision that eligible offenders may serve in the community instead of in confinement. *See generally* N.C.G.S. ch. 15A, art. 82 (2021) (Probation). The term "parole" refers to the early release, subject to conditions, of persons serving sentences of imprisonment for convictions of impaired driving under N.C.G.S. § 20-138.1. N.C.G.S. § 15A-1370.1 (2021); *see generally* N.C.G.S. ch. 15A, art. 85 (Parole). Certain inmates whose crimes occurred before the Structured Sentencing Act took effect on 1 October 1994 are also eligible for parole. "Post-release supervision" refers to a "period of supervised release, similar to probation, that an inmate serves in the community upon release from prison." James M. Markham, *The North Carolina Justice Reinvestment Act* 5 (UNC School of Government 2012); *see generally* N.C.G.S. ch. 15A, art. 84A (2021) (Post-Release Supervision).

condition of participating in the electoral process. We therefore reverse the trial court's final order and judgment.

I. Background

Laws prohibiting persons convicted of felonies from voting have long been common features of the American legal system. When the Fourteenth Amendment to the United States Constitution was ratified in 1868, twenty-nine of the nation's then thirty-seven states had provisions in their state constitutions that either denied felons the right to vote or allowed their respective legislatures to enact legislation to that effect. *Richardson v. Ramirez*, 418 U.S. 24, 48 (1974). "Today, almost all States disenfranchise felons in some way, although the recent trend is toward expanding access to the franchise." *Jones v. Governor of Fla.*, 975 F.3d 1016, 1029 (11th Cir. 2020) (en banc).

North Carolina's 1776 constitution did not prohibit felons from voting. Rather, "the 1776 constitution . . . granted the franchise indiscriminately to all 'freemen' who met the property qualification, including free blacks." John V. Orth and Paul Martin Newby, *The North Carolina State Constitution* 14 (2d ed. 2013) [hereafter *State Constitution*].

In 1835 the citizens of North Carolina ratified a group of extensive amendments to the 1776 constitution regulating elections and office-holding. John V. Orth, *North Carolina Constitutional History*, 70 N.C. L. Rev. 1759, 1771 (1992) [hereafter *Constitutional History*]. One noted the loss of citizenship rights by "any person convicted of an infamous crime" but authorized the General Assembly to "pass general laws regulating" the restoration of such rights. N.C. Const. of 1776, amends. of 1835, art. I, § 4, cls. 3–4. Another amendment deprived free African Americans of the right to vote. N.C. Const. of 1776, amends. of 1835, art. I, § 3, cl. 3.

In 1841 the General Assembly enacted legislation providing for the restoration of citizenship rights for persons convicted of infamous crimes. An Act Providing for Restoring to the Rights of Citizenship Persons Convicted of Infamous Crimes, ch. 36, §§ 1–6, 1841 N.C. Sess. Laws 68, 68–69. The legislation instituted a lengthy and burdensome petition-and-hearing procedure for rights restoration. A petitioner had to wait a minimum of four years after his conviction to file his petition. *Id.* § 3. Notwithstanding where the petitioner resided, he had to file the petition in the superior court of the county where he had been indicted. *Id.* § 4. The petition had to set out the petitioner's "conviction and the punishment inflicted," as well as his current residence, his occupation since conviction, and the "meritorious causes" justifying the restoration

of his rights. *Id.* § 1. The clerk of court then had to advertise the substance of the petition at the courthouse door for three months prior to the petitioner's proposed hearing date. *Id.* At the hearing, the petition's contents had to be "proved" by "five respectable witnesses" who had known the petitioner for the three years immediately preceding the petition's filing date and who could confirm "his character for truth and honesty." *Id.* If the five witnesses supplied the necessary character evidence and the court was "satisfied of the truth of the facts set forth in the petition," the court was to "decree [the petitioner's] restoration to the lost rights of citizenship." *Id.*

Following the Civil War, North Carolinians ratified a new state constitution drafted by a convention held in compliance with federal Reconstruction legislation. *State Constitution* at 19. The 1868 constitution removed all property qualifications for voting and extended voting rights to all male citizens, regardless of race, who had reached the age of twenty-one and satisfied certain residency requirements. N.C. Const. of 1868, art. I, § 22 (eliminating property qualifications for voting); *id.* art. VI, § 1 (designating as an "elector" every male aged twenty-one or older who fulfilled specified residency requirements). Although the 1868 constitution did not expressly prohibit felons from voting, it repeated the "infamous crimes" language that had been added to the 1776 constitution in 1835. *Id.* art. II, § 13.

In 1875 the General Assembly called a convention to propose amendments to the 1868 constitution. An Act to Call a Convention of the People of North Carolina, ch. 222, 1874–75 N.C. Sess. Laws 303, 303–05. Ratified by voters in 1876, the thirty amendments approved by the convention contained several racially discriminatory measures. One amendment banned interracial marriage between whites and African Americans, N.C. Const. of 1868, amend. XXX of 1875, while another mandated racially segregated schools, *id.* amend. XXVI. Other amendments that did not mention race had the deliberate effect of reducing the political influence of African Americans. One such amendment restored the General Assembly's power to appoint local government officials. *See id.* amend. XXV. "[A]s was well understood," the purpose of that amendment "was to block control of local government in the eastern counties by blacks who were in the majority there." *State Constitution* at 26.

The 1875 amendments contained the state's first constitutional provision expressly denying the franchise to individuals convicted of felonies. Under that provision, "no person . . . adjudged guilty of [a] felony, or of any other crime infamous by the laws of this State" could vote without first having been "restored to the rights of citizenship in a

mode prescribed by law." N.C. Const. of 1868, amend. XXIV of 1875. In 1877 the General Assembly criminalized voting by felons whose rights had not been restored.[2] An Act to Regulate Elections, ch. 275, §§ 10, 62, 1877 N.C. Sess. Laws 516, 519–20, 537. The 1877 law did not articulate the steps that felons had to follow to have their citizenship rights restored, so the procedures set out in the 1841 rights restoration legislation remained in place, including the four-year waiting period and the petition-and-hearing requirements.

Between 1897 and 1941, the General Assembly enacted legislation that relaxed some of the rules for petitions filed by felons seeking restoration of their citizenship rights. *See*, *e.g.*, An Act to Amend Section 2940 of the Code in Reference to Restoration of Citizenship, ch. 110, § 1, 1897 N.C. Sess. Laws 155, 155–56 (allowing a petitioner to file in the county of indictment or county of residence). Some of the enactments reduced the waiting period for felons in designated categories. *See*, *e.g.*, An Act to Amend Section Two Thousand Nine Hundred and Forty-One of the Code, and to Facilitate the Restoration to the Rights of Citizenship in Certain Cases, ch. 44, § 1, 1899 N.C. Sess. Laws 139, 139 (shortening to one year the waiting period after conviction when the petitioner (1) had not been sentenced to a term of imprisonment and (2) had been pardoned by the Governor); An Act to Amend Chapter 44, Acts of 1899, and to Facilitate the Restoration to the Rights of Citizenship in Certain Cases, ch. 547, § 2, 1905 N.C. Sess. Laws 553, 554 (allowing a petitioner to file at any time after conviction and without alleging or proving a pardon if the court suspended judgment); An Act to Provide for the Return of Rights of Citizenship to Offenders Committed to Certain Training Schools, ch. 384, § 1, 1937 N.C. Sess. Laws 713, 713 (reducing to one year after discharge the waiting period for felons committed to certain "training schools"). In 1933, the legislature replaced the requirement that felons wait four years after conviction to file their petitions with a requirement that they wait two years after being discharged. An Act to Amend Consolidated Statutes with Reference to Restoration to Citizenship, ch. 243, § 1, 1933 N.C. Sess. Laws 370, 370.

By 1969 the General Assembly had codified the rules for the restoration of felons' citizenship rights as Chapter 13 of our General Statutes. N.C.G.S. § 13-1 (1969) (repealed 1971). On 2 July 1969, the General Assembly passed legislation to submit what became our current state constitution to the electorate for approval. An Act to Revise and Amend

---

2. It remains a crime for any felon whose rights have not been restored to vote in a primary or general election. N.C.G.S. § 163-275(5) (2021).

the Constitution of North Carolina, ch. 1258, 1969 N.C. Sess. Laws 1461. Voters ratified the new constitution in the 1970 general election, and it went into effect on 1 July 1971.

The 1971 constitution continues our state's general prohibition against voting by felons:

> No person adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law.

N.C. Const. art. VI, § 2(3). The text of Article VI, Section 2(3) tracks that of the corresponding 1876 amendment, though there are differences. Article VI, Section 2(3) does not refer to infamous crimes. It encompasses not just individuals convicted of felonies under our state's laws but also persons convicted of felonies under federal law or, if the conduct would have been felonious here, convicted of felonies in other states. *Id.*

During the 1971 legislative session, Representatives Joy Johnson of Robeson County and Henry Frye of Guilford County[3]—then the only African American members of the General Assembly—introduced a bill to amend Chapter 13 of the General Statutes.[4] In its original form, the bill provided for the automatic restoration of citizenship rights for any felon "upon the full completion of his sentence or upon [his] receiving an unconditional pardon." A legislative committee amended the bill to remove the word "automatically" and to clarify that the phrase "full completion of his sentence" included "any period of probation or parole." The final form of the bill passed into law by the legislature in 1971 repealed Chapter 13 "in its entirety" and enacted "a new Chapter 13." An Act to Amend Chapter 13 of the General Statutes to Require the Automatic Restoration of Citizenship to Any Person Who Has Forfeited Such Citizenship Due to Committing a Crime and has Either Been Pardoned or Completed His Sentence, ch. 902, § 1, 1971 N.C. Sess. Laws 1421, 1421.

---

3. Representative Henry Frye subsequently served as an Associate Justice and then as Chief Justice of this Court.

4. The trial court's final judgment and order states that Representatives Johnson and Frye both introduced the bill to amend Chapter 13. However, the copy of the bill in the record names only Representative Johnson as a sponsor.

The new Chapter 13 did not make rights restoration automatic, but it did dramatically streamline the process, largely by eliminating the petition-and-hearing requirements. Under N.C.G.S. § 13-1, anyone convicted of a felony became eligible for rights restoration if (1) the Department of Correction recommended restoration at the time of release, (2) the individual received an unconditional pardon, *or* (3) "two years ha[d] elapsed since [the person's] release by the Department of Correction, including probation or parole." *Id.* Once any of the three conditions was met, the eligible felon could regain his citizenship rights by going "before any judge of the General Court of Justice in Wake County or in the county where [the felon] reside[d] or in which [the felon] was last convicted" and taking an oath verifying compliance with section 13-1 and pledging loyalty and obedience to "the Constitution and laws of the United States, and the Constitution and laws of North Carolina not inconsistent therewith." *Id.*

In 1973 Representatives Johnson and Frye, joined by a new African American legislator, Representative (later Senator) Henry Michaux Jr., tried again to make the restoration of citizenship rights automatic for some felons. Their bill as introduced amended section 13-1 to make rights restoration automatic "[u]pon the unconditional discharge of an inmate by the Department of Correction or Department of Juvenile Correction, of a probationer by the Probation Commission, or of a parolee by the Board of Paroles[,] . . . [o]r upon [a felon's] receiving an unconditional pardon." The version of the bill ultimately passed by the General Assembly did not differ materially from the initial bill. *See* An Act to Provide for the Automatic Restoration of Citizenship, ch. 251, § 1, 1973 N.C. Sess. Laws 237, 237–38.

The few changes that the legislature has made to section 13-1 since 1973 have no bearing on the issues raised in this litigation. In its current form, section 13-1 reads as follows:

> Any person convicted of a crime, whereby the rights of citizenship are forfeited, shall have such rights automatically restored upon the occurrence of any one of the following conditions:
>
> (1) The unconditional discharge of an inmate, of a probationer, or of a parolee by the agency of the State having jurisdiction of that person or of a defendant under a suspended sentence by the court.
>
> (2) The unconditional pardon of the offender.

> (3) The satisfaction by the offender of all conditions of a conditional pardon.
>
> (4) With regard to any person convicted of a crime against the United States, the unconditional discharge of such person by the agency of the United States having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.
>
> (5) With regard to any person convicted of a crime in another state, the unconditional discharge of such person by the agency of that state having jurisdiction of such person, the unconditional pardon of such person or the satisfaction by such person of a conditional pardon.

N.C.G.S. § 13-1 (2021). The parties to this litigation agree that subsection (1) of section 13-1 renders persons convicted of felonies in our state courts ineligible for rights restoration until they have finished any applicable period of probation, parole, or post-release supervision (collectively, felony supervision).

Plaintiffs consist of four nonprofit organizations (plaintiff-organizations) that work with or advocate for persons involved with the criminal justice system and six individuals with felony convictions (plaintiff-felons) who are unable to vote while on felony supervision. On 20 November 2019, plaintiffs filed suit against defendants in their official capacities challenging section 13-1 as facially unconstitutional under various provisions of our state constitution.[5] Specifically, plaintiffs alleged that section 13-1 is unconstitutional in that it violates (1) the Equal Protection Clause in Article I, Section 19 by discriminating against African Americans in intent and effect; (2) the Equal Protection Clause in Article I, Section 19 and the Property Qualifications Clause in Article I, Section 11 by conditioning the restoration of citizenship rights on the ability to pay court costs, fines, or restitution; (3) the Equal Protection Clause in Article I, Section 19 by depriving convicted felons of the

5. Defendants Timothy K. Moore, Speaker of the North Carolina House of Representatives, and Philip E. Berger, President Pro Tempore of the North Carolina Senate, are pursuing this appeal. Plaintiffs' lawsuit also named as defendants the North Carolina State Board of Elections and members of the same, but none of those defendants appealed the trial court's order.

"fundamental right" to vote on "equal terms" and with "substantially equal voting power"; and (4) the Free Elections Clause in Article I, Section 10 by producing elections that do not reflect the will of the people.[6]

Pursuant to N.C.G.S. § 1-267.1, the Chief Justice assigned the case to a three-judge panel in the Superior Court, Wake County. With one judge dissenting in part, the trial court granted partial summary judgment and a preliminary injunction in favor of plaintiffs, finding that section 13-1 "condition[s] the restoration of the right to vote on the ability to make financial payments" in violation of the Equal Protection Clause and the Property Qualifications Clause. On 28 March 2022, following a trial on the remaining claims, the court in another two-to-one decision issued a final judgment and order ruling that section 13-1 discriminates against African Americans and deprives felons of the fundamental right to vote in violation of the Equal Protection Clause and results in elections that do not reflect the will of the people contrary to the Free Elections Clause. The trial court issued a permanent injunction under which any person otherwise eligible to vote and "not in jail or prison for a felony conviction . . . may lawfully register and vote in North Carolina." Defendants timely appealed.

On 26 April 2022, a split panel of the Court of Appeals issued a partial writ of supersedeas, staying the trial court's injunction for the "elections on 17 May 2022 and 26 July 2022." The panel also ordered the State Board of Elections "to take actions to implement" the trial court's order "for subsequent elections." On 4 April 2022, and in accordance with N.C.G.S. § 7A-31, plaintiffs filed in this Court a petition for discretionary review prior to a determination by the Court of Appeals. This Court allowed the petition on 4 May 2022.

II. Jurisdiction

[1] Defendants argue that plaintiffs lack standing to dispute the constitutionality of section 13-1. "Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Am. Woodland Indus. v. Tolson*, 155 N.C. App. 624, 626, 574 S.E.2d 55, 57 (2002). "A plaintiff must establish standing in order to assert a claim for relief." *United Daughters of the Confederacy v. City of Winston-Salem*,

---

6. Plaintiffs likewise challenged section 13-1 under Article I, Sections 12 (right of assembly and petition) and 14 (freedom of speech and press). The trial court granted summary judgment in favor of defendants on those claims, and plaintiffs did not appeal that ruling.

383 N.C. 612, 625, 881 S.E.2d 32, 44 (2022). We must therefore address defendants' standing arguments before we may reach the substance of the trial court's rulings.

Defendants contend that plaintiffs lack standing because (1) plaintiffs have "challenged the wrong law" and (2) plaintiffs' claims are not judicially redressable. In support of their first argument, defendants point out that plaintiffs have been disenfranchised by Article VI, Section 2(3) of the North Carolina Constitution, not by section 13-1, which merely sets out the "manner prescribed by law" for felon *re-enfranchisement*. With respect to their redressability argument, defendants maintain that, since only the legislature has the power to define the rights restoration process for persons disenfranchised under Article VI, Section 2(3), a final judgment striking down section 13-1 would not open the door to voting by individuals on felony supervision; rather, it would "close[ ] off the sole avenue by which a felon may regain the franchise while leaving in place the constitutional provision that strips it away in the first place." Hence, as defendants see things, the real impact of a final judgment in plaintiffs' favor would be to deny to all felons whose rights have not yet been restored any path to regaining the franchise.

Plaintiffs insist that they do have standing to challenge the constitutionality of section 13-1 because that statute "prevents people from registering and voting as long as they are on felony probation, parole, or post-release supervision." Plaintiffs argue that any rights restoration legislation enacted by the General Assembly pursuant to Article VI, Section 2(3) "must comport with all other provisions of the North Carolina Constitution." They further contend that the remedy ordered by the trial court falls within the judiciary's broad discretion to fashion equitable remedies for constitutional violations. Plaintiffs cite decisions in which the Supreme Court of the United States has ordered federal agencies to extend benefits to classes of persons that federal law unconstitutionally excluded. *See*, *e.g.*, *Califano v. Westcott*, 443 U.S. 76, 92–93 (1979) (affirming a lower court's order that a federal benefits program offer the same financial support to dependent children of unemployed mothers that the law provided for dependent children of unemployed fathers).

The standing requirements articulated by this Court are not themselves mandated by the text of the North Carolina Constitution. *See Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 599, 853 S.E.2d 698, 728 (2021) ("[T]he 'judicial power' provision [in Article IV] of our Constitution imposes no particular requirement regarding 'standing' at all."). This Court has developed standing requirements out of a "prudential self-restraint" that respects the separation

of powers by narrowing the circumstances in which the judiciary will second guess the actions of the legislative and executive branches. *Id.*

When a plaintiff challenges the constitutionality of a statute, "[t]he 'gist of the question of standing' is whether" the plaintiff "has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *Stanley v. Dep't of Conservation and Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968)). To ensure the requisite concrete adverseness, "a party must show they suffered a 'direct injury.' The personal or 'direct injury' required in this context could be, but is not necessarily limited to, 'deprivation of a constitutionally guaranteed personal right or an invasion of his property rights.' " *Forest*, 376 N.C. at 607–08, 853 S.E.2d at 733 (citations omitted).

"[T]he rule requiring direct injury to challenge the constitutionality of a statute is based on the rationale 'that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue.' " *Id.* at 594, 853 S.E.2d at 724. (quoting *Stanley*, 284 N.C. at 28, 199 S.E.2d at 650). The direct injury criterion applies even where, as here, a plaintiff assails the constitutionality of a statute through a declaratory judgment action. *See United Daughters*, 383 N.C. at 629, 881 S.E.2d at 46–47 ("[P]laintiff is still required to demonstrate that it has sustained a legal or factual injury arising from defendants' actions as a prerequisite for maintaining the present declaratory judgment action.").

Defendants make plausible arguments in urging us to throw out plaintiffs' lawsuit on standing grounds. The amended complaint repeatedly mischaracterizes section 13-1 as "North Carolina's felony disenfranchisement statute." Section 13-1 does not disenfranchise anyone. Like other felons, plaintiff-felons had their right to vote eliminated by Article VI, Section 2(3). Had the General Assembly not enacted section 13-1 or some other statute providing for the restoration of their citizenship rights, plaintiff-felons and all other felons in this state would be disenfranchised permanently. *See Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (holding that the federal constitution's Equal Protection Clause did not bar California from denying the vote to felons who had completed their sentences and periods of parole).

Moreover, the trial court may well have exceeded the bounds of its remedial powers by ordering that all felons not in jail or prison be allowed to register and vote. In depriving felons of the right to vote

unless their citizenship rights have been restored "in the manner prescribed by law," Article VI, Section 2(3) unquestionably assumes that the General Assembly—not the courts—will set the conditions for rights restoration, and as discussed above, the legislature has declined to extend automatic rights restoration to persons on felony supervision.

Despite the force of defendants' standing arguments, we hold that plaintiff-felons have standing to bring their claims against defendants. While it is true that section 13-1 confers a statutory benefit that the General Assembly was under no legal obligation to grant, it is also true that the legislature may not condition eligibility for a statutory benefit on criteria that violate the North Carolina Constitution. *See*, *e.g.*, *Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) ("Even a statutory benefit can run afoul of the Equal Protection Clause . . . if it confers rights in a discriminatory manner . . . . For instance, a state could not choose to re-enfranchise voters of only one particular race . . . .").

The amended complaint alleges that the General Assembly has imposed unconstitutional conditions on the restoration of felons' voting rights. For example, the law makes payment of any court-ordered costs, fines, and restitution a condition of probation. N.C.G.S. § 15A-1343(b)(9) (2021). If a felon is found to have violated this condition, his time on probation—and thus his ineligibility to vote—can be extended. N.C.G.S. §§ 15A-1342(a) (2021), 15A-1344(a), (d) (2021). The amended complaint asserts that, by tying a felon's eligibility to vote to the completion of probation, section 13-1 "condition[s] the right to vote on whether people have a type of property—money." According to the amended complaint, this condition violates Article I, Section 11 of the state constitution, which provides that "no property qualification shall affect the right to vote or hold office." N.C. Const. art. I, § 11. We ultimately reject this claim, but it does not follow that plaintiff-felons lacked standing to bring it or their other constitutional claims. The amended complaint alleges that plaintiff-felons are on felony supervision and subject to the allegedly unconstitutional re-enfranchisement conditions of which they complain. Plaintiff-felons thus have been "personally injured by [the] statute" and "can be trusted to battle the issue." *Stanley*, 284 N.C. at 28, 199 S.E.2d at 650.

Furthermore, the constitutional violations alleged in the amended complaint are redressable. The question of redressability turns not on whether a plaintiff can obtain her preferred form of relief but on whether the law provides a remedy for the plaintiff's injury. *See Lozano v. City of Hazleton*, 620 F.3d 170, 192 (3d Cir. 2010) ("Redressability . . . does not require that a court be able

to solve all of a plaintiff's woes. Rather, [it] need only be able to redress, to some extent, the specific injury underlying the suit."), *vacated and remanded for further consideration*, 563 U.S. 1030 (2011), *aff'd in part and rev'd in part on other grounds*, 724 F.3d 297 (3d Cir. 2013). The essence of the amended complaint's claims is that section 13-1 attaches conditions to the restoration of citizenship rights that unlawfully distinguish between felons based on race or wealth. A court order that simply struck down section 13-1 would leave plaintiff-felons and all other felons whose rights had not already been restored in precisely the same position regardless of race or wealth: disenfranchised without any avenue for re-enfranchisement. This outcome would not give plaintiff-felons what they want, but it would halt the alleged violations of the North Carolina State Constitution.

Although plaintiff-felons have standing, some plaintiff-organizations clearly do not. For a legal entity other than a natural person to have standing, it or one of its members "must suffer some immediate or threatened injury." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990). "An association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Standing exists for an association to bring a lawsuit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 130, 388 S.E.2d at 555 (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

The amended complaint alleges that plaintiff-organizations Community Success Initiative, Justice Served N.C., Inc., and Wash Away Unemployment have standing because they work to reintegrate into society "people who find themselves entangled in the criminal justice system" and that section 13-1 forces them to redirect some of their resources "to educate people, including people disenfranchised under [section] 13-1, about their voting rights (or lack thereof)." Such vague allegations of resource reallocation do not evince the kind of direct injury necessary for an association acting in its own right to attack the constitutionality of a statute, nor do they offer grounds to believe that section 13-1 infringes on any rights or immunities that these three plaintiff-organizations may possess. Additionally, inasmuch as the amended complaint does not allege that Community Success Initiative, Justice Served N.C., Inc., and Wash Away Unemployment have any members

who could challenge section 13-1, they lack standing to sue on behalf of their members. *See id.*

Similarly, the amended complaint's allegations concerning plaintiff-organization North Carolina State Conference of the NAACP do not establish that it has standing in its own right to dispute the validity of section 13-1. In language that echoes the descriptions of "harm" allegedly suffered by other plaintiff-organizations, the amended complaint alleges that the North Carolina NAACP "is currently forced to divert organizational resources away from activities core to its mission in furtherance of education and voter engagement efforts required to assist potential voters . . . in understanding North Carolina's felony-based disenfranchisement laws." Again, this vague allegation of resource reallocation does not identify a direct injury for standing purposes.

The amended complaint's factual allegations are sufficient, however, to show that the North Carolina NAACP qualifies under *River Birch* to sue on behalf of its members. The amended complaint alleges that some of those members are ineligible for re-enfranchisement under section 13-1. It ties the interest of those members in regaining the franchise to the North Carolina NAACP's "fundamental mission of . . . advanc[ing] and improv[ing] . . . the political, civil, educational, social, and economic status of minority groups." Finally, because plaintiffs brought a declaratory judgment action, it appears that the North Carolina NAACP can obtain relief for its members without their participation in the lawsuit. *See id.* ("When an organization seeks declaratory or injunctive relief on behalf of its members, 'it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.' " (quoting *Warth*, 422 U.S. at 515)).

Plaintiff-felons and one plaintiff-organization have standing to pursue the claims alleged in the amended complaint. Accordingly, we now take up defendants' legal challenges to the merits of the trial court's ruling.

III. Standard of Review

Whether made at summary judgment or at trial, a trial court's ruling on the constitutionality of a statute receives de novo review on appeal. *State v. Whittington*, 367 N.C. 186, 190, 753 S.E.2d 320, 323 (2014); *Hart v. State*, 368 N.C. 122, 130–31, 774 S.E.2d 281, 287 (2015). Under de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). When the trial court has conducted a trial

without a jury, we examine whether the trial court's findings of fact support its conclusions of law. *Blanton v. Blanton*, 40 N.C. App. 221, 225, 252 S.E.2d 530, 533 (1979). "[T]he trial court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding." *In re Estate of Skinner*, 370 N.C. 126, 139, 804 S.E.2d 449, 457 (2017) (quoting *Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998)).

We review permanent injunctions for abuse of discretion. *See Roberts v. Madison Cnty. Realtors Ass'n*, 344 N.C. 394, 399, 474 S.E.2d 783, 787 (1996) ("When equitable relief is sought, courts claim the power to grant, deny, limit, or shape that relief as a matter of discretion."). "A [trial] court by definition abuses its discretion when it makes an error of law." *State v. Rhodes*, 366 N.C. 532, 536, 743 S.E.2d 37, 39 (2013) (alteration in original) (quoting *Koon v. United States*, 518 U.S. 81, 100 (1996)).

IV. Analysis

Given the number and complexity of the legal issues raised by the parties to this appeal, we briefly review the fundamental principles that guide our inquiry when an appeal squarely presents a state constitutional challenge to the validity of a statute. One such principle is that we defer to legislation enacted by the General Assembly. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989) ("Since our earliest cases applying the power of judicial review under the Constitution of North Carolina, . . . we have indicated that great deference will be paid to acts of the legislature . . . .").

We defer to legislative enactments for at least two reasons. The first is the status of legislative enactments in our constitutional order. In this state, "[a]ll 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, § 2. Ordinarily, the people exercise this sovereign power through their elected representatives in the General Assembly. *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895). This Court therefore looks upon laws enacted by our General Assembly as expressions of the people's will. *Preston*, 325 N.C. at 448, 385 S.E.2d at 478. It follows that we may not strike down a law unless it violates federal law or the supreme expression of the people's will, the North Carolina Constitution. *See id.* at 448–49, 385 S.E.2d at 478; *see also State v. Emery*, 224 N.C. 581, 583, 31 S.E.2d 858, 860 (1944) ("The will of the people as expressed in the Constitution is the supreme law of the land.").

The second reason for deference is more practical. Almost by definition, legislation involves the weighing and accommodation of competing interests, and "it is the role of the legislature, rather than this Court, to balance disparate interests and find a workable compromise among them." *Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009). When a statute constitutes a permissible exercise of legislative authority, we must uphold the statute regardless of whether we agree with the General Assembly's public policy choices. *See In re Appeal of Philip Morris U.S.A.*, 335 N.C. 227, 231, 436 S.E.2d 828, 831 (1993) ("[T]he determination of whether a particular policy is wise or unwise is for determination by the General Assembly."); *Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 41, 175 S.E.2d 665, 671 (1970) ("[Q]uestions as to public policy are for legislative determination."). Put differently, "[t]his Court will only measure the balance struck in the statute against the minimum standards required by the constitution." *Beaufort Cnty. Bd. of Educ.*, 363 N.C. at 502, 681 S.E.2d at 280–81.

Consistent with the deference owed to legislative enactments, when this Court is called upon to decide the constitutionality of a statute, we start with a strong presumption of the statute's validity. *Am. Equitable Assurance Co. v. Gold*, 249 N.C. 461, 462–63, 106 S.E.2d 875, 876 (1959); *see also Hart*, 368 N.C. at 131, 774 S.E.2d at 287 ("We therefore presume that a statute is constitutional . . . ."). The burden is on the party challenging the statute to demonstrate its unconstitutionality. *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 669, 174 S.E.2d 542, 548 (1970). To prevail, the challenger must demonstrate that the law is unconstitutional beyond a reasonable doubt. *See Hart*, 368 N.C. at 126, 774 S.E.2d at 284; *see also Glenn v. Bd. of Educ.*, 210 N.C. 525, 529–30, 187 S.E. 781, 784 (1936) ("If there is any reasonable doubt [as to a law's constitutionality], it will be resolved in favor of the lawful exercise of their powers by the representatives of the people.").

Notwithstanding our deference to legislative enactments, when a challenger proves the unconstitutionality of a law beyond a reasonable doubt, this Court will not hesitate to pronounce the law unconstitutional and to vindicate whatever constitutional rights have been infringed. Glenn, 210 N.C. at 529, 187 S.E. at 784; *see also Roller v. Allen*, 245 N.C. 516, 518, 96 S.E.2d 851, 854 (1957) ("An Act will be declared unconstitutional and its enforcement will be enjoined when it clearly appears either that property or fundamental human rights are denied in violation of constitutional guarantees."); *N.C. Real Est. Licensing Bd. v. Aikens*, 31 N.C. App. 8, 11, 228 S.E.2d 493, 495 (1976) ("[T]he courts of this State have not hesitated to strike down regulatory legislation [that is] repugnant

to the State Constitution." (citing *Roller*, 245 N.C. 516, 96 S.E.2d 851; *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940))).

Plaintiffs have brought a facial challenge to section 13-1. In contrast to an as-applied challenge, which "represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act," *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 460, 786 S.E.2d 335, 347 (2016) (quoting *Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999)), a facial challenge "is an attack on a statute itself as opposed to a particular application," *Holdstock v. Duke Univ. Health Sys., Inc.*, 270 N.C. App. 267, 272, 841 S.E.2d 307, 311 (2020) (quoting *City of L.A. v. Patel*, 576 U.S. 409, 415 (2015)). "[A] facial challenge to the constitutionality of an act . . . is the most difficult challenge to mount successfully." *Hart*, 368 N.C. at 131, 774 S.E.2d at 288. To establish the unconstitutionality of a statute beyond a reasonable doubt on a facial challenge, "[a] party must show that there are *no circumstances* under which the statute might be constitutional." *Beaufort Cnty. Bd. of Educ.*, 363 N.C. at 502, 681 S.E.2d at 280 (emphasis added). "The fact that a statute 'might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.' " *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)).

Of course, this Court cannot properly evaluate a challenge to the constitutionality of a statute without understanding the meaning of the constitutional provision at issue. Our interpretive endeavor begins with the text of the provision. "[W]here the meaning is clear from the words used, we will not search for a meaning elsewhere." *Preston*, 325 N.C. at 449, 385 S.E.2d at 479. If the text does not resolve the matter, we examine the available historical record in an effort to isolate the provision's meaning at the time of its ratification. *See Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980) ("Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation."). We also seek guidance from any on-point precedents from this Court interpreting the provision. *Elliott v. State Bd. of Equalization*, 203 N.C. 749, 753, 166 S.E. 918, 921 (1932). With these fundamental principles in mind, we now direct our attention to the constitutional issues raised by this appeal.

A. Racial Discrimination

[2] The trial court concluded that "[s]ection 13-1's denial of the franchise to people on felony supervision" unconstitutionally discriminates against African Americans in "intent and effect" and "denies [them] substantially equal voting power on the basis of race" in violation of our state constitution's Equal Protection Clause. Defendants argue that this Court should reverse the trial court because "[s]ection 13-1's historical background demonstrates definitively that the law as it currently stands was not motivated by racial discrimination." Plaintiffs urge us to affirm the trial court, contending that section 13-1 is the successor to earlier felon voting legislation designed to discriminate against African Americans; that the passage of time did not purge section 13-1 of that racially discriminatory intent; and that the General Assembly's refusal in the 1970s to extend the franchise to individuals on felony supervision "was independently motivated by racism."

"The civil rights guaranteed by the Declaration of Rights in Article I of [the North Carolina] 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). Article I, Section 19 reads in part: "No 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. Because the text of this provision does not tell us how to analyze plaintiffs' claims of racial discrimination, we turn to the provision's historical context and pertinent caselaw for assistance.

Unlike most other provisions in Article I, which "may be traced back through [this state's] 1868 constitution to [its] Revolutionary Constitution of 1776[,]" *State Constitution* at 45, the Equal Protection Clause and the Nondiscrimination Clause in Article I, Section 19 did not become part of our fundamental law until 1971, when the current state constitution went into effect. The drafters of the two clauses based their work on the Equal Protection Clause in the Fourteenth Amendment to the United States Constitution and on federal nondiscrimination laws. *Id.* at 68. Accordingly, "[t]his Court's analysis of the State Constitution's Equal Protection Clause generally follows the analysis of the Supreme Court of the United States in interpreting the corresponding federal clause." *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009). "However, in the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this

Court."[7] *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974).

Section 13-1 makes no reference to race and thus appears to be race neutral. Yet even an apparently race-neutral statute can violate equal protection if enacted with a racially discriminatory purpose. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

Decisions by the Supreme Court of the United States describe a burden-shifting framework that federal courts must employ when a plaintiff alleges that an apparently race-neutral law was motivated by a racially discriminatory purpose contrary to the Fourteenth Amendment's Equal Protection Clause. Under that framework, "the burden of proof lies with the challenger, not the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Moreover, the court must approach any evidence introduced by the plaintiff with a presumption that the legislature acted in good faith. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("[T]he good faith of a state legislature must be presumed . . . .").

To overcome the presumption of good faith and carry the burden of proof, the plaintiff must almost always do more than show that the statute "produces disproportionate effects along racial lines."[8] *Hunter v. Underwood*, 471 U.S. 222, 227 (1985); *see also Arlington Heights*, 429 U.S. at 264–65 ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact."). In its *Arlington Heights* decision, the Supreme Court identified other, nonexclusive factors that can support federal equal protection challenges to ostensibly race-neutral government actions: (1) the historical background of an action; (2) the legislative or administrative history of an action; and (3) deviations from normal procedures. *Arlington Heights*, 429 U.S. at 267–68.

If the plaintiff proves that racial discrimination motivated the legislature, "the burden shifts to the law's defenders[,]" *Hunter*, 471 U.S. at

---

7. Of course, this Court must follow Supreme Court precedent when we interpret provisions of the United States Constitution.

8. In rare cases, statistical evidence alone can establish discriminatory intent. *McCleskey v. Kemp*, 481 U.S. 279, 293–94 (1987) ("[S]tatistical proof normally must present a 'stark' pattern to be accepted as the sole proof of discriminatory intent under the Constitution . . . ." (quoting *Arlington Heights*, 429 U.S. at 266)). Here, however, plaintiffs do not argue that the statistical evidence presented at trial suffices to prove an equal protection violation.

228, and "judicial deference [to the legislature] is no longer justified[,]" *Arlington Heights*, 429 U.S. at 266. To avoid defeat on the plaintiff's federal equal protection claim at that point, the defenders must show that the statute would have been enacted even if the legislature had not intended to discriminate on racial lines. *Hunter*, 471 U.S. at 228.

Here, the parties and the trial court assumed that the Supreme Court's burden-shifting framework applies to plaintiffs' racial discrimination claims. We are not bound by their assumption, however. *See Baxley v. Nationwide Mut. Ins. Co.*, 104 N.C. App. 419, 422, 410 S.E.2d 12, 14 (1991) ("Generally, parties may stipulate as to matters which involve individual rights and obligations of the parties but may not stipulate as to what the law is."), *aff'd*, 334 N.C. 1, 430 S.E.2d 895 (1993). When resolving claims that a facially neutral law discriminates against persons of a particular race in violation of our state Equal Protection Clause, we are free to depart from the federal burden-shifting framework if we deem it incompatible with the principles that guide our review of state constitutional challenges to the validity of statutes. Nonetheless, applying that framework to this case solely for the sake of argument, we hold that the trial court erred in ruling that section 13-1 unlawfully discriminates based on race. The court misapplied the framework to the evidence by ignoring Supreme Court precedent that should have informed its approach. Furthermore, and contrary to the court's findings of fact and conclusions of law, the available evidence does not show that racial discrimination inspired the General Assembly to require that felons complete their felony supervision before they regain the right to vote.

1. Trial Court's Findings of Discriminatory Intent not Binding

The trial court committed legal error by failing to apply the presumption of legislative good faith to the General Assembly's 1971 enactment of a new section 13-1 and 1973 amendments to the same. That presumption applied notwithstanding the lamentable catalogue of measures adopted by legislators in times past for the purpose of disenfranchising African Americans. *See Abbott*, 138 S. Ct. at 2324 ("The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination."). Rather than presuming good faith, the trial court assumed that past discrimination infected the 1971 and 1973 felon voting legislation because "[t]he legislature cannot purge through the mere passage of time an impermissibly racially discriminatory intent." As explained below, this is precisely the kind of error criticized by the Supreme Court of the United States in *Abbott*.

Inasmuch as the trial court did not presume legislative good faith, its findings of fact concerning the discriminatory intent allegedly infecting section 13-1 are not binding on appeal. *See id.* at 2326 ("[W]hen a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand." (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984) (referring to "an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law"))).

2. **Arlington Heights *Factors***

Serious defects in its treatment of the *Arlington Heights* factors led the trial court to the erroneous conclusion that section 13-1 embodies an unconstitutional legislative intent to suppress the votes of African Americans. The evidence corresponding to each factor should have led the trial court to render judgment in favor of defendants.

a. Disproportionate Impact

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it bears more heavily on one race than another—may provide an important starting point." *Arlington Heights*, 429 U.S. at 266 (internal quotation marks and citation omitted).

According to the trial court, the statistical evidence presented by plaintiffs reveals that "North Carolina's denial of the franchise [to those] on felony . . . supervision disproportionately affects African Americans by wide margins." At the statewide level, "African Americans comprise 21% of North Carolina's voting-age population, but over 42% of those denied the franchise due to felony . . . supervision from a North Carolina state court conviction alone. . . . In comparison, White people comprise 72% of the voting-age population, but only 52% of those denied the franchise." Moreover, "[i]n total, 1.24% of the entire African American voting-age population in North Carolina are denied the franchise due to felony . . . supervision, whereas only 0.45% of the White voting-age population are denied the franchise." The result is that African Americans are "denied the franchise at a rate 2.76 times as high as the rate of the White population."

The trial court likewise found that "[e]xtreme racial disparities in denial of the franchise to persons on [felony] supervision also exist at the county level." For instance, "[i]n 77 counties, the rate of African

Americans denied the franchise due to felony . . . supervision is high (more than 0.83% of the African American voting-age population), whereas there are only 2 counties where the rate of African American disenfranchisement is low (less than 0.48% of the African American voting-age population)." On the other hand, "the rate of White disenfranchisement is high in only 10 counties, while the rate of White disenfranchisement is low in 53 counties." Indeed, "[a]mong the 84 counties where there is sufficient data for comparison, African Americans are denied the franchise due to felony . . . supervision at a higher rate than White people in every single county." With respect to felony convictions in our state courts, "the percentage [in 44 counties] of the African American voting-age population that is denied the franchise due to [felony] supervision . . . is more than three times greater than the comparable percentage of the White population." Taken together, in the trial court's view, the statewide data and county-level data show that "North Carolina's denial of the franchise to persons on felony . . . supervision has an extreme disparate impact on African American people."

The trial court's disparate impact analysis suffers from at least two major flaws. First, the court incorrectly held section 13-1 responsible for the disenfranchisement of individuals on felony supervision. Like other felons, felons in that category have been disenfranchised by Article VI, Section 2(3) of the state constitution, not by section 13-1. If the General Assembly were to repeal section 13-1 tomorrow, Article VI, Section 2(3) would still exclude anyone on felony supervision from the electoral process. Affording the trial court the benefit of the doubt, we assume it meant that the criteria imposed by section 13-1 for felon *re-enfranchisement* operate to the peculiar disadvantage of African Americans.

Second, the trial court erred by not making any findings concerning the racial makeup of the overall felon population. Absent such findings, the court could not determine whether section 13-1 affects African American felons differently than white felons.[9] Defendants' expert

9. The dissent contends that our reasoning could have been employed by defenders of the poll tax to argue that, since "African Americans were disproportionately poor . . . wealth inequality, rather than laws implementing poll taxes, was to blame for the disproportionate number of African Americans barred from voting." The dissent misapprehends our position. We do not hold that a court must refuse to credit a plaintiff's disparate impact showing unless the plaintiff can also prove that race alone accounts for the disparity. Rather, we point out that the trial court should have compared the percentages of African American felons and white felons ineligible for re-enfranchisement under section 13-1 with the racial makeup of the total felon population because, unlike the poll tax that all would-be voters had to pay, section 13-1's scope is limited to individuals with felony convictions.

witness, Dr. Keegan Callanan, stated that African Americans constitute forty-two percent of the total felon population. The trial court found that, despite his expertise in the "broad field of political science," Dr. Callanan lacked expertise in the "particular issues" presented by this case and thus that his opinions were entitled to "no weight." The percentage of felons who are classified as African Americans is not a matter of opinion, however, and none of plaintiffs' experts disputed the forty-two percent figure.

On its face, the fact that African Americans make up about forty-two percent of the felon population seems to account for the disproportionate share (forty-two percent) of African Americans on felony supervision. In other words, the trial court's findings provide no reason to believe that section 13-1 re-enfranchises African American felons at a rate that differs from the re-enfranchisement rate for white felons.[10]

Interestingly, if the statistics cited by the trial court amount to proof of disparate impact, the court's own remedy becomes vulnerable to equal protection objections. Since a disproportionately large percentage of felons are African American, it stands to reason that African Americans constitute a disproportionate share of felons currently incarcerated. Thus, if we accept the trial court's logic, extending the franchise to persons on felony supervision but not to felons in jail or prison would almost certainly have a disparate impact on African Americans. It may be that the only practical way to avoid this kind of "disparate impact" is to allow all felons to vote. Were we to construe the Equal Protection Clause in Article I, Section 19 to require such a solution, we would essentially hold that the felon voting prohibition in Article VI, Section 2(3) violates Article I, Section 19. Because we must give effect to both provisions, we may not adopt that interpretation. *See Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997) ("Plaintiffs are essentially reduced to arguing that one section of the North Carolina Constitution violates another. It is axiomatic that the terms or requirements of a constitution cannot be in violation of the same constitution—a constitution cannot violate itself.").

The trial court's findings of fact do not support its ultimate finding that section 13-1 has a disproportionate impact on African Americans. Undisputed evidence in the record but ignored by the trial court

---

10. Our disparate impact analysis might have come out differently if, for instance, the evidence had shown that African American felons are significantly more likely than white felons to be placed on felony supervision and thus to be ineligible for re-enfranchisement under section 13-1. On those facts, plaintiffs would have had a credible argument that section 13-1 disproportionately affects African American felons.

undermines the court's position. Accordingly, the trial court's disparate impact finding cannot be relied upon to sustain its conclusion that the General Assembly enacted a new section 13-1 in 1971 and then amended it in 1973 with the intent of discriminating against African Americans.

b. Historical Background

The "historical background" of a legislative enactment is relevant to discriminatory motive determinations, "particularly if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. The trial court's order contains extensive findings about the efforts of many white North Carolinians in the nineteenth century to manipulate the legal system to exclude African Americans from the political process. For example, the order discusses an "extensive campaign" in the late 1860s by "White former Confederates" to "convict[ ] African American men of petty crimes *en masse* and whip[ ] them to disenfranchise them 'in advance' of the Fifteenth Amendment." (At the time, receiving an "infamous punishment," such as a public whipping, could disqualify someone from voting.) According to the trial court's order, an 1867 article in the *National Anti-Slavery Standard* reported that "in all country towns the whipping of Negroes is being carried on extensively," the motive being "to guard against their voting in the future." Regarding the 1876 constitutional ban on felon voting and the corresponding 1877 felon voting legislation, the trial court found that "[t]he goal of the felony disenfranchisement regime established in 1876 and 1877, including the 1877 expansion of the onerous 1840 [sic] rights restoration regime to apply to all felonies, was to discriminate against and disenfranchise African American people."

Far from denying the incontrovertible record of racism that mars the history just described, defendants' legal counsel conceded at trial:

> The plaintiffs here presented a lot of evidence; much of it, if not all of it, all of it, troubling and irrefutable. You can't — I can't say anything about a newspaper report that says what it says. I can't say anything about the history that is in the — in the archives. What I can say is that the evidence . . . presented certainly demonstrates a shameful history of our state's use of laws, and with regard to voting in particular, to suppress the African American population. That I can't — I can't contest that. We never tried to contest that.

The trial court's historical findings say little about the period between 1877 and 1971, the year in which Representatives Johnson and

Frye introduced their first proposal to reform the procedures for the restoration of felons' citizenship rights. According to the trial court, "[b]etween 1897 and 1970, the legislature made various small adjustments to the procedure for restoration of rights and recodified that law at N.C.G.S. § 13-1, but the substance of the law was largely unchanged." The court's order does remark that, while "the requirements for rights restoration were slightly relaxed . . . during th[e] period [between 1877 and 1971], none of those changes were likely to help African American people, who had been 'effectively' disenfranchised by this time 'by other means,' including North Carolina's poll tax and literacy test established in 1899."

The pre-1971 events recounted in the trial court's order, along with much of the history summarized at the beginning of this opinion, paint a profoundly troubling portrait of a legal system used time and again to deny African Americans a voice in government by banning or restricting their participation in elections. Yet it is not those deplorable measures that are in dispute. Plaintiffs have challenged section 13-1 as enacted in 1971 and amended in 1973. The question therefore is whether the trial court rightly understood the relevance of the pre-1971 history to its deliberations on the constitutionality of section 13-1.

The conclusions of law in the trial court's order indicate that the pre-1971 history of felon voting laws in North Carolina was a substantial factor in the outcome. The order asserts that "[t]he legislature cannot purge through the mere passage of time an impermissibly racially discriminatory intent." As legal authority for the importance that it assigns to pre-1971 events, the order cites the 1985 decision of the Supreme Court of the United States in *Hunter v. Underwood*, 471 U.S. 222 (1985). There, the plaintiffs brought an equal protection challenge to a provision in the 1901 Alabama Constitution that disenfranchised persons convicted of certain crimes, some of them minor offenses. *Id.* at 226–29. The evidence overwhelmingly showed that the constitutional convention at which the provision had been adopted "was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* at 229. In his opening remarks, the convention's president publicly announced that the goal of the 1901 convention was "to establish white supremacy" in Alabama "within the limits imposed by the Federal Constitution." *Id.* Additionally, "the crimes selected for inclusion in [the 1901 felon voting provision] were believed by the delegates to be more frequently committed by blacks." *Id.* at 227. Influenced by those facts and the provision's ongoing discriminatory impact on African Americans, the Supreme Court held that the provision violated the federal Equal

Protection Clause. *Id.* at 233. The Court expressly declined to decide, though, whether the provision "would be valid if enacted today without any impermissible motivation." *Id.*

The *Hunter* decision is plainly not on point. Unlike *Hunter*, this case does not concern the constitutionality of a now 122-year-old provision adopted at a proceeding held for the avowed purpose of ensuring white supremacy. As previously observed, the General Assembly in 1971 repealed Chapter 13 of the General Statutes "in its entirety" and enacted "a new Chapter 13" with a new section 13-1. An Act to Amend Chapter 13 of the General Statutes to Require the Automatic Restoration of Citizenship to Any Person Who Has Forfeited Such Citizenship Due to Committing a Crime and has Either Been Pardoned or Completed His Sentence, ch. 902, § 1, 1971 N.C. Sess. Laws 1421, 1421. The new Chapter 13 was much friendlier to felons than its predecessor legislation. It replaced the onerous petition-and-hearing procedure with a simple oath requirement. *Id.* It also eliminated the waiting period for "[a]ny person convicted of a [felony when] . . . the Department of Correction at the time of release recommend[ed] restoration of citizenship." *Id.* The legislature's amendments to Chapter 13 in 1973 terminated the oath requirement altogether, making the restoration of citizenship rights automatic upon a felon's unconditional discharge. An Act to Provide for the Automatic Restoration of Citizenship, ch. 251, § 1, 1973 N.C. Sess. Laws 237, 237–38. In short, the *Hunter* decision does not apply to a case such as this one, where the legislature repealed allegedly discriminatory laws and replaced them with a substantially different statutory scheme.

The trial court should have looked to the Supreme Court's more recent decision in *Abbott v. Perez*, 138 S. Ct. 2305 (2018), which arose from the Texas legislature's adoption in 2011 of new maps for state legislative and congressional districts. *Id.* at 2313. Litigation immediately ensued over claims that the 2011 maps improperly took race into account, and a federal district court in Texas drew up interim maps for the state's upcoming primaries without deferring to the maps enacted by the legislature. *Id.* at 2315–16. Texas challenged the interim maps, and the Supreme Court reversed and remanded, directing the district court to start with the 2011 maps drawn by the Texas legislature and modify them as necessary to comply with federal law. *Id.* at 2316. In 2013 the Texas legislature repealed the original 2011 maps and enacted the interim maps as modified by the district court. *Id.* at 2317. Litigation again ensued, and the district court struck down the 2013 maps, reasoning that (1) the 2011 legislature had intended the original maps to discriminate on the basis of race and (2) the 2011 legislature's discriminatory

intent should be attributed to the 2013 legislature because the latter "had failed to engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." *Id.* at 2318 (internal quotation marks and citations omitted).

Texas appealed again, and the Supreme Court reversed the district court a second time, primarily because the maps adopted by the 2013 legislature were not the original 2011 maps. *Id.* at 2325. "Under these circumstances," said the Court, "there can be no doubt about what matters: It is the intent of the 2013 Legislature." *Id.* Furthermore, the Court explained, a finding of past discrimination did not alter the burden of proof or the presumption of legislative good faith. *Id.* at 2324–25 ("[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." (alteration in original) (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion))). The district court thus erred by "revers[ing] the burden of proof" and "impos[ing] on the State the obligation of proving that the 2013 Legislature had experienced a true 'change of heart' and had 'engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.' " *Id.* at 2325 (third alteration in original) (quoting *Perez v. Abbott*, 274 F. Supp. 3d 624, 649 (D.C. Cir. 2017)). The district court should have held the plaintiffs "to their burden of overcoming the presumption of [legislative] good faith and proving discriminatory intent." *Id.* Examining the available evidence, the Supreme Court held that it was "plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination." *Id.* at 2327. The "direct evidence" of intent in the record revealed that the 2013 legislature adopted the modified interim maps for the acceptable purpose of shortening any redistricting litigation that might follow. *Id.* Inasmuch as those maps had already been approved by the district court in earlier litigation, the 2013 legislature had "good reason to believe that [they] were legally sound." *Id.* at 2328.

When applied to this case, *Abbott* leads us to conclude that the trial court erred as a matter of law by requiring the General Assembly to prove that it had purged past discriminatory intent prior to its enactment of a new section 13-1 in 1971. While it would be an overstatement to say that the trial court should have ignored the pre-1971 history recounted in its order, plaintiffs' claims must finally rise or fall on whether their evidence overcomes the presumption of legislative good faith and proves that discriminatory intent motivated the legislators who voted in the early 1970s to reduce the barriers to felon re-enfranchisement. *See id.* at 2327 ("[W]e do not suggest . . . that the intent of the 2011 Legislature is

irrelevant . . . . Rather, . . . the intent of the 2011 Legislature . . . [is] relevant to the extent that [it] naturally give[s] rise to—or tend[s] to refute—inferences regarding the intent of the 2013 Legislature.").

Before proceeding, we observe that the trial court's order omits a major historic development close in time to the General Assembly's 1971 and 1973 rewrites of section 13-1: the legislature's approval in 1969 of what became our current state constitution. As noted above, that document incorporated equal protection and nondiscrimination guarantees that had not appeared in our previous state constitutions. *State Constitution* at 45, 68. In other words, not long before it took action to dismantle procedural obstacles to the restoration of eligible felons' citizenship rights, the General Assembly adopted a draft constitution that explicitly prohibited government discrimination based on race, color, religion, or national origin. The trial court should have considered the relevance of this event to plaintiffs' racial discrimination claims.

c. Legislative History

For a court conducting an *Arlington Heights* inquiry, "[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Arlington Heights*, 429 U.S. at 268. The principal findings of fact in the trial court's order that chronicle the events of 1971 and 1973 read as follows:

> 42. In 1971, Reps. Joy Johnson and Henry Frye proposed a bill amending section 13-1 to eliminate the petition and witness requirement and to "automatically" restore citizenship rights to anyone convicted of a felony "upon the full completion of his sentence." But their proposal was rejected. Their proposed bill was amended to retain section 13-1's denial of the franchise to people living in North Carolina's communities. In particular, the African American legislators' 1971 proposal was successfully amended in committee to specifically require the completion of "any period of probation or parole"—words that had not appeared in Rep. Johnson and Frye's original proposal—and then successfully amended again to require "two years [to] have elapsed since release by the Department of Corrections, including probation or parole." The amendments also deleted the word "automatically" and added a requirement to take an

oath before a judge to obtain rights restoration. The 1971 revision to section 13-1 passed as amended. It thus required people with felony convictions to wait two years from the date of the completion of their probation or parole, and then to go before a judge and take an oath to secure their voting rights.

43. Rep. Frye explained on the floor of the North Carolina House of Representatives in July 1971 that "he preferred the bill's original provisions which called for automatic restoration of citizenship when a felon had finished his prison sentence, but he would go along with the amendment if necessary to get the bill passed."

44. In 1973, the three African American legislators were able to convince their 167 White colleagues to further amend the law to eliminate the oath requirement and to eliminate the two-year waiting period after completion of probation and parole, but they were not able to reinstate voting rights upon release from incarceration. Senator Michaux explained, with respect to the 1973 revision, that "[o]ur aim was a total reinstatement of rights, but we had to compromise to reinstate citizenship voting rights only after completion of a sentence of parole or probation." "To achieve even that victory, we vehemently argued and appealed to our colleagues that if you had served your time, you were entitled to your rights. Ultimately, what we achieved was a compromise."

45. The record evidence is clear and irrefutable that the goal of these African American legislators and the NC NAACP was to eliminate section 13-1's denial of the franchise to persons released from incarceration and living in the community, but that they were forced to compromise in light of opposition by their 167 White colleagues to achieve other goals, such as eliminating the petition requirement. Both Henry Frye's statement on the House floor and Senator Michaux's affidavit make[ ] clear that the African American legislators wanted disenfranchisement to end at the conclusion of "prison" or "imprisonment." But as Senator Michaux explained: "We

> understood at the time that we would have to swallow the bitter pill of the original motivations of the law—the disenfranchisement at its core was racially motivated—to try to make the system practiced in North Carolina somewhat less discriminatory and to ease the burdens placed on those who were disenfranchised by the state."
>
> . . . .
>
> 49. Rep. Jim Ramsey, who chaired the House Committee offering the committee substitute adding back in the words "probation and parole," openly acknowledged in 1971 that the provision governing restoration of voting rights was "archaic and inequitable." Rep. Ramsey provided no explanation for the Committee's decision to nonetheless preserve the existing law's disenfranchisement of people after their release from any incarceration.

(First and second alterations in original) (citations omitted).

The only evidence cited by the trial court in the above findings to show that racial discrimination motivated white legislators in 1971 and again in 1973 consists of (1) committee amendments to the initial 1971 bill and (2) statements by three legislators. It does not take much inspection to perceive the meagerness of this evidence. We have already seen that, even as amended by committee, the 1971 legislation streamlined the rights restoration process for all eligible felons by, *inter alia*, substituting an oath requirement for the time-consuming and complicated petition-and-hearing procedure.

A closer examination of the contemporaneous records pertaining to the 1973 amendments to section 13-1 further undercuts the trial court's findings. To begin with, though the trial court ignored this fact, the automatic restoration bill introduced by Representatives Johnson, Frye, and Michaux in 1973 did *not* cover individuals on felony supervision; rather, it expressly *excluded* felons on probation or parole. Moreover, the record shows that white legislators voted down attempts to weaken the legislation. They rejected, for instance, an amendment that would have retained the oath requirement. The final legislation enacted by the General Assembly in 1973 did not differ materially from the original bill. It ended the waiting period and mandated automatic rights restoration for eligible felons. An Act to Provide for the Automatic Restoration of Citizenship, ch. 251, § 1, 1973 N.C. Sess. Laws 237, 237–38.

With the enactment of the 1973 amendments to Chapter 13, Representatives Johnson, Frye, and Michaux obtained everything they had sought, save automatic restoration for individuals on felony supervision, and their 1973 bill did not even propose automatic restoration for felons in that category. Especially when viewed through the presumption of legislative good faith, the unwillingness of their white colleagues to compromise on this one issue hardly substantiates a charge of racism. As Senator Michaux himself testified during his deposition on 24 June 2020, "everything that comes out of that legislature is a compromise." *See NLRB v. SW Gen., Inc.*, 580 U.S. 288, 306 (2017) ("Passing a law often requires compromise, where even the most firm public demands bend to competing interests.").

Similarly, the legislators' statements relied on by the trial court provide a thoroughly inadequate foundation for its conclusion that racism drove the legislature's refusal to restore the rights of individuals on felony supervision. As the Supreme Court has explained:

> Inquiries into congressional motives or purposes are a hazardous matter. When the issue is simply the interpretation of legislation, the Court will look to statements by legislators for guidance as to the purpose of the legislature, because the benefit to sound decision-making in this circumstance is thought sufficient to risk the possibility of misreading Congress' purpose. *It is entirely a different matter when we are asked to void a statute that is, under well-settled criteria, constitutional on its face, on the basis of what fewer than a handful of Congressmen said about it.* What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

United States v. O'Brien, 391 U.S. 367, 383–84 (1968) (emphasis added) (footnote omitted).

The statements by Representatives Frye and Ramsey are the only ones cited by the trial court that were made during the General Assembly's consideration of the 1971 legislation. They appeared in a brief 1971 newspaper article reporting on the House's debate. Significantly, there is no mention of race in the article, much less any allegation that racism played a role in the legislation's development.

The trial court's order does not quote or reference any statements made by legislators during the General Assembly's consideration of the 1973 amendments to Chapter 13. The statements by Senator Michaux quoted in Findings of Fact 44 and 45 come from an affidavit executed on 7 May 2020, roughly 50 years after the legislative actions that plaintiffs challenge. While the affidavit broadly alleges that many state legislators held racist views in 1973, it contains few details and speculates a great deal about the motives of Senator Michaux's white colleagues. In recounting the defeat of a "Landlord-Tenant rights bill[,]" for instance, Senator Michaux opined, "[The] bill . . . was ultimately defeated based, I believe, on bias in the legislative body."

Taken at face value, the comments by Representatives Frye and Ramsey do not so much as imply that racism had anything to do with amendments to the 1971 bill introduced by Representatives Johnson and Frye. In any case, "floor statements by individual legislators rank among the least illuminating forms of legislative history." *SW Gen.*, *Inc.*, 580 U.S. at 307. The only statements by a legislator that accuse the white legislators who voted to amend section 13-1 in 1973 of racially discriminatory motives were made by Senator Michaux nearly half a century after the fact. The probative value of those statements is diminished by the length of time between the statements and the events they recount, as well as the general and speculative quality of the statements. The trial court should have heeded the warning in *O'Brien* against striking down a law based on the comments of a few legislators, however respected and distinguished they may be. *See O'Brien*, 391 U.S. at 383–84.

Finally, the trial court's inference of discriminatory intent from the legislative history seems curiously at odds with the cumulative effect of the 1971 and 1973 legislation, which has been to restore automatically the citizenship rights of all felons, whatever their race, who have completed their sentences. To the degree that African Americans make up a disproportionate share of the felon population, this sea change in the law may well have led to a disproportionate number of African American felons regaining the right to vote. In light of the legislation's impact and the absence of reliable evidence of discriminatory intent, the legislative history in this case did little, if anything, to help plaintiffs prove that racial prejudice motivated the white legislators who reformed our felon re-enfranchisement statutes in 1971 and 1973.

d. Procedural Sequence

"Departures from the normal procedural sequence might also afford evidence that improper purposes are playing a role" in a government

action. *Arlington Heights*, 429 U.S. at 267. In this case, there is no contention by plaintiffs or finding by the trial court that the General Assembly deviated from its normal procedures during its consideration and enactment of felon rights legislation in 1971 and 1973. Like the other *Arlington Heights* factors, this one favors defendants.

e. Arlington Heights *Conclusion*

The trial court misapplied the *Arlington Heights* factors and relied on manifestly insufficient evidence to bolster its conclusion that racial discrimination prompted the General Assembly in 1971 and again in 1973 not to restore the citizenship rights of persons on felony supervision. When viewed through the presumption of legislative good faith, as it must be, the statistical and historical evidence presented by plaintiffs does not show racial discrimination "to have been a 'substantial' or 'motivating' factor behind" the 1971 repeal and replacement of section 13-1 or the 1973 amendments to that statute. *Hunter*, 471 U.S. at 228. Consequently, the burden of proof did not shift to defendants "to demonstrate that the law[s] would have been enacted without this factor." *Id.* The trial court should have rendered judgment for defendants on plaintiffs' claim that section 13-1 discriminates against African Americans in violation of our state Equal Protection Clause.

B. Wealth-Based Classification

[3] State law makes the payment of court costs, fines, and restitution a condition of probation, parole, and post-release supervision. N.C.G.S. §§ 15A-1343(b)(9) (2021) (probation); 15A-1374(b)(11a)–(11b) (2021) (parole); 15A-1368.4(e)(11)–(12) (2021) (post-release supervision). In its order granting partial summary judgment to plaintiffs, the trial court offered an example of how this requirement can interact with section 13-1 to postpone the restoration of a felon's right to vote: "[P]robation may be extended for up to five years, then an additional three with the consent of the probationer, to allow time for the compliance with the financial obligation of restitution. The impact is that a person remains disenfranchised for up to eight years because he has been unable to pay . . . ." The court concluded that, "by requiring an unconditional discharge that includes payments of all monetary obligations imposed by the court, [section] 13-1 creates a wealth classification" in violation of the Equal Protection Clause in Article I, Section 19.

Defendants argue that the trial court "relied on the . . . mistaken premise that felons have a fundamental right to vote to apply strict scrutiny to [p]laintiffs' claim that [s]ection 13-1 creates an impermissible wealth classification." Defendants further contend that "[s]ection 13-1

does not create a wealth classification[,]" and even if it did, the trial court erred in subjecting that classification to strict scrutiny. Plaintiffs would have us affirm the trial court's ruling, contending that equal protection " 'bars a system which excludes' from the franchise those unable to pay a fee[,]' " quoting *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668 (1966), and that the trial court rightly applied strict scrutiny to their wealth classification claim.

"The Equal Protection Clause necessarily operates as a restraint on certain activities of the State that either create classifications of persons or interfere with a legally recognized right." *Blankenship*, 363 N.C. at 521–22, 681 S.E.2d at 762. For most equal protection claims, this Court employs one of three tiers of scrutiny. "The upper tier of equal protection analysis requiring strict scrutiny of a governmental classification applies only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *White v. Pate*, 308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983). When a statute draws such a classification, strict scrutiny "requires that the government demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest." *Id.*

On the other hand, when a statute does not burden a fundamental right or peculiarly disadvantage a suspect class, we typically apply rational basis review, "the lowest tier of review." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 181, 594 S.E.2d 1, 16 (2004). A statute survives rational basis review so long as the classification at issue "bear[s] some rational relationship to a conceivable legitimate interest of the government." *White*, 308 N.C. at 766–67, 304 S.E.2d at 204; *see also Rhyne*, 358 N.C. at 180–81, 594 S.E.2d at 15 ("Rational basis review is 'satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.' " (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992))).

We have applied intermediate scrutiny to one kind of equal protection claim under Article I, Section 19. In *Blankenship*, we held that intermediate scrutiny is the proper standard of review for claims that superior court districts drawn by the General Assembly deny citizens "the right to vote in superior court elections on substantially equal terms." 363 N.C. at 525–26, 681 S.E.2d at 765. Under intermediate scrutiny, "[j]udicial districts will be sustained if the legislature's formulations advance

important governmental interests unrelated to vote dilution and do not weaken voter strength more than necessary to further those interests." *Id.* at 527, 681 S.E.2d at 766.

Although "[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), the suffrage provisions in Article VI limit the scope of that right. Pursuant to Article VI, Section 1, for instance, no one under the age of eighteen has the right to vote.[11] We thus would not apply strict scrutiny to a claim that denying the vote to sixteen-year-olds violates the Equal Protection Clause. Likewise, the default rule under Article VI, Section 2(3) is that felons do not have the right to vote. The provision authorizes the General Assembly to adopt a process by which felons may regain that right, but it leaves the details to the legislature's sound discretion. Usually, then, laws that set out the process by which felons may have their rights restored do not trigger strict scrutiny. *See Jones v. Governor of Fla.*, 975 F.3d 1016, 1030 (11th Cir. 2020) (en banc) ("[A]bsent a suspect classification that independently warrants heightened scrutiny, laws that govern felon disenfranchisement and reenfranchisement are subject to rational basis review.").

The trial court applied strict scrutiny to section 13-1 because the statute conditions felons' eligibility to vote on their ability to pay any court costs, fines, or restitution owed. According to the court, "when a wealth classification is used to restrict the right to vote or in the administration of justice, it is subject to heightened scrutiny, not the rational basis review urged by Defendants in this case."

The trial court got the standard wrong. The Supreme Court case cited by the court to justify its use of strict scrutiny did not concern voting rights. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996) (holding that a state may not "condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees"). Moreover, federal appellate courts that have confronted claims akin to plaintiffs' wealth classification argument have not resorted to strict scrutiny.[12]

---

11. "Every person born in the United States and every person who has been naturalized, 18 years of age, and possessing the qualifications set out in this Article, shall be entitled to vote at any election by the people of the State, except as herein otherwise provided." N.C. Const. art. VI, § 1.

12. The dissent argues that strict scrutiny should apply to plaintiffs' wealth classification claim but does not cite a single case that supports the application of strict scrutiny in this context.

In *Jones*, the United States Court of Appeals for the Eleventh Circuit, sitting en banc, used rational basis review to evaluate an equal protection challenge to Florida laws that allowed felons to regain their voting rights upon completion of their sentences, "including imprisonment, probation, and payment of any fines, fees, costs, and restitution." 975 F.3d at 1025. The court noted that under the federal Equal Protection Clause felons do not have a fundamental right to vote and wealth is not a suspect classification. *Id.* at 1029–30; *see also Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (stating that the plaintiffs "cannot complain about their loss of a fundamental right to vote because felon disenfranchisement is explicitly permitted under the terms of" the Supreme Court's decision in *Richardson v. Ramirez*, 418 U.S. 24 (1974)); *Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986) ("It is undisputed that . . . the right of felons to vote is not fundamental."). The court distinguished Florida's requirement that felons pay fines, fees, costs, and restitution to regain their voting rights from a poll tax. "Unlike [a] poll tax . . . , that requirement is highly relevant to voter qualifications. It promotes full rehabilitation of returning citizens and ensures full satisfaction of the punishment imposed for the crimes by which felons forfeited the right to vote." *Jones*, 975 F.3d at 1031 (citation omitted); *see also Harvey*, 605 F.3d at 1080 ("That restoration of [the plaintiff-felons'] voting rights requires them to pay all debts owed under their criminal sentences does not transform their criminal fines into poll taxes.").

The Eleventh Circuit further reasoned:

> The only classification at issue is between felons who have completed all terms of their sentences, including financial terms, and those who have not. This classification does not turn on membership in a suspect class: the requirement that felons complete their sentences applies regardless of race, religion, or national origin. Because this classification is not suspect, we review it for a rational basis only.

Jones, 975 F.3d at 1030; *see also Johnson v. Bredesen*, 624 F.3d 742, 746 (6th Cir. 2010) (applying rational basis review to felon re-enfranchisement law); *Hayden v. Paterson*, 594 F.3d 150, 170 (2d Cir. 2010) (applying rational basis review to statutes disenfranchising felons); *Owens v. Barnes*, 711 F.2d 25, 27 (3d Cir. 1983) ("[T]he standard of equal protection scrutiny to be applied when the state makes classifications relating to disenfranchisement of felons is the traditional rational basis standard."); *Shepherd v. Trevino*, 575 F.2d 1110, 1114–15 (5th Cir. 1978) (holding that state laws on felon re-enfranchisement receive rational basis review).

Employing rational basis review, the Eleventh Circuit held that Florida's felon re-enfranchisement laws were reasonably related to legitimate government interests. *Jones*, 975 F.3d at 1035. The state could rationally have believed "that felons who have completed all terms of their sentences, including paying their fines, fees, costs, and restitution, are more likely to responsibly exercise the franchise than those who have not." *Id*.

We find the Eleventh Circuit's approach in *Jones* persuasive. The trial court should have subjected section 13-1 to rational basis review on plaintiffs' claim that the statute unconstitutionally conditions felon re-enfranchisement on the capacity of felons to satisfy the financial terms of their sentences. The statute unquestionably survives rational basis review because the General Assembly could reasonably have believed in 1971 and 1973 that felons who pay their court costs, fines, or restitution are more likely than other felons to vote responsibly. The legislature could also have rationally viewed the requirement as an incentive for felons to take financial responsibility for their crimes.

In their brief to this Court, plaintiffs argue that, under our current re-enfranchisement laws, "[t]wo North Carolinians could be convicted of the same crime, receive the same sentence, and each complete all other terms of their probation, but the person with financial means to pay will be re-enfranchised while the person without will remain barred from voting." Even if that assertion is correct, it does not save plaintiffs' equal protection claim. Practically every law affects those who come within its ambit differently based on their individual situations. The question under rational basis review is whether distinctions drawn by the law are reasonable and connected to a legitimate government interest. When it comes to section 13-1's requirement that felons satisfy the conditions of their felony supervision, the answer to that question is undoubtedly yes. Once again, we find the Eleventh Circuit's analysis convincing:

> To be sure, the line Florida drew might be imperfect. The classification may exclude some felons who would responsibly exercise the franchise and include others who are arguably less deserving. But Florida was not required to draw the perfect line nor even to draw a line superior to some other line it might have drawn. The Constitution requires only a rational line. The line between felons who have completed their sentences and those who have not easily satisfies that low bar.

Jones, 975 F.3d at 1035.

We should add that, even if the scenario posed by plaintiffs were constitutionally problematic, it would not be enough to sustain their equal protection claim. Plaintiffs brought a facial challenge to section 13-1, "the most difficult challenge to mount successfully." *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 288 (2015). To prevail, they must show that "there are *no circumstances* under which the statute might be constitutional." *Beaufort Cnty. Bd. of Educ. v. Beaufort Cnty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009) (emphasis added). "The fact that a statute might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998).

Section 13-1 does not impermissibly condition the right to vote on a felon's ability to pay whatever court costs, fines, or restitution the felon may owe. Because this equal protection claim lacks merit, the trial court should have granted summary judgment for defendants. *See* N.C.G.S. § 1A-1, Rule 56(c) (2021) ("Summary judgment, when appropriate, may be rendered against the moving party.").

C. Property Qualifications

[4] The Property Qualifications Clause in our state constitution declares: "As political rights and privileges are not dependent upon or modified by property, no property qualification shall affect the right to vote or hold office." N.C. Const. art. I, § 11. In granting summary judgment for plaintiffs on their Property Qualifications Clause claim, the trial court reasoned that, "when legislation is enacted that restores the right to vote, thereby establishing qualifications which certain persons must meet to exercise their right to vote, such legislation must not do so in a way that makes the ability to vote dependent on a property qualification." The trial court opined that section "13-1 does exactly that" by making the re-enfranchisement of felons depend on whether they satisfy the financial terms of their sentences.

Defendants argue that section 13-1 does not violate the Property Qualifications Clause because "[t]he requirement that felons complete their sentences, including financial aspects of their sentences, is a predicate for felons having their rights *restored*, not a qualification for *exercising* their rights." In defendants' view, "[t]he Constitution's demand that 'political rights and privileges' not be made 'dependent upon or modified by property' is inapplicable to felons who have no political right to vote until [that right is] reinstated by [s]ection 13-1." Defendants also maintain that the trial court's interpretation conflicts with the original understanding of property qualifications. Plaintiffs

argue in response that money constitutes a form of property and consequently the Property Qualifications Clause prohibits the state from withholding the franchise over a felon's nonpayment of court costs, fines, or restitution.

The Property Qualifications Clause does not exist in a textual vacuum. It forbids the imposition of property qualifications on "the right to vote," but it does not define that right. Other provisions in the state constitution give that right content. Thus, for example, Article I, Section 9 guarantees anyone entitled to vote in North Carolina the right to do so in elections that are held frequently. *See* N.C. Const. art. I, § 9 ("[E]lections shall be often held."). Under Article I, Section 10, those frequent elections must be conducted "free from interference or intimidation." *State Constitution* at 56; *see also* N.C. Const. art. I, § 10 ("[E]lections shall be free."). Article VI sets out the qualifications that individuals must satisfy to have the right to vote in the frequent and free elections mandated by Article I, Sections 9 and 10. In general, as we have seen, that right belongs to anyone who has reached eighteen years of age and meets certain residency requirements. N.C. Const. art. VI, § 1, § 2(1)–(2).

Article VI expressly disqualifies from voting, however, anyone "adjudged guilty of a felony . . . unless that person shall first be restored to the rights of citizenship in the manner prescribed by law." *Id.* § 2(3). The obvious import of these words is that felons whose rights have not been restored as provided by law have no right to vote under our state constitution. Put differently, felon re-enfranchisement through section 13-1 "is not a . . . right; it is a mere benefit that" the General Assembly could "choose to withhold entirely." *Harvey*, 605 F.3d at 1079. Because felons whose citizenship rights have not been restored have no state constitutional right to vote, requiring them to fulfill the financial terms of their sentences as a condition of re-enfranchisement cannot be said to violate the Property Qualifications Clause. Financial obligations imposed on individuals who already lack the right to vote simply do not trigger that provision.

The historical background of the Property Qualifications Clause lends weight to our interpretation of the provision's scope. Under the 1776 constitution, all freemen aged twenty-one or older who satisfied a one-year residency requirement and had paid "public taxes" could vote for members of the state house. N.C. Const. of 1776, Declaration of Rights, § VIII. When it came to voting for a member of the state senate, though, a freeman could not vote unless he met the residency requirement and was "possessed of a freehold within the same county of fifty acres of land for six months next before, and at the day of election." *Id.*

§ VII. The 1776 constitution also imposed property ownership qualifications on the governor and members of the legislature.[13]

The property qualifications in the 1776 constitution were meant to ensure that the people who voted and those for whom they voted had a personal investment in the governance of the state. "Although [Article I, Section 11 of the current state constitution] confidently declare[s] that politics and property are not related . . . , the fact was not self-evident to the generation that made the Revolution. On the contrary, the state's 1776 constitution excluded paupers from the franchise: Those without property had, it was thought, no stake in society." *State Constitution* at 57.

The 1835 amendments to the state constitution left the property qualifications intact. "In 1857, voters approved the only amendment submitted to them between 1836 and [their ratification of the 1868 constitution]. The amendment . . . abolished the 50-acre land ownership requirement for voters to cast ballots in state senate races."[14] John L. Sanders, *Our Constitutions: An Historical Perspective*, https://www.sosnc.gov/static_forms/publications/North_Carolina_Constitution_Our_Co.pdf (last visited Apr. 14, 2023). The 1857 amendment did not alter property qualifications for governor and members of the legislature, which remained in effect until after the Civil War. *State Constitution* at 57.

The Property Qualifications Clause that now resides in Article I, Section 11 first appeared in the 1868 constitution. It banned—and continues to ban—property qualifications for voting or officeholding. "[A] milestone on the road to modern democracy[,]" the provision owes its existence to Republican delegates to the 1868 constitutional convention, who insisted "that popular sovereignty not be limited by property." *Id.*

The requirement that felons pay what they owe differs in kind and purpose from the 1776 constitution's property qualifications. As we have

---

13. "[M]embership in the senate was restricted to men with 'not less than three hundred acres of land in fee,' while each member of the house of commons had to hold 'not less than one hundred acres of land in fee, or for the term of his own life.' The governor had to be a man of still more substantial property, possessed of 'a freehold in lands and tenements, above the value of one thousand pounds.' " John V. Orth, *Fundamental Principles in North Carolina Constitutional History*, 69 N.C. L. Rev. 1357, 1361 (1991) (footnotes omitted) (citing N.C. Const. of 1776, §§ 5–6, 15).

14. "Every free white man of the age of twenty-one years, being a native or naturalized citizen of the United States and who has been an inhabitant of the State for twelve months immediately preceding the day of an election, and shall have paid public taxes, shall be entitled to vote for a member of the senate for the district in which he resides." N.C. Const. of 1776, amends. of 1857.

seen, the framers of the 1776 constitution restricted voting and certain offices to owners of real property in the belief that propertyless individuals lacked a stake in the conduct of government affairs. Insisting that felons *pay* their court costs, fines, and restitution is not the same thing as mandating that they *own* real or personal property in particular amounts. Nothing prohibits a relative, for instance, from paying a felon's court costs. Moreover, section 13-1's re-enfranchisement criteria are not premised on the outdated notion that the poor have no interest in how the state is run.

Plaintiffs cite *Wilson v. Board of Aldermen*, 74 N.C. 748 (1876), for the proposition that money constitutes property for purposes of the Property Qualifications Clause. There, the plaintiff disputed the constitutionality of a provision in the City of Charlotte's charter that endowed the city with the power to tax his bonds and income. *Id.* at 748–49. The plaintiff based his argument on Article VII, Section 9 of the 1868 constitution, which directed that any property taxes levied by counties or municipalities be "uniform and *ad valorem*." *Id.* at 754 (quoting N.C. Const. of 1868, art. VII, § 9). The plaintiff interpreted Article VII, Section 9 to confine local government property taxes to tangible property. *Id.* We disagreed, pointing out that other provisions in the 1868 constitution, such as the Property Qualifications Clause, used the term "property" more generally. *Id.* at 755–56.

The *Wilson* case does not lead to the conclusion that section 13-1 violates the Property Qualifications Clause. While money is a form of property, the Property Qualifications Clause bans laws that make property ownership a condition of voting, and we have just explained that section 13-1 does not mandate that felons own property.[15]

The trial court erred in ruling that section 13-1 violates the Property Qualifications Clause. When read alongside related constitutional provisions, the Property Qualifications Clause does not bar the General Assembly from requiring that felons satisfy the financial terms of their sentences before they regain the franchise. The history behind the Property Qualifications Clause reenforces this view. Section 13-1 does not implicate "the purposes sought to be accomplished by [the] promulgation" of the Property Qualifications Clause. *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980). Defendants were entitled to summary judgment on this claim.

---

15. The dissent incorrectly asserts that we construe the Property Qualifications Clause to refer to real property only.

D. Free Elections Clause

[5] In its final order, the trial court ruled that section 13-1 "violates the Free Elections Clause [in Article I, Section 10 of the North Carolina Constitution] by preventing elections that ascertain the will of the people." The trial court reasoned that "North Carolina's elections do not faithfully ascertain the will of the people when such an enormous number of people living in communities across the state—over 56,000 individuals [on felony supervision]—are prohibited from voting."[16]

Defendants argue that section 13-1 does not violate the Free Elections Clause because (1) felons have no right to vote under the state constitution and thus fall outside the scope of the Free Elections Clause; (2) section 13-1 cannot be said to contravene the Free Elections Clause because it is more lenient on felons than the version of section 13-1 that was in effect when voters ratified the current state constitution in 1970; and (3) "[p]laintiffs have failed to prove that [s]ection 13-1 constrains any voter's choice in voting for particular candidates." According to plaintiffs, the Free Elections Clause requires allowing individuals on felony supervision to vote because elections must "reflect to the greatest extent possible the will of *all* people living in North Carolina communities."

We hold that section 13-1 does not violate the Free Elections Clause in Article I, Section 10. Like the Property Qualifications Clause in Article I, Section 11, the Free Elections Clause must be harmonized with the provisions of Article VI. Pursuant to Article VI, Section 2(3), only those felons whose citizenship rights have been restored in the manner prescribed by law have the right to vote. Accordingly, the Free Elections Clause is not violated when felons whose rights have not been restored are excluded from the electoral process. In plain English, it is not unconstitutional merely to deny the vote to individuals who have no legal right to vote.

The historical background of the Free Elections Clause substantiates our holding. Our opinion issued today in *Harper v. Hall*, No. 413PA21-2 (N.C. Apr. 28, 2023), discusses that background in detail, so we need not duplicate the discussion here. Suffice to say that a free elections guarantee has appeared in each of our state's constitutions, the first of which declared that "elections of members, to serve as Representatives in

16. The trial court further concluded that section 13-1 "strikes at the core of the Free Elections Clause . . . because of its grossly disproportionate effect on African American people." We explained earlier in this opinion why the trial court's disparate impact findings are unreliable.

General Assembly, ought to be free." N.C. Const. of 1776, Declaration of Rights, § VI. The wording of the free elections guarantee in the 1776 constitution echoes a parallel provision in the 1689 Bill of Rights adopted by the English Parliament following the overthrow of King James II. *See* Bill of Rights 1689, 1 W. & M. Sess. 2, ch. 2, § I, cl. 13 ("[E]lection of Members of Parlyament ought to be free."); *State Constitution* at 56 ("The word ['free' as used in the Free Elections Clause] originally derives . . . from the English Declaration of Rights (1689)[.]").

As explained in *Harper*, "the drafters of the English Bill of Rights sought to secure a 'free [P]arliament,' a Parliament where the electors could vote for candidates of their choice, and the members, once elected, could legislate according to their own consciences without threat of intimidation or coercion from the monarch." *Harper*, slip op. at 111–12 (alteration in original) (quoting Michael Barone, *Our First Revolution: The Remarkable British Upheaval that Inspired America's Founding Fathers* 230 (2007)). The framers of our 1776 constitution hoped to achieve a similar goal: state legislative elections "free from interference or intimidation." *State Constitution* at 56.

This Court's decisions interpreting the Free Elections Clause further illuminate the contours of that provision. In *Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746 (1937), the plaintiff alleged that the county board of elections had fraudulently altered the results of his county commissioner race, thereby depriving him of office. *Id.* at 700–01, 191 S.E. at 746. We rejected the defendant's argument that the complaint failed to state a claim and held that, under the Free Elections Clause, "[a] free ballot and a fair count must be held inviolable to preserve our democracy." *Id.* at 702, 191 S.E. at 747. We thus construed the Free Elections Clause to prohibit fraudulent vote counts.

In *Clark v. Meyland*, 261 N.C. 140, 134 S.E.2d 168 (1964), the plaintiff challenged a statutory requirement that voters seeking to change their party affiliation take an oath promising to support their new party's nominees until "in good faith" they changed their party affiliation again. *Id.* at 141, 134 S.E.2d at 169. We held that the portion of the oath requiring support for future candidates violated the Free Elections Clause because "[i]t denie[d] a free ballot—one that is cast according to the dictates of the voter's judgment." *Id.* at 143, 134 S.E.2d at 170. We explained that "the Legislature [was] 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.* In summary, "[b]ased upon . . . this Court's precedent, the free elections clause means a voter is deprived of a 'free' election if (1) a law prevents a voter from

voting according to one's judgment, or (2) the votes are not accurately counted." *Harper*, slip op. at 117 (citations omitted).

"[A] constitution cannot violate itself[,]" *Leandro*, 346 N.C. at 352, 488 S.E.2d at 258, so denying the franchise to felons as required by Article VI, Section 2(3) cannot be a violation of the Free Elections Clause. Furthermore, excluding felons whose rights have not been restored from the electoral process does not expose our elections to the sort of interference, intimidation, fraud, or infringements on conscience that the Free Exercise Clause exists to prevent. The trial court therefore erred in ruling that section 13-1 contravenes the Free Elections Clause.

E. Fundamental Right to Vote

Lastly, the trial court concluded that section 13-1 unconstitutionally "interferes with the fundamental right to vote on equal terms[,]" reasoning that felons "on felony supervision share the same interest as . . . North Carolina residents who have not been convicted of a felony or [felons] who have completed their supervision." We have already concluded that felons have no fundamental right to vote, as Article VI, Section 2(3) expressly divests them of this right upon conviction. Contrary to the trial court's reasoning, felons are not "similarly situated" to non-felons when it comes to voting; our state constitution could not be clearer on this point.

V. Disposition

Plaintiffs failed to prove the unconstitutionality of section 13-1 beyond a reasonable doubt. The General Assembly did not engage in racial discrimination or otherwise violate the North Carolina Constitution by requiring individuals with felony convictions to complete their sentences—including probation, parole, or post-release supervision—before they regain the right to vote. We therefore reverse the trial court's grant of summary judgment and declaratory and injunctive relief to plaintiffs and remand this case to the trial court for dismissal of plaintiffs' claims with prejudice.

REVERSED AND REMANDED.

Justice EARLS dissenting.

The majority's decision in this case will one day be repudiated on two grounds. First, because it seeks to justify the denial of a basic human right to citizens and thereby perpetuates a vestige of slavery, and second, because the majority violates a basic tenet of appellate review

by ignoring the facts as found by the trial court and substituting its own. *See, e.g.*, *State v. Taylor*, 379 N.C. 589, 608 (2021) ("[A]n appellate court is not entitled to 'make its own findings of fact and credibility determinations, or overrule those of the trier of fact.' " (quoting *Desmond v. News & Observer Publ'g Co.*, 375 N.C. 21, 44 n.16 (2020))).

With regard to the first and most serious issue, the majority interprets the North Carolina Constitution to reduce the humanity of individuals convicted of felony offenses to the point of cruelty: People who are convicted of felony offenses are no longer people, they are felons.[1] The majority believes that, as felons, they are not free even after their sentences are complete, they are merely felons for the rest of their lives. At about the same time that the state constitution was amended to disenfranchise all Blacks, both those who were slaves and those who were free, this Court held that "[t]he power of the master must be absolute to render the submission of the slave perfect." *State v. Mann*, 13 N.C. (2 Dev.) 263, 266 (1829). The Court found that proposition to be inherent in the institution of slavery and professed no power to "chang[e] the relation in which these parts of our people stand to each other." *Id.* at 267. Today, the Court again consigns a portion of the state's population to a less than free status, unable to participate in the fundamental exercise of self-governance upon which democracy is based. *See Blankenship v. Bartlett*, 363 N.C. 518, 522 (2009); *see also Reynolds v. Sim*s, 377 U.S. 533, 554–55 (1964) (declaring that the right to vote is a fundamental right, preservative of all other rights). As preservative of all other rights, the right to vote also recognizes the inherent humanity of every adult citizen. The state constitution contemplates that the right to vote, along with all rights of citizenship, shall be restored to people who commit felony offenses. N.C. Const. art. VI, § 2(3). The only question in this case is whether the statute that prescribes how restoration is accomplished, N.C.G.S. § 13-1, unconstitutionally discriminates against individuals with felony convictions. The trial court heard extensive evidence, made detailed findings of fact, and applied the correct legal standards to answer that question. The trial court's final judgment and order should be affirmed.

---

1. The rationale for denying the franchise to returning citizens was questioned at the time the statute at issue here was under consideration. *See, e.g.*, North Carolina Law Review, *Notes*, 50 N.C. L. Rev. 903, 910 (1972) ("If the prisoner is worthy of being released to the community he should be made to feel that he is ready to rejoin society as a participant and not as an outsider.").

I. Factual Background

A. The Racist Origins of N.C.G.S. § 13-1

Years before the original version of N.C.G.S. § 13-1 was adopted, the North Carolina Constitution expressly forbade all African Americans, whether free or enslaved, from voting. This wholesale prohibition came about in 1835. Prior to 1835, the state constitution already prohibited slaves from voting. But in response to African Americans' growing political influence in certain parts of the state and broader fears surrounding racial empowerment, there were calls to amend the state constitution to deny the franchise to all African Americans, regardless of their status as slaves or free people. This fear is encapsulated by a plea from white North Carolinians to the state legislature, urging the General Assembly to deny the franchise to free African Americans:

> A very large portion of our population are slaves, and recent occurrences must deeply impress . . . the vital necessity of keeping them in a state of discipline and subordination. . . . [P]ermitting free negroes to vote at elections, contributes to excite and cherish a spirit of discontent and disorder among the slaves. . . . Will not practices such as these . . . 'naturally excite in the slaves discontent with their condition, encourage idleness and disobedience, and lead possibly in the course of human events, to the most calamitous of all contests, a *bellum servile* a servile war.'

The Sentinel (New Bern, N.C.), December 7, 1831, at 3. This plea further decried that *free* African Americans were not truly free: "[T]hey are forbidden to contract marriage except with their own class . . . [and] they are not called upon to aid in the execution of the civil or criminal processes of the law: they may be subjected even to the punishment of death on the testimony of a slave. Can these disabilities belong to the Freeman?" *Id.*

Concerns like these prevailed during the 1835 Constitutional Convention.[2] And so, in 1835, the North Carolina constitution was amended to provide that "[n]o free negro, free mulatto, or free person

2. For example, Jesse Wilson of Perquimans County argued that "[c]olor is a barrier" and "[i]f you make it your business to elevate the condition of the blacks, in the same proportion do you degrade that of the poorer whites," which could lead to "an *increase of mixed breeds*." *State Convention*, The Weekly Standard (Raleigh, N.C.), June 19, 1835, at 2.

of mixed blood, descended from negro ancestors to the fourth generation inclusive[ ] (though one ancestor of each generation may have been a white person[ ]) shall vote for members of the Senate or House of Commons." N.C. Const. of 1776, amend. 1835, art. I, § 3(3) (1835). The constitution of 1835 did not contain a felony disenfranchisement provision. *See generally* N.C. Const. of 1776, amends. of 1835. Instead, the constitution prohibited individuals convicted of "infamous" crimes, such as treason, bribery, or perjury, from voting. N.C. Const. of 1776, amends. of 1835, art. I, § 4, pt. 4. Receiving an infamous punishment, such as a whipping, also served to bar individuals from voting.

The 1835 constitutional amendments were in effect for just over thirty years. Following the Civil War, however, North Carolina adopted a new constitution during the 1868 Reconstruction Convention as a condition for its return to the Union. The 1868 constitution provided for universal male suffrage, eliminated property ownership requirements as a condition for voting, and abolished slavery. Notably, the 1868 constitution did not contain any provision that denied the franchise to felons. *See generally* N.C. Const. of 1868.

The 1868 constitution's promise of equal treatment for African Americans sparked an immediate and vicious backlash. Violence against African Americans and their sympathizers was rampant, as were efforts to prevent African Americans from voting. As part of these disenfranchisement efforts, "White former Confederates in North Carolina conducted an extensive campaign of convicting African American men of petty crimes *en masse* and whipping them to disenfranchise them 'in advance' of the Fifteenth Amendment," which was not ratified until 1870. The whipping campaign exploited a North Carolina law that disenfranchised anyone subject to this brutal and degrading form of punishment. One Congressman explained before the United States House of Representatives that "in North Carolina . . . they are now whipping negroes for a thousand and one trivial offenses . . . and in one county . . . they had whipped every adult male negro" in order to "prevent[ ] these negroes from voting."

White conservative Democrats ultimately regained control over the General Assembly in 1870 and doubled-down on efforts to suppress African Americans' newly won freedom. These efforts culminated in 1875 when a series of constitutional amendments were introduced that were intended to curb the rights of African Americans. For example, the amendments, which were ratified in 1876, banned interracial marriage, required segregation in public schools, and stripped counties of their ability to elect their own local officials, delegating that power instead to

the General Assembly.[3] N.C. Const. of 1868, amends. of 1875, amends. XXVI, XXV, XXX.

Particularly significant to this case, the 1876 amendments disenfranchised any person "adjudged guilty of felony" and provided that disenfranchised persons would be "restored to the rights of citizenship in a mode prescribed by law." N.C. Const. of 1868, amends. of 1875, amend. XXIV. The felon disenfranchisement amendment was introduced in the General Assembly by a former Confederate who had been "instructed by his nominating county to lead a 'crusade' against the 'radical civil rights officers' holders party,' *i.e.*, the party that supported equal rights for African American people[,]" as the trial court explained.

The trial court recognized that the General Assembly's disenfranchisement scheme "capitalized on Black Codes that North Carolina had enacted in 1866, which allowed sheriffs to charge African American people with crimes at their discretion," enabling targeted and systematic disenfranchisement. The amendment's purpose was no secret. As one conservative Democrat explained, felon disenfranchisement would result in "a purification of the ballot box." *Address of the Executive Democratic Central Committee to the People of North Carolina*, The Raleigh News (Raleigh, N.C.), June 23, 1875. This amendment remains on the books today, and it is largely unchanged since its ratification in 1876. *See* N.C. Const. art. VI, § 2(3).

During the first legislative session after the 1876 amendments were ratified, the General Assembly enacted a new law to implement the constitution's new felony disenfranchisement provision. The 1877 law prohibited people convicted of felonies from voting unless their rights were restored "in the manner prescribed by law." In turn, the "manner prescribed by law" incorporated an 1840s statute that governed rights restoration for individuals convicted of the most heinous crimes, namely treason and other "infamous crimes." In so doing, as the trial court stated, "[t]he 1877 statute took all of the onerous requirements for rights restoration that had previously applied only to people convicted of treason and for the first time extended them to anyone convicted of any felony."

Importantly, the 1877 law did not merely disenfranchise convicted felons during the duration of their prison sentences. Rather, the law

---

3. According to the trial court, "[t]he purpose of [the latter] amendment was to prevent African Americans from electing African American judges, or judges who were likely to support equality."

continued to bar people from voting even after they were released from incarceration. An Act to Regulate Elections, ch. 275, §§ 10, 62, 1877 N.C. Sess. Laws 516, 519–20, 537. The law also imposed burdensome procedural requirements that convicted felons had to meet in order to have their rights restored. Namely, they had to wait four years from the date of their felony conviction to file a petition for rights restoration. *See* An Act Providing for Restoring to the Rights of Citizenship Persons Convicted of Infamous Crimes, ch. 36, § 3, 1841 N.C. Sess. Laws 68, 68. Once eligible to file a petition, they had to secure the testimony of "five respectable witnesses who have been acquainted with the petitioner's character for three years next preceding the filing of the petition, that his character for truth and honesty during that time has been good." *Id.* § 1. The witness requirement served to bar people from petitioning for rights restoration until three years after their release from prison. Once a petition was filed, judges had complete discretion to approve or deny it, and the clerk of court was required to post the individual's petition on the courthouse door for a three-month period before the restoration hearing. *Id.* Any member of the public could then challenge the petition. *Id.*

The law's message was simple: once a felon, always a felon. Once an individual bore this label, only that person's extensive efforts coupled with the lucky draw of a sympathetic judge could restore the rights every other citizen enjoyed. But such luck could be difficult to come by. Indeed, according to the trial court, "[t]he 1877 law's adoption of the requirement to petition an individual judge for restoration had a particularly discriminatory effect against African American people considering the contemporaneous 1876 constitutional amendment stripping African American communities of the ability to elect local judges."

Together, the 1876 constitutional amendments and the 1877 law were intended to "instill White supremacy and . . . disenfranchise African-American voters." Legislative Defendants themselves conceded that the historical evidence presented at trial "demonstrates a shameful history of our state's use of laws, and with regard to voting in particular, to suppress the African American population."

B. N.C.G.S. § 13-1's Modern History

Despite some minor changes, the 1877 law went largely unchanged from 1897 until 1970. Most notably here, it was recodified at N.C.G.S. § 13-1 during this period, where it remains in effect today. Then in the early 1970s, the General Assembly's only African American members sought to amend the law to eliminate its denial of the franchise to individuals who had completed their prison sentences.

These efforts were first rejected in 1971. That year, two African American members of the General Assembly proposed a bill that would remove N.C.G.S. § 13-1's denial of the franchise to convicted felons who had finished serving their period of incarceration. Despite the purpose behind their original proposal, the bill was amended in committee to require the completion of "any period of probation or parole" before an individual could retain the right to vote, among other modifications. And as if this deprivation of the right to vote was not sufficiently severe, as the trial court's order explained, N.C.G.S. § 13-1 was further amended to require "two years [to] have elapsed since release by the Department of Corrections, including probation or parole" before an individual could petition for rights restoration.

In 1973, the only three African American members of the General Assembly again attempted to reform N.C.G.S. § 13-1. As before, their efforts to amend the law to restore a convicted felon's right to vote upon completion of the individual's prison sentence were unsuccessful. They were, however, able to persuade their colleagues to do away with the 1971 amendment that required a two-year waiting period *after* an individual finished serving a period of probation or parole. An Act to Provide for the Automatic Restoration of Citizenship, ch. 251, § 1, 1973 N.C. Sess. Laws 237, 237–38.

The trial court found that "[t]he record evidence is clear and irrefutable that the goal of these African American legislators . . . was to eliminate section 13-1's denial of the franchise to persons released from incarceration and living in the community, but . . . they were forced to compromise in light of opposition by their 167 White colleagues" and to accept other modifications to the law.

C. N.C.G.S. § 13-1's Modern Discriminatory Effects

Extreme racial disparities in disenfranchisement between African Americans and White individuals convicted of felonies persist. In North Carolina, a staggering 56,516 people are denied the franchise due to probation, parole, or post-release supervision from a felony conviction in state or federal court. Of North Carolina's voting-age population, 21% are African Americans yet, critically, over 42% of those denied the franchise due to felony probation, parole, or post-release supervision from a state court conviction alone are African American. By contrast, White people represent 72% of North Carolina's voting-age population yet only constitute 52% of those who are similarly denied the franchise. African Americans in North Carolina are denied the franchise at a rate 2.76 times as high as the rate of White people with 1.24% of the African American

voting-age population being denied the franchise, whereas only 0.45% of the White voting-age population is similarly disenfranchised. These statistics demonstrate the stark reality of N.C.G.S. § 13-1's disproportionate effect on African Americans.

Countless extreme racial disparities in voter disenfranchisement of persons on community supervision also exist at the county level. The rate of African American disenfranchisement due to felony probation, parole, or post-release supervision is considered "high" in seventy-seven counties. However, the rate of White disenfranchisement is only considered "high" in ten counties. In North Carolina, the highest rate of White disenfranchisement in any county is 1.25% whereas rates of African American disenfranchisement are as high as 2% in nineteen counties, 3% in four counties, and over 5% in one county. This means that one out of every twenty African American adults in that county cannot vote due to felony probation, parole, or post-release supervision.

There is not a single county in the state where the White disenfranchisement rate is greater than the African American disenfranchisement rate. The African American disenfranchisement rate is at least four times greater than the White rate in twenty-four counties and at least five times greater than the White rate in eight counties.

These grave differences represent the extreme disparate impact that the state's denial of the franchise to people on felony probation, parole, or post-release supervision has on African Americans. As one of Plaintiffs' experts opined, "We find in every case that it works to the detriment of the African American population." Although the Legislative Defendants' expert claims that there is no racial disparity in voter disenfranchisement of people on community supervision because "100% of felons of every race in North Carolina" are disenfranchised, the statistics tell a very different, grim story.[4]

II. Analysis

A. Standing

I agree with the Court's conclusion that "plaintiff-felons have standing to bring their claims against defendants" as well as its reasoning in reaching its conclusion as to the traceability issue. I reject the deference

4. In its September 2020 summary judgment order, the trial court concluded that this expert's report was entitled to "no weight" because it was "unpersuasive in rebutting the testimony of Plaintiffs' experts, was flawed in some of its analysis and, while [he] is an expert in the broad field of political science, his experience and expertise in the particular issues before this panel are lacking."

the Court affords Defendants' arguments, however, as they are entirely divorced from this Court's standing doctrine. They are so dumbfounding that they do not even warrant being acknowledged as "plausible." I therefore address these arguments separately. Though I also agree that Plaintiffs' injuries are redressable, I reach this conclusion on different grounds. Finally, I dissent from the majority's holding that plaintiff-organizations Community Success Initiative, Justice Served N.C., Inc., and Wash Away Unemployment lack standing in this litigation.

1. Traceability

Defendants argue that the Plaintiffs lack standing to challenge N.C.G.S. § 13-1 because "Plaintiffs have not been injured by Section 13-1. Rather, they have targeted the very avenue by which they may *regain* their right to vote." Instead, Defendants argue that article VI, section 2(3) is responsible for depriving individuals on community supervision of the right to vote. In Defendants' view then, Plaintiffs have challenged the wrong law, and therefore the alleged injury is not traceable to the statute that is the subject of this litigation.

This argument fails because, as Plaintiffs point out, N.C.G.S. "§ 13-1 is the law that prevents people from registering to vote as long as they are on felony probation, parole, or post-release supervision." "As a general matter, the North Carolina Constitution confers standing on those who suffer harm . . . ." *Magnum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642 (2008) (citing N.C. Const. art. I, § 18). In other words, Plaintiffs are "required to demonstrate that [they have] sustained a legal or factual injury arising from defendants' actions." *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 629 (2022). Here, Plaintiffs do not challenge article VI's felon disenfranchisement provision itself. Rather, they challenge N.C.G.S. § 13-1's specific extension of article VI to individuals who have completed their prison sentences and have been released into their communities on probation, parole, or post-release supervision.

It is a first principle of constitutional interpretation that constitutional provisions "cannot be applied in isolation or in a manner that fails to comport with other requirements of the State Constitution." *Stephenson v. Bartlett*, 355 N.C. 354, 376 (2002). This means that article VI, section 2's denial of the franchise to anyone "adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state" cannot be read in such a way that would violate other provisions of the North Carolina constitution. *See* N.C. Const. art. VI, § 2(3). Thus, if Plaintiffs are correct that it violates other constitutional

provisions to deny the franchise to individuals who have been released back into the community, article VI, section 2's disenfranchisement provision must necessarily be read to exclude those individuals. And if article VI, section 2(3) does not include individuals on probation, parole, or post-release supervision, then N.C.G.S. § 13-1 is singularly responsible for bringing those individuals within the reach of the constitution's disenfranchisement provisions.

But at this stage, the conclusion that Plaintiffs have standing does not turn on agreeing with their argument on the merits that N.C.G.S. § 13-1, rather than the North Carolina constitution, is responsible for disenfranchising the population of convicted felons that have reintegrated into the community. Defendants' argument that Plaintiffs lack standing is simply a misapplication of well-established standing doctrine.

Traceability is the requirement that an alleged "injury was likely caused by the defendant" in a case. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). In other words, "there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.' " *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (alterations in original) (quoting *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976)). In Defendants' view, there is no connection between the alleged injury—the disenfranchisement of individuals on community supervision in violation of multiple constitutional provisions—and Defendants' actions—the passage and continued implementation of N.C.G.S. § 13-1—because the constitution, rather than N.C.G.S. § 13-1, is responsible for Plaintiffs' injury.

In effect, Defendants' argument that Plaintiffs' injury is not traceable to the challenged law is based on the resolution of one of the primary issues that this Court must address on the merits—whether various provisions of the North Carolina constitution, namely the equal protection clause, the free elections clause, and the constitution's ban on property qualifications, require that convicted felons who have completed their prison sentences and have returned to their communities be permitted to vote. But whether Plaintiffs have standing to bring suit is a " 'threshold question' to be resolved before turning attention to more 'substantive' issues." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 490 (1982) (Brenan, J., dissenting). Indeed, "the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Here, however, Defendants argue

that this Court should hold that Plaintiffs lack standing *by deciding* the merits of this dispute. The error lies in the wholesale integration of these two distinct analyses.

What is more, "[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). In North Carolina, "[w]hen a person *alleges* the infringement of a legal right directly under a cause of action at common law, a statute, or the North Carolina Constitution, . . . the legal injury itself gives rise to standing." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 609 (2021) (emphasis added). Here, Plaintiffs have alleged that they have been deprived of a legal right under N.C.G.S. § 13-1, and they have therefore established standing under North Carolina law. Even if one disagrees about whether there has, in fact, been a deprivation of any legal right, at this point in the analysis, Plaintiffs allegations are sufficient to establish their legal standing.

2. Redressability

Defendants also argue that Plaintiffs lack standing because their injury cannot be redressed by a favorable decision. This is perhaps an even more egregious misapplication of standing doctrine than Defendants' clumsy attempt to apply the federal traceability requirement. Redressability is the idea that, for a plaintiff to have standing, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " *Lujan*, 504 U.S. at 561. Here, it is not merely likely but certain that a decision favorable to Plaintiffs, which holds that N.C.G.S. § 13-1 violates the North Carolina constitution, would redress the alleged injury.

If such a favorable decision were rendered, two conclusions would necessarily follow. First, Defendants' argument that article VI, section 2(3) itself disenfranchises individuals on probation, parole, or post-release supervision would fail based on the principle previously explained: that one constitutional provision "cannot be applied . . . in a manner that fails to comport with other requirements of the State Constitution." *Stephenson*, 355 N.C. at 376. Second, once it has been determined that the constitution prohibits the disenfranchisement of individuals on probation, parole, or post-release supervision, a court can redress the injury by striking the portions of N.C.G.S. § 13-1 that discriminate against this class of people. This is precisely what the trial court's injunction did here.

Perhaps aware of this straightforward redressability analysis, Defendants argue that such a remedy is not within the power of the courts. Specifically, Defendants contend that the trial court's injunction directing that "if a person otherwise eligible to vote is not in jail or prison for a felony conviction, they may lawfully register and vote in North Carolina" was an "attempt[ ] to prescribe the manner for felon reenfranchisement itself," and thus the "Superior Court improperly exercised the lawmaking power reserved for the General Assembly."

The idea that the trial court "re[wrote] Section 13-1 [to] make new law to restore voting rights upon 'release from prison' rather than 'unconditional discharge' from a criminal sentence" is a dishonest mischaracterization of the trial court's injunction. As explained, after concluding that the equal protection clause, the free elections clause, and the constitution's ban on property qualifications prohibit the General Assembly from discriminating against individuals on probation, parole, or post-release supervision, the trial court struck down the specific language in N.C.G.S. § 13-1 that denies the franchise to this class of individuals and imposed an injunction instructing that such individuals be permitted to register and vote.

Defendants do not cite a *single* case that supports the proposition that the trial court here lacked the authority to strike down N.C.G.S. § 13-1's discriminatory provisions and issue an injunction directing that individuals on probation, parole, or post-release supervision not be denied their constitutional right to vote. Nor could they. The trial court here did no more than "enjoin only the unconstitutional applications of [§ 13-1] while leaving other applications in force," *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006)—a routine action that courts must take when faced with an unconstitutional statute. "Each time a court strikes down a statutory provision, it must determine whether to invalidate only the unconstitutional provision or instead whether to invalidate the statute in its entirety or in substantial part." Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 Tex. Rev. L. & Pol. 1, 3 (2011). Indeed, "[f]ew would suggest that a court should invalidate an entire statute every time any aspect of the statute is unconstitutional." *Id.* at 7; *see also Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508 (2010) ("[T]he 'normal rule' is 'that partial, rather than facial, invalidation is the required course.' " (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985))).

This Court has *never* suggested that North Carolina's courts lack such authority. In fact, this Court has done just the opposite and has

conducted severability analyses in countless cases virtually since its inception. *See*, *e.g.*, *Pope v. Easley*, 354 N.C. 544, 548 (2001) (determining "whether the trial court properly severed the unconstitutional part of" a statute); *Appeal of Springmoor, Inc.*, 348 N.C. 1, 13 (1998) ("[S]everance may be applied to save the remainder of a statute if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone." (cleaned up)); *State v. Waddell*, 282 N.C. 431, 442 (1973) ("If the objectionable parts of a statute are severable from the rest . . . the statute may be enforced as to those portions of it which are constitutional." (cleaned up)), *superseded on other grounds by statute*; An Act to Amend G.S. 14-17 Murder Defined and Punishment Provided for Murder, Rape, Burglary and Arson, ch. 1201, § 1, 1973 N.C. Sess. Laws 323, 323; *Keith v. Lockhart*, 171 N.C. 451 (1916) ("It is the recognized principle that . . . [w]here a part of the statute is unconstitutional, but the remainder is valid, the parts will be separated, if possible, and that which is constitutional will be sustained." (cleaned up)); *Gamble v. McCrady*, 75 N.C. 509, 512 (1876) ("[W]hile the general provisions of an act may be unconstitutional, one or more clauses may be good, provided they can be separated from the others so as not to depend upon the existence of the others for their own."). There is simply nothing unique or unusual about the trial court's injunction here, and it is certainly not a basis from which to conclude that Plaintiffs lack standing in this case.

3. Organizational Standing

The majority relies on *River Birch Associates v. City of Raleigh*, 326 N.C. 100 (1990), for the proposition that two of the Organizational Plaintiffs do not have standing because they have failed to allege their own injuries with sufficient particularity and failed to allege that they have members who are injured by the statute they challenge.[5] *River Birch Associates* relied on two federal cases decided in the 1970s, *Warth*, 442 U.S. 490 (1979), and *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977). *River Birch Assocs.*, 326 N.C. at 129–30. None of these cases consider this Court's careful analysis of the distinction between standing in federal court and standing in state court as elaborated in *Committee to Elect Dan Forest*, 376 N.C. 558. Moreover, the majority relies solely on allegations in the complaint rather than

5. The majority also concluded that similar resource allocation allegations were insufficient to establish the North Carolina State Conference of the NAACP's standing. However, the Court held that this Organizational Plaintiff established standing through additional allegations in the amended complaint.

examining all the evidence produced at the trial, which potentially also bears on organizational standing at this stage of the proceedings.

Since none of the parties made the argument now relied upon by the majority, it is unwise to undergo the superficial standing analysis advanced here. Claiming that assertions in the complaint regarding resource allocation are too vague without acknowledging the fuller testimony in the record from Plaintiff Organizations is unfair to plaintiffs. In light of the relaxed "injury in fact" requirement established by this Court only two years ago in *Committee to Elect Dan Forest* and the fuller testimony in the record regarding the activities and efforts of the Organizational Plaintiffs that the majority summarily concludes do not have standing, that conclusion is in error.

III. N.C.G.S. § 13-1 Violates Multiple Provisions of the North Carolina Constitution

A. The Equal Protection Clause

Plaintiffs allege and the trial court concluded that N.C.G.S. § 13-1 violates the equal protection clause based on three distinct grounds: (1) that the statute unconstitutionally discriminates based on race; (2) that it deprives African Americans of the fundamental right to vote on equal terms; and (3) that it imposes an unconstitutional wealth-based classification. The majority does not dispute much of the evidence that the trial court relied on in finding these constitutional violations. But in spite of the extensive evidence upon which the trial court's findings and conclusions are based, the majority nonetheless determines that N.C.G.S. § 13-1 does not violate the equal protection clause in any respect. This conclusion can follow only from a complete disregard of the evidence before this Court.

1. Discrimination Based on Race

The trial court held that N.C.G.S. § 13-1's denial of the franchise to people on felony supervision violates the equal protection clause because it discriminates against African Americans in intent and effect. The majority holds otherwise, reasoning that "[t]he trial court misapplied the *Arlington Heights* factors and relied on manifestly insufficient evidence to bolster its conclusion that racial discrimination prompted the General Assembly . . . not to restore the citizenship rights of persons on felony supervision." *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977). Considering the ample evidence of racial discrimination Plaintiffs have produced and the trial court accepted, the majority demonstrates that it would prefer to simply

pretend racial discrimination does not exist today, rather than grapple with the plain and undisputed facts in front of it.

a. Analyzing Facially Neutral, Discriminatory Laws

Though the parties do not dispute that *Arlington Heights* controls here, the majority finds it necessary to point out that this Court is "free to depart from the federal burden-shifting framework" imposed by *Arlington Heights* "if [the Court] deem[s] it incompatible with the principles that guide our review of state constitutional challenges."

True enough. If this Court believed it appropriate, it could indeed apply a framework of its own design to determine whether a facially neutral law discriminates based on race in violation of the equal protection clause. What the majority fails to mention, however, is that any test it fashions must render the state constitution's equal protection clause at least as potent as its federal counterpart. *See State v. Carter*, 322 N.C. 709, 713 (1988) ("Even were the two provisions identical, we have the authority to construe our own 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."); *see also Stephenson v. Bartlett*, 355 N.C. 354, 381 n.6 (2002). Unsurprisingly then, and despite its musings about its authority to apply a framework other than *Arlington Heights*, the majority proceeds with the *Arlington Heights* analysis.[6]

b. The Trial Court's Findings of Fact are Binding

Before the majority analyzes N.C.G.S. § 13-1 under the *Arlington Heights* framework, it first criticizes the trial court's final judgment and order for omitting a direct reference to "the presumption of legislative good faith." The majority therefore concludes that "[i]nasmuch as the trial court did not presume legislative good faith, its findings of fact concerning the discriminatory intent allegedly infecting section 13-1 are

6. This Court has, in fact, applied *Arlington Heights* to a facially neutral law before. *See Holmes v. Moore*, 383 N.C. 171 (2022), *rev'd*, No. 342PA19-3 (N.C. Apr. 28, 2023). Today, the majority overturns this decision in a separate opinion, expressing the same inexplicable resistance to applying the *Arlington Heights* framework. *See Holmes*, slip op. at 22. In repeatedly challenging the applicability of *Arlington Heights* but applying its framework anyway, as here, or adopting an inadequate framework as in the newly issued *Holmes* opinion, it appears that the Court's current majority is merely reluctant to accept that facially neutral laws can be found to be discriminatory. The Court seems poised to make this endeavor more challenging. Unfortunately for the majority, the federal Constitution will constrain these efforts.

not binding on appeal." For one thing, the presumption of legislative good faith is built into the *Arlington Heights* framework when properly applied in that plaintiffs must first present evidence of the discriminatory intent behind a legislative act. But "[w]hen there is . . . proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified." *Arlington Heights*, 429 U.S. at 265–66.

In holding that the trial court did not clearly apply the presumption of good faith, the majority perhaps attempts to follow the reasoning of federal circuit court cases that have concluded that the trial court failed to apply the presumption. *See*, *e.g.*, *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020); *League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363 (11th Cir. 2022). But cases in the federal circuit courts of appeals that have held that the trial court rulings at issue failed to apply the presumption of good faith examine the content of the trial courts' *Arlington Heights* analyses themselves, rather than admonish the trial courts for failing to declare that the presumption of good faith has been applied. *See*, *e.g.*, *League of Women Voters of Fla.*, 32 F.4th at 1373 ("[W]hile we do not require courts to incant magic words, it does not appear to us that the district court here meaningfully accounted for the presumption at all.").

The trial court need not explicitly state that it has applied the presumption, as the majority suggests. The presumption is better assessed by reference to the trial court's actual analysis of racial discrimination than by simplistically noting whether it used certain magic words, and the majority need not agree with this analysis to understand that the presumption has been applied. Here, and analyzed in depth below, the trial court considered in exhaustive detail Plaintiffs' evidence of racial discrimination under N.C.G.S. § 13-1. After concluding that Plaintiffs introduced ample evidence of discriminatory intent, the trial court properly shifted the burden to Defendants to prove race-neutral justifications. Ignoring the trial court's painstaking analysis, the majority forsakes a thoughtful review of the trial court's decision for expediency—in the majority's view, the trial court did not directly mention the presumption of good faith, so it must not have been applied.

Moreover, though a trial court's failure to apply the presumption of good faith may impact its conclusions of law, a trial court's findings of fact are based on concrete facts contained in the record. Put another way, a failure to apply the presumption of good faith does not change the veracity of the facts themselves—only the conclusions drawn from them. As much as the majority may like to resist the trial court's findings,

as they reveal the malicious and racist intent of N.C.G.S. § 13-1, a fact is a fact. And in this case, Defendants contested almost none of the trial court's factual findings. The presumption of good faith is not a magic wand that transforms such uncontested facts into mere ruminations that this Court, as an appellate court, can accept or reject at will without a specific legal basis for doing so. But that is how the majority treats the presumption—without mentioning a *single* finding of fact that demonstrates that the trial court failed to apply the presumption of good faith, the majority inexplicably declares *all* of them nonbinding. This it cannot do.

c. Discriminatory Impact

As to N.C.G.S. § 13-1's discriminatory impact, the majority holds that "[t]he trial court's findings of fact do not support its ultimate finding that section 13-1 has a disproportionate impact on African Americans." This conclusion is plainly incorrect.

The trial court made extensive findings based on evidence introduced by Plaintiffs that N.C.G.S. § 13-1 has a discriminatory impact. Its findings include:

- That African Americans represent 21% of the voting-age population in North Carolina, but 42% of the people who are denied the franchise under N.C.G.S. § 13-1 from a North Carolina state court conviction alone. African American men make up 9.2% of the total voting-age population but constitute 36.6% of the people who are disenfranchised by N.C.G.S. § 13-1. By contrast, White people make up a much larger share of North Carolina's voting-age population—72%, to be precise—but only constitute 52% of those denied the franchise under N.C.G.S. § 13-1.

- That 1.24% of the total African American voting-age population in North Carolina is on community supervision compared to 0.45% of the total White voting-age population. African Americans are therefore disenfranchised at a rate that is 2.76 times as high as White people.

- That the number of African Americans on community supervision that are denied the franchise under N.C.G.S. § 13-1 relative to the overall number of African American registered voters is almost three times as high as the number of White people on community supervision that are denied the franchise under N.C.G.S. § 13-1.

- That African Americans are disenfranchised under N.C.G.S. § 13-1 at higher rates than White people in the eighty-four counties that have sufficient data to perform comparative analyses. There is not a single county where the White disenfranchisement rate is greater than the African American disenfranchisement rate.
- That in seventy-seven of those counties, the rate of African American disenfranchisement is high (over 0.83% of the African American voting-age population), whereas the rate of White disenfranchisement is high in only ten counties.
- That in forty-four counties, the percentage of the African American voting-age population that is denied the franchise under N.C.G.S. § 13-1 is at least three times greater than the comparable percentage of the White population. In twenty-four counties, the African American disenfranchisement rate is at least four times greater than the White disenfranchisement rate. In eight counties, the African American disenfranchisement rate is at least five times greater than the White disenfranchisement rate.

This non-exhaustive list covers only a few of the trial court's findings regarding N.C.G.S. § 13-1's discriminatory impact. Based on this extensive statewide and county-level data, the trial court found that "North Carolina's denial of the franchise [to individuals] on felony probation, parole, or post-release supervision disproportionately affects African Americans by wide margins." Importantly, the trial court found that "[a]lthough more White people are denied the franchise due to felony post-release supervision than African American people in [the] aggregate, this does not affect the finding that African American people are disproportionately affected by section 13-1." In North Carolina, there are nearly 6 million White voting-age individuals compared to fewer than 1.8 million African American voting-age individuals. Thus, the trial court found that "to determine whether racial disparities exist, it is necessary to compare African American and White rates of disenfranchisement, rather than aggregate numbers of disenfranchised African American and White people."

Notably, the majority does not hold that these findings are erroneous. Instead, it reasons only that the fact that "African Americans make up about forty-two percent of the felon population seems to account for the disproportionate share . . . of African Americans on felony supervision." But this reasoning ignores a core reality of this case—N.C.G.S.

§ 13-1 was designed to prohibit as many African Americans from voting as possible by preying on the disproportionate makeup of the felon population. The issue the majority raises simply demonstrates that N.C.G.S. § 13-1 is working precisely as it was intended.

Take a moment to consider the import of the majority's logic. If this argument were correct, then any disparate impact analysis would be meaningless—it would be impossible to prove that *any* facially-neutral, discriminatory law designed to exploit a societal inequality causes a disparate impact. Using the majority's logic, poll taxes would not have a discriminatory impact because at the time the poll tax was held to be unconstitutional, African Americans were disproportionately poor, meaning wealth inequality, rather than laws implementing poll taxes, was to blame for the disproportionate number of African Americans barred from voting. Likewise, literacy tests would not have a discriminatory impact because, applying the majority's rationale, "the fact that African Americans [made up a disproportionate share of those who were illiterate would] seem[ ] to account for the disproportionate share . . . of African Americans" who were barred from voting because they could not pass literacy tests.[7] It is no wonder Defendants themselves did not even raise this point as a basis for concluding that there is no evidence that N.C.G.S. § 13-1 has a disparate impact. The majority's fundamentally flawed logic is no basis for concluding that, in spite of the overwhelming evidence, "[t]he trial court's findings of fact do not support its ultimate finding that section 13-1 has a disproportionate impact on African Americans."[8]

d. Historical Background

The historical background of N.C.G.S. § 13-1 also supports that the law was motivated by discriminatory intent. Importantly, as noted by

---

7. It is well understood that literacy tests were "particularly effective" at suppressing African American voters. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 219–20 (2009). "These laws were based on the fact that as of 1890," in many southern states, including North Carolina, "more than two-thirds of the adult Negroes were illiterate while less than one-quarter of the adult whites were unable to read or write." *South Carolina v. Katzenbach*, 383 U.S. 301, 311 (1966).

8. The majority attempts to salvage its conclusion and asserts that the dissent misunderstands its position. The majority explains "the trial court should have compared the percentages of African American felons and white felons ineligible for re-enfranchisment under section 13-1 with the racial makeup of the total felon population because, unlike the poll tax that all would-be voters had to pay, section 13-1's scope is limited to individuals with felon convictions." This explanation is nonsensical, but it appears to merely rephrase the reasoning already described. It fails for the same reasons.

the trial court, "[i]t was well understood and plainly known in the 1970s that the historical and original motivation for denial of the franchise to persons on community supervision in the post-reconstruction era had been to attack and curb the political rights of African Americans." At no time during this litigation have Legislative Defendants disputed that the General Assembly was aware of this fact at the time that N.C.G.S. § 13-1 was amended both in 1971 and 1973. Despite its knowledge of the racist history and lasting discriminatory impact of N.C.G.S. § 13-1's denial of the franchise to individuals on community supervision, the General Assembly maintained this provision when amending N.C.G.S. § 13-1 in 1971 and 1973. During trial, Legislative Defendants did not offer *any* race-neutral explanation for this decision. Meanwhile, Defendants "presented no evidence at any time during trial advancing any race-neutral explanation for the legislature's decision in 1971 and 1973 to preserve, rather than eliminate, the 1877 bill's denial of the franchise to persons on community supervision."

Further, at the time that N.C.G.S. § 13-1 was amended in the 1970s, the General Assembly was plagued by racism among its members. In 1973, there were only three African American members of the General Assembly compared to 167 White representatives.[9] Many of these White representatives held openly racist views about African Americans and used racial slurs to refer to the General Assembly's three African American members. This evidence demonstrates the tenor of the General Assembly at the time that it chose to retain N.C.G.S. § 13-1's community supervision disenfranchisement provision despite being aware of the law's intended and continued impact on African American voters.

At this point in the analysis, it is important to remember that *Arlington Heights* "does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." 429 U.S. at 265. This means that we do not have to decide how important the racist motivations were behind the General Assembly's decision to continue disenfranchising individuals on community supervision because "racial discrimination is not just another competing consideration." *Id.* Any degree of a racially-fueled motivation is too much. Based on the evidence before it, the trial court correctly concluded that race was at

9. In 1971, there were only two African American legislators in the General Assembly.

least one of the motivating factors in the General Assembly's decision to retain N.C.G.S. § 13-1's disenfranchisement provision for individuals on community supervision and shifted the burden to the Defendants to offer a race-neutral explanation for the decision to retain the provision. As noted, Defendants did not provide any such evidence.[10]

Though it is true that the intentions of the General Assembly in the 1970s ultimately determine whether N.C.G.S. § 13-1 was motivated by discriminatory intent, as the majority recognizes, the law's pre-1971 history is not irrelevant to this analysis. Indeed, this history provides important context for understanding the changes that came about in the 1970s. The United States Supreme Court has similarly held that even when a law undergoes changes over time, its history remains relevant.

In *Hunter v. Underwood*, 471 U.S. 222 (1985), the United States Supreme Court held that a felon disenfranchisement provision in the Alabama constitution constituted an equal protection violation under the Fourteenth Amendment. There, despite acknowledging the racist history of the constitutional provision, the defendants argued that this history was inapposite because subsequent changes to the law's enforcement, including court decisions striking down various portions of the provision, rendered what remained constitutional. *Id.* at 232–33.

The United States Supreme Court rejected this argument, explaining that regardless of whether the provision would be constitutional had it been passed with race-neutral motivations and in its current form today, "its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect." *Id.* at 233. The same is true here: Section 13-1 was passed with racist motivations, it was amended with full knowledge of both those motivations and its discriminatory impact, members of the General Assembly themselves engaged in racist behavior at the time N.C.G.S. § 13-1 was amended, and no alternative reason for retaining the discriminatory provision of N.C.G.S. § 13-1 that Plaintiffs challenge has been provided. Though there may be instances "where a legislature actually confronts a law's tawdry past in reenacting it [and] the new law may well be free of discriminatory taint[, t]hat cannot be said

10. In applying the *Arlington Heights* framework in this manner, the trial court gave Defendants all of the legislative good faith they were due: It placed the burden on Plaintiffs to present convincing evidence of racial discrimination and gave Defendants an opportunity to provide race-neutral explanations for the General Assembly's decisions. When Defendants failed to provide such explanations, there was simply no more deference that could be afforded.

of" N.C.G.S. § 13-1. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1410 (2020) (Sotomayor, J., concurring).[11]

The majority disagrees that N.C.G.S. § 13-1's historical background demonstrates its discriminatory intent. The majority explains that "[w]hile it would be an overstatement to say that the trial court should have ignored [N.C.G.S. § 13-1's] pre-1971 history recounted in its order, plaintiffs' claims must finally rise or fall on whether their evidence overcomes the presumption of legislative good faith and proves that discriminatory intent" motivated N.C.G.S. § 13-1 as amended in the 1970s. The majority notes that the trial court should have considered "the legislature's approval in 1969 of what became our current state constitution" because "that document incorporated equal protection and nondiscrimination guarantees that had not appeared in our previous state constitutions." Confusingly, however, the majority's analysis ends there. It does not actually analyze the evidence presented surrounding N.C.G.S. § 13-1's post-1971 history.

e. Legislative Process and History

Section 13-1's relevant legislative process and history is somewhat limited because the General Assembly did not explicitly declare its reasons for retaining the disenfranchisement provision at issue. Though N.C.G.S. § 13-1's legislative history is not enough on its own to prove racially discriminatory intent, it adds further support to the trial court's conclusion that the decision was motivated by such intent.

The trial court made several important findings with respect to N.C.G.S. § 13-1's amendments in the 1970s. Specifically, in 1971, the only two African American members of the General Assembly proposed a bill that would, among other changes, " 'automatically' restore citizenship rights to anyone convicted of a felony 'upon the full completion of his sentence.' " The proposal was rejected and the bill was "amended to retain N.C.G.S. § 13-1's denial of the franchise to people living in North Carolina's communities." The bill was further amended to both add an oath requirement and mandate that a felon wait two years after completion of all terms of a sentence before rights could be restored. The 1971 version of N.C.G.S. § 13-1 passed as amended. At the time, one of the

11. The majority rejects *Hunter* as inapplicable here because the General Assembly "repealed allegedly discriminatory laws and replaced them with a substantially different statutory scheme." But this argument ignores that the specific provision in N.C.G.S. § 13-1 that is challenged here originates in the version of the law that was passed in 1877. Any amendments in the 1970s that altered the statutory scheme or made it easier for felons to have their rights restored do not bear on the unchanged challenged provision.

African American legislators who introduced the original version of the bill—Representative Henry Frye—explained on the floor of the North Carolina House of Representatives that "he preferred the bill's original provisions which called for automatic restoration of citizenship when a felon had finished his prison sentence, but he would go along with the amendment if necessary to get the bill passed."

In 1973, the General Assembly's three African American members again attempted to reform N.C.G.S. § 13-1. Though they were successful in convincing their fellow members to eliminate the oath requirement and the two-year waiting period from the 1971 amendments, "they were not able to reinstate voting rights upon release from incarceration." Senator Henry Michaux Jr., who was previously a member of the North Carolina House of Representatives and was one of the members who introduced the 1973 proposal, explained that the intention behind the 1973 proposal to amend N.C.G.S. § 13-1 "was a total reinstatement of rights, but [they] had to compromise to reinstate citizenship voting rights only after completion of a sentence of parole or probation."

Based on these facts, the trial court found that it "is clear and irrefutable that the goal of these African American legislators . . . was to eliminate section 13-1's denial of the franchise to persons released from incarceration and living in the community, but that they were forced to compromise in light of opposition by their 167 White colleagues to achieve other goals." As before, this legislative history is useful in contextualizing N.C.G.S. § 13-1's continued disenfranchisement of individuals on community supervision. To repeat, "[i]t was well understood and plainly known in the 1970s that the historical and original motivation for denial of the franchise to persons on community supervision in the post-reconstruction era had been to attack and curb the political rights of African Americans." Aware of N.C.G.S. § 13-1's history and its lasting effects, the predominantly White General Assembly chose to retain the challenged provision and in the process, rejected multiple attempts to eliminate it without having ever provided justifications for doing so.

f. Race-Neutral Motivations

In light of the extensive evidence supporting that discriminatory intent was a motivating factor in passing N.C.G.S. § 13-1, the trial court correctly "shifted to [Legislative Defendants] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." *Arlington Heights*, 429 U.S. at 270 n.21. Defendants utterly failed this task.

As the trial court found, "Defendants failed to introduce any evidence supporting a view that section 13-1's denial of the franchise to people on felony supervision serves any valid state interest today." For example, the interrogatory responses for the State Board Defendants identified interests behind N.C.G.S. § 13-1, including "regulating, streamlining, and promoting voter registration and electoral participation among North Carolinians convicted of felonies who have been reformed"; "simplifying the administration of the process to restore the rights of citizenship to North Carolinians convicted of felonies who have served their sentences"; and "avoiding confusion among North Carolinians convicted of felonies as to when their rights are restored." However, "[t]he Executive Director testified that the State Board is not asserting that the denial of the franchise to people on felony supervision serves any of these interests as a factual matter in the present day, and she admitted that the State Board is unaware of any evidence that denying the franchise to such people advances any of these interests." Moreover, "the State Board's Executive Director conceded that *striking down* section 13-1's denial of the franchise to people on felony supervision would 'promote their voter registration and electoral participation.' "[12]

In this Court, Defendants argued that N.C.G.S. § 13-1's denial of the franchise to individuals on felony supervision is "easily administrable by the State and easily understood by the felons it impacts." They also argued that it advances the State's "interest in *restoring* felons to the electorate after justice has been done and they have been fully rehabilitated by the criminal justice system," quoting *Jones v. Governor of Florida*, 975 F.3d 1016, 1034 (2020).

But Defendants provide no citation or explanation for why the current requirements of N.C.G.S. § 13-1 are "easily administrable." Presumably, amending N.C.G.S. § 13-1 to restore rights once an individual is released from jail or prison would be just as easy to administrate, if not more so. Similarly, such language would be easily understood by individuals who have been convicted of a felony. In the face of extensive evidence of N.C.G.S. § 13-1's discriminatory intent and effect, these proffered race-neutral justifications are little more than a weak attempt to mask N.C.G.S. § 13-1's nefarious purpose.

In sum, N.C.G.S. § 13-1's discriminatory impact is both statistically and practically significant, and its racist motivations are clear. Because

---

12. Though the State Board Defendants are not a party to this appeal, these responses demonstrate the lack of a plausible explanation for N.C.G.S. § 13-1's retention of the community supervision disenfranchisement provision.

"there is proof that a discriminatory purpose has been a motivating factor [behind § 13-1] . . . judicial deference [to the legislature] is no longer justified," *see Arlington Heights*, 429 U.S. at 265–66, and it became Defendants burden to provide race-neutral justifications for the law under *Arlington Heights*. Defendants failed at this task, and N.C.G.S. § 13-1 therefore discriminates based on race in violation of North Carolina's equal protection clause.

2. The Fundamental Right to Vote on Equal Terms

The right to vote on equal terms is a fundamental right. *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 747 (1990). The right not only protects an individual's ability to participate in the electoral process but also "the principles of substantially equal voting power and substantially equal legislative representation." *Stephenson v. Bartlett*, 355 N.C. 354, 382 (2002). When a law "impermissibly interferes with the exercise of a fundamental right," strict scrutiny applies. *Id.* at 377 (quoting *White v. Pate*, 308 N.C. 759, 766 (1983)).

The trial court correctly concluded that N.C.G.S. § 13-1's denial of the franchise to people on felony supervision violates their fundamental right to vote, as well as the right of all African Americans to vote with substantially equal voting power. "The right to vote is the right to participate in the decision[ ]making process of government" among all persons "sharing an identity with the broader humane, economic, ideological, and political concerns of the human body politic." *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 13 (1980). By denying individuals the right to vote until they have completed any period of felony supervision, N.C.G.S. § 13-1 denies individuals who have been released from prison the opportunity to engage in this civic process.

Yet again, with tautological insistence, the majority holds that N.C.G.S. § 13-1 violates neither the fundamental right to vote nor its inextricable promise of the right to vote on equal terms, reasoning that N.C.G.S. § 13-1 does not deprive individuals on felony supervision of the fundamental right to vote because "felons have no fundamental right to vote, as Article VI, Section 2(3) expressly divests them of this right upon conviction." Repeating this argument to the point of absurdity does not make it stronger. Again, article VI, section 2(3)'s felon disenfranchisement provision does not enable N.C.G.S. § 13-1 to function as a blank check to the legislature to impose any "re-enfranchisement" requirements it desires.

An example demonstrates this point. No one would contend that, as a result of article VI, section 2(3)'s expansive language, N.C.G.S. § 13-1

could contain a provision that expressly prohibits only African American felons from voting until they have completed felony supervision, while individuals of any other race have their rights restored upon completion of their prison sentences. Such a provision, which is an example of an express, race-based classification, would violate other sections of the North Carolina constitution, namely the equal protection clause. In the same vein, article VI, section 2(3) is not a blanket permission to the General Assembly to use N.C.G.S. § 13-1 as a means of passing racially discriminatory restrictions that are race-neutral on their face.

N.C.G.S. § 13-1 denies individuals on community supervision of the right to vote in the most literal way possible: It forbids this class of people from voting. As previously explained, N.C.G.S. § 13-1 is unconstitutional on other grounds because, in singling out individuals on felony supervision, it discriminates against African Americans in violation of the equal protection clause's guarantee that no "person [shall] be subjected to discrimination by the State because of race," N.C. Const. art. I, § 19, and it is not justified by any compelling state interest. Because N.C.G.S. § 13-1's denial of the franchise to individuals on felony supervision unconstitutionally discriminates on the basis of race, it follows that this provision illegitimately deprives this class of people of their fundamental right to vote.

The trial court also concluded that N.C.G.S. § 13-1 violates the equal protection clause because it "unconstitutionally denies [African Americans] substantially equal voting power on the basis of race." As explained above, the right to substantially equal voting power derives from the fundamental right to vote itself and was recognized by this Court in *Stephenson*, 355 N.C. at 379. There, the Court, applying strict scrutiny, held that "use of *both* single-member and multi-member districts within the same redistricting plan violates the Equal Protection Clause of the State Constitution unless it is established that inclusion of multi-member districts advances a compelling state interest." *Id.* at 380–81 (footnote omitted). The Court held that certain uses of multi-member districts could violate the state constitution's equal protection clause by depriving North Carolina voters of "the fundamental right . . . to substantially equal voting power." *Id.* at 379.

The majority does not address this issue, but Defendants contend that N.C.G.S. § 13-1 does not deprive African Americans of equal voting power because "convicted felons are not constitutionally entitled to vote *at all* until their voting rights are restored in a manner that the General Assembly provides." Aside from repeating the same point that this dissent has repeatedly rejected, this argument fails to recognize the

full class of people who are denied the right to substantially equal voting power. This class is not limited to African Americans on felony supervision as Defendants imply. Rather, N.C.G.S. § 13-1 denies substantially equal voting power to the entire African American electorate by disproportionately disenfranchising African American potential voters.

To repeat, at the statewide level, the rate of African American disenfranchisement under N.C.G.S. § 13-1 is 2.76 times as high as the comparable percentage of the White population that is disenfranchised. At the county level, the percentage of voting-age African Americans who are disenfranchised is at least three times as high as the disenfranchised White population in forty-four counties, four times as high in twenty-four counties, and five times as high in eight counties. In every single county where there is sufficient data to perform a comparison, voting-age African Americans are disenfranchised under N.C.G.S. § 13-1 at higher rates than White people. These numbers are glaring, and it stands to reason that a law that was motivated by the overtly discriminatory purpose of repressing the African American vote in an effort to stifle African American political power and that successfully achieves that intended effect denies the African American population of "substantially equal voting power by diminishing or diluting their votes on the basis of [race]." *Harper v. Hall*, 380 N.C. 317, 378–79 (2022), *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022), *vacated*, *Harper v. Hall*, No. 413PA21-2 (N.C. Apr. 28, 2023).

Under article I, section 19, strict scrutiny applies when: (1) a "classification impermissibly interferes with the exercise of a fundamental right"; or (2) a statute "operates to the peculiar disadvantage of a suspect class." *Stephenson*, 355 N.C. at 377 (quoting *White v. Pate*, 308 N.C. 759, 766 (1983)). Thus, when the "fundamental right to vote on equal terms" is implicated, "strict scrutiny is the applicable standard." *Id.* at 378.

Section 13-1 cannot withstand this exacting review. "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.* at 377. To repeat the trial court's finding, "Defendants failed to introduce any evidence supporting a view that section 13-1's denial of the franchise to people on felony supervision serves any valid state interest today," let alone a compelling one. The interests that the state did attempt to assert were mere pretexts given their lack of logic and were certainly not narrowly tailored. In any case, there is very little in the way of a compelling government interest that could permit the legislature to deny an entire class of people the fundamental right to vote on otherwise unconstitutional grounds.

3. Wealth-based Classification

In concluding that N.C.G.S. § 13-1 imposes a wealth-based classification under the North Carolina constitution, the trial court explained that "by requiring an unconditional discharge that includes payments of all monetary obligations imposed by the court, N.C.G.S. § 13-1 creates a wealth classification that punishes felons who are genuinely unable to comply with the financial terms of their judgment more harshly than those who are able to comply." Put simply, N.C.G.S. § 13-1 "provides that individuals, otherwise similarly situated, may have their punishment alleviated or extended solely based on wealth." The trial court applied strict scrutiny because "when a wealth classification is used to restrict the right to vote or in the administration of justice, it is subject to heightened scrutiny," rather than rational basis review. It further concluded that N.C.G.S. § 13-1 cannot survive this exacting review.

In applying strict scrutiny, the trial court relied on the Supreme Court's decision in *M.L.B v. S.L.J.*, 519 U.S. 102 (1996), which applied heightened scrutiny to a termination of parental rights case. There, the Court "d[id] not question the general rule . . . that fee requirements ordinarily are examined only for rationality." *Id.* at 123. But it held that precedent "solidly establish[ed] two exceptions to that general rule." *Id.* at 124. "The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license. Nor may access to judicial processes in cases criminal or 'quasi criminal in nature' turn on ability to pay."[13] *Id.* (cleaned up). The *M.L.B.* Court explained that these types of sanctions "are wholly contingent on one's ability to pay, and thus 'visi[t] different consequences on two categories of persons,' they apply to all indigents and do not reach anyone outside that class." *Id.* at 127 (alteration in original) (citation omitted) (quoting *Williams v. Illinois*, 399 U.S. 235, 242 (1970)). *M.L.B.* extended certain prohibitions on fee requirements from the criminal context to cases involving termination of parental rights because "[f]ew consequences of judicial action are so grave as the severance of natural family ties." *Id.* at 119 (alteration in original) (quoting *Santosky v. Kramer*, 455 U.S. 745, 787 (1982)).

M.L.B. in turn relied on *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), the landmark United States Supreme Court case

13. The Court cited *Williams v. Illinois*, 399 U.S. 235 (1970), which struck down an Illinois law providing for the extended incarceration of an indigent offender who was unable to pay costs associated with his conviction. The Court explained that "the Illinois statute in operative effect exposes *only indigents* to the risk of imprisonment beyond the statutory maximum." *Id.* at 242.

that struck down as unconstitutional any law making "the affluence of the voter or payment of any fee an electoral standard." *Id.* at 666. The United States Supreme Court reasoned that, while the States are free to regulate certain voter qualifications, these valid qualifications "have no relation to wealth nor to paying or not paying this or any other tax." *Id.*

The principles of *M.L.B.* and *Harper* apply here. By conditioning restoration of the right to vote on the payment of fees that are prohibitive to many, N.C.G.S. § 13-1 "exposes only indigents to the risk of" being unable to reclaim their fundamental right to vote. *Williams*, 399 U.S. at 242. As in *M.L.B.*, N.C.G.S. § 13-1 " 'visi[ts] different consequences on two categories of persons,' [it] appl[ies] to all indigents and do[es] not reach anyone outside that class." *M.L.B.*, 519 U.S. at 127. But it should not matter "whether the citizen, otherwise qualified to vote, has $1.50 in his pocket or nothing at all, pays the fee or fails to pay it." *Harper*, 383 U.S. at 668. And in the same way that one's ability to pay a poll tax in order to vote is not a valid voter qualification, the ability to pay legal fees when all other aspects of a sentence have been completed is "not germane to one's ability to participate intelligently in the electoral process" and is therefore not an appropriate consideration in determining whether an individual is legally qualified to vote. *Id.* Section 13-1 is therefore not a permissible voter qualification but instead is an unconstitutional wealth-based classification.

The majority, however, applies rational basis review and holds that N.C.G.S. § 13-1 does not, in fact, impose an unconstitutional wealth classification because the law bears a reasonable connection to a legitimate government interest. Further, the majority quotes the Eleventh Circuit's decision in *Jones v. Governor of Florida*, 975 F.3d 1016, 1030 (2020), which rejected the idea that a similar disenfranchisement law created a wealth-based classification, reasoning that "[t]he only classification at issue is between felons who have completed all terms of their sentences, including financial terms, and those who have not."

The majority describes *Jones*'s reasoning as "persuasive." But as Plaintiffs point out, the framing of N.C.G.S. § 13-1's only distinction as "between felons who have completed the terms of their sentence, including financial terms, and those who have not," "is exactly the constitutional problem" because the law treats otherwise identically situated individuals differently based on their ability to pay. Further,

> [f]or people on felony probation in North Carolina, the median amounts owed are $573 in court costs, $340 in fees, and $1,400 in restitution. For people on parole or post-release supervision, the median

> amounts owed are $839 in court costs, $40 in fees, and $1,500 in restitution.

As Plaintiffs explain, these fees are "prohibitive" for many individuals, and therefore conditioning a felon's ability to regain the right to vote on payment "imposes a wealth-based classification that triggers strict scrutiny." For the reasons already explained, N.C.G.S. § 13-1 cannot withstand this exacting review.

It is also necessary to bring attention to the majority's conclusion that it is a legitimate government interest to prohibit felons who have not paid court costs and fines from voting because "the General Assembly could reasonably have believed . . . that felons who pay [such costs] are more likely than other felons to vote responsibly." This recognition is shocking in multiple respects. For one thing, it unintentionally admits what the Plaintiffs have argued all along: that N.C.G.S. § 13-1 is intended to inhibit certain individuals whom the General Assembly perceived as undesirable from voting. This is not a legitimate government interest, even for purposes of rational basis review. While the General Assembly can prescribe a variety of relevant voter qualifications, value judgments about whether certain categories of individuals vote in a way that the General Assembly perceives as morally correct is not one of them. It also recognizes that N.C.G.S. § 13-1 indeed imposes a wealth-based classification by determining that felons who are able to afford their fees "are more likely . . . to vote responsibly." Finally, it makes little sense. As already explained, the ability to pay these expenses "is not germane to one's ability to participate intelligently in the electoral process." *Harper*, 383 U.S. at 668. To be clear, "wealth or fee paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Id.* at 670.

B. The Free Elections Clause

The majority also reverses the trial court's final judgment and order based on the trial court's conclusion that N.C.G.S. § 13-1 violates the North Carolina constitution's free elections clause.[14] The trial court explained that "North Carolina's elections do not faithfully ascertain the will of the people when such an enormous number of people living in communities across the State—over 56,000 individuals—are prohibited from voting."

---

14. Article I, section 10 of the constitution states that "[a]ll elections shall be free." N.C. Const. art. I, § 10. This Court has held that a law violates this provision if it "prevents election outcomes from reflecting the will of the people." *Harper*, 380 N.C. at 376. Today, the majority abandons this established interpretation.

The free elections clause dates back to the 1776 Declaration of Rights, but its roots can be traced back even further to the 1689 English Bill of Rights. *Harper*, 380 N.C. at 373 (citing Bill of Rights 1689, 1 W. & M. Sess. 2, ch. 2 (Eng.)). "The English Bill of Rights arose in the aftermath of King James II's tyrannical abuse of authority to force the mostly Protestant nation to tolerate and recognize the Catholic religion." Bertrall L. Ross II, *Inequality, Anti-Republicanism, and Our Unique Second Amendment*, 135 Harv. L. Rev. F. 491, 496 (2022). The English Bill of Rights, which is the codification of the English Declaration of Rights, " 'was the statutory institution of conditional kingship[s] for the future' through its mandate for an independent Parliament through free elections." Bertrall L. Ross II, *Challenging the Crown: Legislative Independence and the Origins of the Free Elections Clause*, 73 Ala. L. Rev. 221, 289 (2021) (alteration in original) (quoting Betty Kemp, *King and Commons: 1660–1832*, at 30 (1st ed. 1957)). Among the civil and political right for which it provided, the English Bill of Right declared, "election of members of parliament ought to be free." Bill of Rights 1689, 1 W. & M. Sess. 2, ch. 2.

"North Carolina's free elections clause was enacted following the passage of similar clauses in other states, including Pennsylvania and Virginia." *Harper*, 380 N.C. at 373. As with the states that adopted similar provisions, the purpose of North Carolina's free elections clause was to prevent "the dilution of the right of the people of [the State] to select representatives to govern their affairs, and to codify an explicit provision to establish the protections of the right of the people to fair and equal representation in the governance of their affairs." *Id.* at 373–74 (cleaned up).

The clause's wording has undergone minor changes over time.[15] "[T]hough those in power during the early history of our state may have

15. As *Harper* explained, the free elections clause originally stated:

> '[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.'

380 N.C. at 375–76 (alterations in original) (quoting *N.C. State Bar v. DuMont*, 304 N.C. 627, 639 (1982)).

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." *Harper*, 380 N.C. at 376. Today, the directive of the free elections clause is simple: "[a]ll elections shall be free." N.C. Const. art. I, § 10. Interpreting both the text and history of the clause, this Court has explained that "elections are not free" if they "do not serve to effectively ascertain the will of the people." *Harper*, 380 N.C. at 376.

At least 56,516 individuals in North Carolina are denied the franchise under N.C.G.S. § 13-1 because they are on probation, parole, or post-release supervision from a felony conviction in state or federal court. According to the trial court's order, "[i]n 2018 alone, there were 16 different county elections where the margin of victory in the election was less than the number of people denied the franchise due to felony supervision in that county." In fact, the number of people disenfranchised in various counties is up to seven or eight times the vote margin in those counties. "The number of African Americans denied the franchise due to being on felony supervision [also] exceeds the vote margin in some elections," including races for one county's board of commissioners, a sheriff's race, and a board of education race. "In addition to county-level elections, there are statewide races where the vote margin in the election was less than the number of people denied the franchise due to being on community supervision statewide." The 2016 Governor's race, for instance, was decided by far fewer votes than the over 56,000 people who are denied the franchise because of felony supervision.

It is challenging to see how North Carolina elections can reflect "the will of the people" when, as the trial court found, "the vote margin in both statewide and local elections is regularly less than the number of people disenfranchised in the relevant geographic area." Moreover, N.C.G.S. § 13-1 places a disproportionately heavy burden on African Americans, thereby suppressing the will of an entire voting demographic. There is little meaning to the words "[a]ll elections shall be free" when election outcomes can be manipulated by barring individuals on felony supervision from voting—individuals who live in our communities, share our concerns about the rules and regulations that govern us, and have the same stake in electing representatives who will represent their interests. These words mean even less when interpreted to permit the continued enforcement of a law that dilutes the efficacy of African Americans' political power. It is inherently inconsistent with the state constitution's command that "[a]ll elections shall be free."

The provision of N.C.G.S. § 13-1 that Plaintiffs challenge is nothing more than an electoral muzzle designed to silence a class of people

the legislature deemed unworthy of exercising the fundamental right to vote. But, as has been explained, N.C.G.S. § 13-1 is not defined solely by its sinister intent; in disproportionately disenfranchising African Americans, it has achieved its intended effect. When a statute burdens the fundamental right to vote, "it is the *effect* of the act, and not the *intention of the Legislature*, which renders it void." *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 226 (1875). Thus, because N.C.G.S. § 13-1 violates the constitutional mandate of free elections, a requirement that is fundamental to the democratic governance of this state, strict scrutiny is the appropriate level of review. As explained, the law fails under such scrutiny.

In reversing the trial court's final judgment and order, the majority reasons that this reading of the free elections clause is too broad. In so holding, the majority relies on the illegitimate and erroneous interpretation of the free elections clause that it adopts today in a separate case, *Harper v. Hall*, No. 342PA19-3 (N.C. Apr. 28, 2023). This Court's stymied interpretation of the free elections clause as rewritten here fails for the same reasons it does in that case. *See Harper v. Hall*, No. 342PA19-3 (N.C. Apr. 28, 2023) (Earls, J., dissenting). Most importantly, this baselessly narrow interpretation fails to recognize that elections can be manipulated in a number of ways. It is not the manner of manipulation but the result that matters. As the majority recognizes, one way that the free elections clause is violated is if "a law prevents a voter from voting according to one's judgment." Another similarly obvious way to tamper with election outcomes is to bar a particular class of voters from exercising their right to vote because they are deemed less desirable than other members of society. As described throughout this dissent, this is precisely what N.C.G.S. § 13-1 was designed to do. An election conducted under such circumstances is no freer than an election in which voters are prevented "from voting according to [their] judgment."

C. The Ban on Property Qualifications

Finally, the majority reverses the trial court's determination that N.C.G.S. § 13-1 violates article I, section 11 of the North Carolina constitution, which provides that "[a]s political rights and privileges are not dependent upon or modified by property, no property qualification shall affect the right to vote or hold office." N.C. Const. art. I, § 11. The trial court concluded that N.C.G.S. § 13-1 violates this ban on property qualifications because "the ability for a person convicted of a felony to vote is conditioned on whether that person possesses, at minimum, a monetary amount equal to any fees, fines, and debts assessed as a result of that person's felony conviction."

The majority concludes that "[b]ecause felons whose citizenship rights have not been restored have no state constitutional right to vote, requiring them to fulfill the financial terms of their sentences as a condition of re-enfranchisement cannot be said to violate the Property Qualifications Clause." In the majority's view, the property qualifications clause refers only to real property, and "[i]nsisting that felons *pay* their court costs, fines, and restitution is not the same thing as mandating that they *own* real or personal property in particular amounts."

"Money, of course, is a form of property." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979). In fact, it is the specific form of property by which almost all other possessions, including real property, are acquired. By conditioning rights restoration upon the ability to pay a financial penalty, N.C.G.S. § 13-1 hinges the individual's ability to vote on his or her wealth. This result violates the plain text of the property qualifications clause, which directs that "political rights and privileges are not dependent upon or modified by property[,]"and "no property qualification shall affect the right to vote." N.C. Const. art. I, § 11.

The terms of this clause are expansive. It speaks simply in terms of property qualifications that *affect* the right to vote, regardless of whether that is through a direct property qualification on someone who already possesses the right or an indirect qualification on someone who must be restored of the right. Under these broad terms, when the only barrier to exercising the political right to vote is an individual's lack of wealth, the right to vote has been affected, and a constitutional violation has occurred.

Similarly, the clause instructs that political rights and privileges are not dependent on property. In so stating, the clause declares that property is not a valid voter qualification, meaning it is not a valid qualification for *any* potential voter, regardless of whether a person already possesses the right or must have the right restored. In other words, the property qualifications clause creates a broad prohibition on a type of voter qualification, and no individual can be barred from voting on that basis alone. As the trial court correctly explained, "when legislation is enacted that restores the right to vote, thereby establishing qualifications which certain persons must meet to exercise their right to vote, such legislation must not do so in a way that makes the ability to vote dependent on a property qualification." But this is exactly what N.C.G.S. § 13-1 does.

Indeed, the Defendants themselves appear to recognize that the state constitution's disenfranchisement provision does not give N.C.G.S.

§ 13-1 license to impose a requirement to rights restoration that violates the property qualifications clause. Defendants explain that "nothing in Section 13-1 requires a felon to possess any property." If N.C.G.S. § 13-1 must otherwise comply with the property qualifications clause, then the disagreement can be reduced to the opposing interpretations of the term "property"—a disagreement that is easily resolved by the plain text of the state constitution.

Finally, as has been explained, constitutional provisions "cannot be applied in isolation or in a manner that fails to comport with other requirements of the State Constitution[,]" *Stephenson*, 355 N.C. at 376, meaning that article VI, section 2's denial of the franchise to anyone "adjudged guilty of a felony against this State or the United States, or adjudged guilty of a felony in another state" cannot be read in such a way that would violate other provisions of the North Carolina constitution, including the property qualifications clause. Because the clause does not permit rights restoration to be conditioned upon wealth, article VI, section 2 cannot be construed to deny the franchise to individuals who have completed all other aspects of their sentences but have not paid their court costs, fines, or other related fees. The majority errs in holding otherwise.

The trial court got it right based on the evidence in the record, the extensive findings of fact, and the proper application of the *Arlington Heights* factors, as well as other controlling legal principles of constitutional interpretation. Having found that N.C.G.S. § 13-1 is discriminatory, the trial court clearly had the obligation to fashion a remedy that protects the fundamental state constitutional rights that are at issue here. This Court should affirm the final judgment and order of the trial court. Therefore, I dissent.

Justice MORGAN joins in this dissenting opinion.

DUKE ENERGY CAROLINAS, LLC
v.
MICHAEL L. KISER, ROBIN S. KISER, AND SUNSET KEYS, LLC
v.
THOMAS E. SCHMITT AND KAREN A. SCHMITT, ET AL.

No. 398PA21

Filed 28 April 2023

Easements—bodies of water—permits to third parties—scope of authority—plain and unambiguous language

Based on the plain and unambiguous language of an easement purchased decades ago by Duke Power Company (Duke) in order to create Lake Norman (by constructing a dam and flooding the land), including language granting Duke "absolute water rights" and the right to "treat [the land] in any manner deemed necessary or desirable by Duke Power Company," Duke acted within the scope of its broad authority and discretion when it granted permits to third-party homeowners to build lake access structures and to use the lake for recreational purposes. Further, the easement's language was consistent with Duke's federal licensing obligations regarding the lake and the authority granted to Duke was confirmed by the parties' practice over many years in seeking permission from Duke to build shoreline structures over and into the submerged property.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 280 N.C. App. 1 (2021), reversing an order and judgment entered on 2 January 2020 by Judge Nathaniel J. Poovey in Superior Court, Catawba County and remanding for further proceedings. Heard in the Supreme Court on 7 February 2023.

Kiran H. Mehta, Christopher G. Browning Jr., and Victoria A. Alvarez for plaintiff-appellant.

TLG Law f/k/a Redding Jones, PLLC, by Ty Kimmell McTier and David G. Redding, for defendant-appellees.

David P. Parker for third-party defendant-appellants Thomas E. Schmitt, Karen A. Schmitt, Linda Gail Combs, and [the Estate of] Robert Donald Shepard.

Mark L. Childers and Kevin C. Donaldson for other third-party defendant-appellants.

No brief for third-party defendant-appellants Donald Reid Hankins, William Claypoole, Val Rhae Claypoole, Theodore H. Corriher, and Tommy L. Wallace.

NEWBY, Chief Justice.

This case requires us to determine Duke Energy Carolinas, LLC's[1] scope of authority under an easement it acquired in order to create Lake Norman. Specifically, we consider, once the lake is created, whether this easement grants Duke the right to allow third-party homeowners to build structures over and into the submerged easement property and to use the lake for recreational purposes. To answer this question, we first look to the language of the easement. The plain language of the easement grants Duke "absolute water rights" to "treat [the land] in any manner [it] deem[s] necessary or desirable." Because the easement's plain language is clear and unambiguous and Duke's actions are encompassed within the broad grant of authority, Duke properly allowed third-party homeowners to build structures over and into the submerged property and use the lake in a recreational manner. This expansive scope of authority evidenced by the easement's plain language is consistent with Duke's federal licensing obligations over Lake Norman and has been confirmed by the parties in practice. As such, we reverse the decision of the Court of Appeals.

On 4 August 1961, Duke purchased an easement from B. L. and Zula C. Kiser (the Kiser Grandparents) covering a 280.4-acre tract as part of what is now known as Lake Norman. At the time of the conveyance, much of the bed of Lake Norman was dry. Duke acquired the easement, as well as an interest in the surrounding lakebed property, in order to create the lake by constructing a dam pursuant to a federal license. Since 1958, Duke has maintained a license issued by the Federal Energy Regulatory Commission (FERC) to operate a long-term hydroelectric project involving Lake Norman and several surrounding lakes and dams and "to supervise and control the uses and occupancies [of Lake Norman] for which it grants permission."[2]

Accordingly, the Kiser Grandparents granted Duke, its successors, and assigns by deed an easement to create a lake with two distinct

---

1. Duke Energy Carolinas, LLC is a subsidiary of Duke Energy Corporation (formerly Duke Power Company) and is herein referred to as "Duke."

2. FERC initially granted Duke a license for a 50-year term in 1958. Thereafter, the license was renewed annually for seven years. In 2015, FERC relicensed Duke for a 40-year term.

component parts: a component covering the anticipated lake level and a component covering the area subject to higher water. The first component part of the conveyance includes

> a permanent easement of water flowage, absolute water rights, and easement to back, to pond, to raise, to flood and to divert the waters of the Catawba River and its tributaries in, over, upon, through and away from the 280.4 acres, more or less, of land hereinafter described, together with the right to clear, and keep clear from said 280.4 acres, all timber, underbrush, vegetation, buildings and other structures or objects, and to grade and to treat said 280.4 acres, more or less, in any manner deemed necessary or desirable by Duke Power Company.

The first component (the Flowage Easement) references the 280.4 acres of land which would become submerged property resting below an elevation of 760 feet as part of the planned lake level. To cover the area subject to higher water, the Kiser Grandparents granted Duke, its successors, and assigns:

> a permanent flood easement, and the right, privilege and easement of backing, ponding, raising, flooding, or diverting the waters of the Catawba River and its tributaries, in, over, upon, through, or away from the land hereinafter described up to an elevation of 770 feet above mean sea level, U.S.G.S. datum, whenever and to whatever extent deemed necessary or desirable by the Power Company in connection with, as a part of, or incident to the construction, operation, maintenance, repair, altering, or replacing of a dam and hydroelectric power plant to be constructed at or near Cowan's Ford on the Catawba River . . . and otherwise use and treat said land up to said 770 feet elevation in any manner deemed necessary or desirable by the Power Company in connection with the construction, reconstruction, maintenance and operation of the dam and power plant above referred . . . and of the reservoir or lake created or to be created by same.[3]

---

3. The language of the easement reflects a filed copy that immaterially differs from the original.

The second component of the easement described in the deed (the Flood Easement) references the land that would rest "up to . . . 770 feet above mean sea level" and thus would remain dry land, but subject to flooding, after the creation of Lake Norman.[4]

About two years later Duke flooded the land at issue. Upon the impoundment of Lake Norman, the Kiser Grandparents retained an area of land that became an island (Kiser Island) surrounded by the 280.4-acre submerged parcel subject to Duke's easement. Between 1964 and 2015, the Kiser Grandparents subdivided Kiser Island into residential waterfront lots and sold the lots to numerous third-party buyers (the third-party homeowners). The Kiser Grandparents retained at least one lot (the Kiser lot).

After the creation of Lake Norman and Kiser Island, Duke implemented the Shoreline Management Guidelines (the SMG) in accordance with its FERC license. The SMG are a "detailed set of procedures and criteria" that "regulate activities within [Lake Norman] pursuant to [Duke's] FERC obligation[ ]" to manage Lake Norman's shoreline, uses, and occupancies. Specifically, the SMG "regulate the construction and maintenance of lake access facilities" and similar dock structures through "permits or other agreements" that Duke issues. Thus, pursuant to the SMG and with Duke's permission, the third-party homeowners began building docks, piers, and other shoreline structures as early as 1964 that extend from their waterfront lots over and into the waters of Lake Norman. The Kiser family has also sought and received permission from Duke to build certain shoreline structures.[5] Accordingly, many of the structures built by the Kisers and the third-party homeowners touch or are anchored to the Kisers' submerged property subject to Duke's easement.

During a drought in 2015, the lake level receded. Michael L. Kiser, a grandson of the Kiser Grandparents, built a seventeen-and-a-half-foot retaining wall extending from the Kiser lot into the once submerged property. Mr. Kiser then backfilled the area behind the wall with dry materials to extend the shoreline and increase the size of the Kiser lot.

---

4. The Flowage and Flood Easements are referred to collectively as "the easement."

5. At oral argument, when asked whether the Kisers have requested a permit from Duke to build a dock or similar structure in the past, counsel for the Kisers responded in the affirmative, stating that Duke has "the authority to grant permission to build" such structures. *See* Oral Argument at 29:58, *Duke Energy Carolinas, LLC v. Kiser* (No. 398PA21) (Feb. 7, 2023), https://www.youtube.com/watch?v=yh0mHp58byg (last visited Mar. 16, 2023).

As a result, the new construction encompassed nearly 2,449 square feet of land covered by Duke's easement which had previously been submerged. Mr. Kiser, however, did not apply for a permit or receive permission from Duke prior to building the retaining wall. In response to Mr. Kiser's actions, Duke issued a Stop-Work Directive, and the North Carolina Department of Environmental Quality (NCDEQ) notified Mr. Kiser that the unauthorized construction would affect the waters of Lake Norman. Despite multiple requests by both Duke and NCDEQ, Mr. Kiser did not remove the retaining wall or any of the fill material from the lakebed within the easement boundary.

On 27 January 2017, Duke filed suit against Mr. Kiser and his wife, Robin S. Kiser, together with their entity Sunset Keys, LLC[6] (the Kisers), alleging trespass and wrongful interference with the easement by building the retaining wall and backfilling the lakebed area subject to Duke's easement. Duke sought injunctive relief requiring the Kisers "to remove the retaining wall and fill material from the lake bed" and restore "the disturbed shoreline area." On 13 February 2017, the Kisers responded and asserted counterclaims against Duke. The Kisers challenged Duke's authority under the easement to demand removal of the retaining wall, to issue dock permits to third-party homeowners, and to allow recreational use of the waters. In addition, the Kisers brought trespass claims against the third-party homeowners for building structures on the Kisers' submerged property without their consent, joining the homeowners[7] as third-party defendants.

On 3 August 2018, Duke moved for partial summary judgment regarding its claims for wrongful interference and injunctive relief against the Kisers. The trial court held a hearing on 13 August 2018, heard oral argument from both parties, and considered the pleadings, affidavits, and briefs submitted to the court. On 27 August 2018, the trial court entered an order and judgment granting Duke's motion for partial summary judgment. The trial court found that Duke's rights under the easement entitled it to have the retaining wall cleared from the submerged property. Accordingly, the trial court ordered the Kisers to remove the retaining wall and clear the backfilled area from the lakebed.

---

6. Upon the death of Michael Kiser's father in March of 2016, Michael Kiser and his two brothers became the owners of the land at issue. They subsequently conveyed the land to Sunset Keys, LLC, of which Michael Kiser and his two brothers are the members.

7. Several of the third-party homeowners to this appeal are represented by counsel while others are proceeding unrepresented.

On 25 October 2019, Duke moved for summary judgment on its remaining trespass claim and the Kisers' counterclaims. On 28 October 2019, the third-party homeowners moved for summary judgment on the Kisers' third-party trespass claims. After conducting a hearing in which the trial court heard oral argument and considered materials submitted by the parties, the trial court entered an order and judgment on 2 January 2020 granting summary judgment in favor of Duke and the third-party homeowners. The trial court recognized Duke's broad authority under the easement and determined that Duke "acted within the scope of [its] authority" by granting permits for docks and other structures on the submerged property and by allowing recreational use of the water above the submerged property. Furthermore, the trial court quieted title in the waterfront lots, structures, and waters to the third-party homeowners, finding that the Kisers' claims constituted a cloud upon the third-party homeowners' titles to their properties. The Kisers appealed.[8]

On appeal, the Kisers argued that Duke acted outside the scope of its authority under the easement by allowing third parties to use the 280.4 acres of Lake Norman without the Kisers' consent and that the trial court erred by quieting title in the waterfront structures to the third-party homeowners. *Duke Energy Carolinas, LLC v. Kiser*, 280 N.C. App. 1, 6, 867 S.E.2d 1, 7–8 (2021). The Court of Appeals reversed the trial court's 2 January 2020 order granting summary judgment to Duke and the third-party homeowners. *Id.* at 16, 867 S.E.2d at 14. First, the Court of Appeals recognized that the plain language of the Flowage Easement is unambiguous and broad enough to "virtually convey a fee simple interest" to Duke. *Id.* at 9, 867 S.E.2d at 9. The Court of Appeals, however, "decline[d] to read [the Flowage Easement] in such a way," deferring instead to its subjective view of the Kiser Grandparents' purported intent in retaining the fee title to the submerged property.[9] *Id.* at 9–10, 867 S.E.2d at 9–10.

---

8. The Kisers filed and served a notice of appeal for both of the trial court's orders but certified only the 2 January 2020 order for review. Thus, the Court of Appeals limited its review to the 2 January 2020 order. Accordingly, we likewise limit our review to the 2 January 2020 order. The trial court's 27 August 2018 order remains undisturbed.

9. There are multiple reasons why the Kiser Grandparents may have conveyed an easement to Duke rather than title to the parcel in fee simple. It was error for the Court of Appeals to project its own subjective beliefs in attempting to discern the original parties' purported intent for granting the easement. When the language of an easement is clear and unambiguous, the court is to infer the intention of the parties from the words of the easement itself. *See State v. Philip Morris USA Inc.*, 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005).

Next, upon noting Duke's broad interest in the submerged property, the Court of Appeals considered whether an easement granting "virtually unlimited authority to 'treat' property 'in any manner' includes the power for the easement holder to permit strangers to the agreement to use the land for their own benefit." *Id.* at 10, 867 S.E.2d at 10. The Court of Appeals adopted a bright-line principle that

> unless an easement explicitly states otherwise, an easement holder may not permit strangers to the easement agreement to make use of the land, other than for the use and benefit of the easement holder, without the consent of the landowner where such use would constitute additional burdens upon the servient tenement.

Id.; *see Lovin v. Crisp*, 36 N.C. App. 185, 189, 243 S.E.2d 406, 409 (1978) (holding that under the terms of the easement at issue, because the easement holder's surrounding property was not mentioned in the easement, the nearby land could not benefit from the easement holder's interest). Therefore, according to the Court of Appeals, because the third-party homeowners here are not mentioned in the easement and did not have a property interest in the land when the easement was created, "Duke exceeded its scope of authority by permitting the [third-party homeowners] to construct and maintain structures over and into the Kisers' submerged land without the Kisers' consent." *Kiser*, 280 N.C. App. at 11, 867 S.E.2d at 10.

Duke filed a petition for discretionary review with this Court on 22 November 2021. On 2 December 2021, the third-party homeowners also filed a petition for discretionary review. This Court allowed the parties' petitions on 9 February 2022.

This Court reviews an appeal of a summary judgment order de novo. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper when "there is no genuine issue as to any material fact and . . . any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A–1, Rule 56(c) (2021). The moving party is entitled to summary judgment "when only a question of law arises based on undisputed facts." *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 334, 777 S.E.2d 272, 278 (2015). "All facts asserted by the [nonmoving] party are taken as true and . . . viewed in the light most favorable to that party." *Id.* (alterations in original) (quoting *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000)).

In applying these well-established principles for summary judgment here, we consider whether an easement granted to establish a lake, which provides for "absolute water rights" to "treat" the servient estate "in any manner deemed necessary or desirable," allows the easement holder to permit third parties to use the land when the easement holder so deems it necessary or desirable. "An easement is an interest in land . . . generally created by deed." *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 542 (1953). "An easement deed . . . is, of course, a contract." *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719, 127 S.E.2d 539, 541 (1962). As such, the ordinary rules of contract construction apply to construing an easement. *Id.*

Like contracts, interpreting an easement "requires the court to examine the language of the [easement] itself for indications of the parties' intent at the moment of execution." *State v. Philip Morris USA Inc.*, 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005) (citing *Lane v. Scarborough*, 284 N.C. 407, 409–10, 200 S.E.2d 622, 624 (1973)). In doing so, "[i]t must be presumed the parties intended what the language used clearly expresses, and the [easement] must be construed to mean what on its face it purports to mean." *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710, 40 S.E.2d 198, 201 (1946) (citation omitted). Accordingly, "[i]f the plain language of [the easement] is clear, the intention of the parties is inferred from the words of the [easement]," *Philip Morris USA Inc.*, 359 N.C. at 773, 618 S.E.2d at 225 (quoting *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996)), and the "construction of the [easement] is a matter of law for the court," *Hagler v. Hagler*, 319 N.C. 287, 294, 354 S.E.2d 228, 234 (1987).

In addressing whether Duke has authority under the easement to allow the third-party homeowners to build shoreline structures over and into the submerged property and use the waters of Lake Norman, we first look to the plain language of the easement. In looking to the plain language, we do bear in mind that the original parties created the easement in order for Duke to form a lake. Here the Flowage Easement expressly provides that the Kiser Grandparents permanently granted Duke "absolute water rights" to "treat said 280.4 acres . . . in any manner [Duke] deem[s] necessary or desirable." The language of the Flowage Easement is clear, unambiguous, and broad in scope, plainly allowing Duke to treat the submerged property however Duke deems "necessary or desirable." Significantly, the easement's text does not limit how Duke may treat the submerged property, confine Duke's exercise of discretion, set conditions that Duke must satisfy before using the submerged property in a particular manner, or prohibit Duke from allowing third-party uses of the property without the Kisers' consent.

The Kisers, on the other hand, contend that because the easement is silent with respect to the third-party homeowners, the third parties have no right to use the waters recreationally, build shoreline structures into the submerged easement property, or otherwise benefit from the easement without the Kisers' consent. The Kisers, however, overlook Duke's expansive scope of authority evidenced by the Flowage Easement's broad, unambiguous language. Such an expansive reading is consistent with the original parties' understanding that the purpose of the easement was for Duke to create and maintain a lake. Accordingly, Duke may properly exercise its expansive rights under the Flowage Easement to benefit the third-party homeowners when it is necessary or desirable to Duke. Therefore, Duke acted within the scope of its authority under the Flowage Easement by allowing the third-party homeowners to build docks, piers, and other structures into the submerged property and to use the waters of Lake Norman for recreation.

The Court of Appeals, despite initially recognizing the Flowage Easement's unambiguous language and Duke's broad authority under the easement, deferred instead to the original parties' purported intent in construing the easement. *Kiser*, 280 N.C. App. at 9–10, 867 S.E.2d at 9–10. As a result, the Court of Appeals adopted a bright-line rule from *Lovin*—that easement rights may only benefit the easement holder unless third parties are also expressly named in the easement—which contradicts the Flowage Easement's plain language. *Id.* at 10, 867 S.E.2d at 10. *Lovin*, however, is readily distinguishable from the facts here, is not binding on this Court, and establishes a principle that narrows the Flowage Easement's broad and unambiguous language.

In *Lovin*, a landowner conveyed an easement by deed to his neighbor. *Lovin*, 36 N.C. App. at 188, 243 S.E.2d at 409. The language of the easement permitted the easement holder "to install and maintain a water line" on a specific tract of land. *Id.* Because the easement's language was narrowly confined to benefit one parcel of land and the surrounding property was not described in the easement, the court held that the easement holder could not install additional water lines to benefit neighboring lands. *Id.* at 189–90, 243 S.E.2d at 409–10. Here, however, unlike the limited easement in *Lovin* confining the use of the easement to a specific tract of land for a narrow purpose, the language of the Flowage Easement is broad and does not constrain how Duke may treat the easement property. There is a vast difference between intending to create and maintain a lake versus allowing a water line to cross a property. As such, under the Flowage Easement's broad language, Duke may permit third parties to use the easement property when such use is necessary

or desirable to Duke. Therefore, because the easement in *Lovin* and the Flowage Easement here serve different purposes and contain material differences, the Court of Appeals erred by relying on *Lovin* and applying a novel principle that contradicts and narrows the Flowage Easement's clear language.

The Flowage Easement's unambiguous language granting Duke broad authority over the submerged property is consistent with the purpose of Duke's federal licensing obligations over Lake Norman and has been confirmed by the parties in practice. When Duke obtained the FERC license in 1958, it likewise needed broad authority over the land at issue in order to flood the entire parcel and comply with its requirements under the license for developing and operating Lake Norman. As such, the Kiser Grandparents conveyed to Duke "permanent" and "absolute water rights" over the Kisers' parcel, which provided Duke with substantial discretion to manage the submerged parcel. Duke therefore created a permit plan for homeowners seeking to build lake access facilities in accordance with Duke's obligation to oversee Lake Norman's shoreline, uses, and occupancies. Duke's permit plan is encompassed within Duke's broad grant of authority under the Flowage Easement's plain language and likewise supports the purposes of Duke's FERC license. Ultimately, Duke's broad grant of authority under the Flowage Easement allows Duke to comply with its FERC license requirements.

Additionally, the parties' practices over the past sixty years have consistently confirmed that Duke has authority under the Flowage Easement to allow the third-party homeowners to build shoreline structures into the submerged property. Since the Kisers began subdividing and selling the waterfront lots on Kiser Island, the third-party homeowners have complied with Duke's permit plan and have received authorization from Duke, rather than the Kisers, to build docks, piers, and other shoreline structures on their lots and into the submerged easement property. Notably, the Kiser family has also sought and received permission from Duke to build shoreline structures extending from the Kiser lot and into the submerged property because Duke has "the authority to grant permission to build" such structures. *See* Oral Argument at 29:58, *Duke Energy Carolinas, LLC v. Kiser* (No. 398PA21) (Feb. 7, 2023), https://www.youtube.com/watch?v=yh0mHp58byg (last visited Mar. 16, 2023). Thus, not only have the third-party homeowners sought permission from Duke, rather than the Kisers, to build into the submerged land, but the Kisers have also requested and received similar authorization from Duke. As such, both the named and unnamed parties to the easement have repeatedly acted in a manner consistent with Duke's having authority under the Flowage Easement to permit homeowners

to build structures from their waterfront lots over and into the submerged property.

In summary, the plain language of the easement is unambiguous and grants Duke broad authority to treat the submerged easement property in any manner Duke deems necessary or desirable. Therefore, Duke acted within the scope of its broad authority under the easement by allowing the third-party homeowners to build docks, piers, and other structures over and into the submerged land without the Kisers' consent. The easement's plain language is consistent with Duke's federal licensing obligations and has been confirmed by the parties in practice. Accordingly, the decision of the Court of Appeals is reversed.

REVERSED.

MICHAEL R. GALLOWAY, AS TRUSTEE OF THE MELISSA GALLOWAY SNELL LIVING TRUST DATED MAY 1, 2018, AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MELISSA GALLOWAY SNELL

v.

JEFFREY SNELL

No. 90A22

Filed 28 April 2023

Contracts—separation settlement agreement—terms—naming of insurance policy beneficiaries—no ambiguity

In a declaratory judgment action regarding a separation settlement agreement—the terms of which defendant interpreted as requiring the proceeds from his deceased ex-wife's life insurance policy to be paid to him and not to her trust (which had been established for the benefit of their four children)—the Court of Appeals erred when it determined that the settlement agreement's terms regarding the ex-wife's ability to change the beneficiary of her life insurance policies were ambiguous. The agreement's plain language was clear and unambiguous; therefore, the trial court properly awarded summary judgment in favor of the trust.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 282 N.C. App. 239 (2022), reversing an order entered on 19 August 2020 by Judge A. Graham Shirley II in Superior Court, Wake County, and remanding to the trial court for further proceedings. Heard in the Supreme Court on 15 March 2023.

Gregory S. Connor for plaintiff-appellant.

Smith Debnam Narron Drake Saintsing & Myers, LLP, by Bettie Kelley Sousa and Alicia Jurney, for defendant-appellee.

BARRINGER, Justice.

In this matter, we review the Court of Appeals' determination that provisions in a settlement agreement are ambiguous. Having reviewed the plain language of the settlement agreement and having determined it to be unambiguous, we conclude that the Court of Appeals erred.

I. Background

Defendant Jeffrey Snell and Melissa Galloway Snell (Melissa) married in March 2000 but subsequently separated in August 2017. Thereafter, on 8 February 2018, defendant and Melissa executed a Memorandum of Mediated Settlement Agreement (Settlement Agreement). On 28 December 2018, a judgment of divorce was granted to defendant and Melissa in District Court, Wake County. A few months later, Melissa passed away. At the time of her death, the life insurance policy on Melissa's life (Policy) listed the Melissa Galloway Snell Living Trust (Trust), dated 1 May 2018, as the Policy's beneficiary. Defendant and Melissa had four children, who are the beneficiaries of the Trust.

Defendant on his own and through counsel asserted that the proceeds from Melissa's Policy should be paid to defendant. As a result, the trustee of the Trust, plaintiff Michael Galloway, sued and sought a declaratory judgment that the Settlement Agreement permitted Melissa to lawfully name the Trust as the beneficiary of her Policy binding defendant.[1] Defendant asserted a counterclaim, seeking a declaration that the Settlement Agreement required payment of the death benefits from Melissa's Policy to defendant.

Plaintiff and defendant both moved for summary judgment on the declaratory judgment claim. The trial court concluded that the Settlement Agreement was not ambiguous and there was no genuine issue of material fact precluding the granting of summary judgment on plaintiff's declaratory judgment claim. The trial court granted plaintiff's motion for summary judgment as to his declaratory judgment claim and declared as follows:

---

1. Plaintiff in his capacity as the personal representative of Melissa's estate also asserted a breach of contract claim. However, as this claim is not relevant to the appeal, we do not discuss it further in this opinion.

> I. The Settlement Agreement, subject to II below, required [Melissa Galloway] Snell to maintain life insurance naming [Defendant] the beneficiary with a death benefit of at least $1 Million until she no longer had an obligation to pay for college expenses;
>
> II. The Settlement Agreement permitted Melissa Galloway Snell to change the beneficiary on insurance she owned to the children's trust in lieu of having the Defendant named as beneficiary, including changing the beneficiary on the two life insurance policies in which Defendant was named as the beneficiary, with death benefits totaling $1,000,000.00, to the Melissa Galloway Snell Living Trust as beneficiary;
>
> III. That the Melissa Galloway Living Trust dated May 1, 2018 is the proper sole beneficiary of all of the life insurance policies owned by Melissa Galloway Snell at her death.

The trial court denied defendant's motion for summary judgment.

Thereafter, defendant appealed the trial court's order granting plaintiff's summary judgment motion and denying defendant's summary judgment motion as to the declaratory judgment claim to the Court of Appeals. A divided panel of the Court of Appeals concluded that the relevant language of the Settlement Agreement was ambiguous. *Galloway v. Snell*, 282 N.C. App. 239, 240 (2022). Thus, it reversed the trial court's order and remanded for further proceedings. *Id.* In contrast, the dissent concluded that the relevant language of the Settlement Agreement was unambiguous. *Id.* at 251 (Hampson, J., dissenting). The dissent took the position that the trial court properly granted summary judgment in favor of plaintiff. *Id.* at 253. Plaintiff appealed to this Court based on the dissent.

II. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573 (2008) (cleaned up).

III. Analysis

Written contracts "are to be construed and enforced according to their terms." *Gould Morris Elec. Co. v. Atl. Fire Ins. Co.*, 229 N.C. 518,

520 (1948). They "must receive a reasonable interpretation, according to the intention of the parties at the time of executing them, gathered from the language employed by them." *Lane v. Scarborough*, 284 N.C. 407, 411 (1973) (cleaned up). "When the language of a contract is clear and unambiguous, effect must be given to its terms," *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N.C. 717, 719 (1962), and "its terms may not be contradicted by parol or extrinsic evidence," *Root v. Allstate Ins. Co.*, 272 N.C. 580, 587 (1968).

Further, a contract's meaning and effect is a question of law for the court—not the jury—when the language of the contract is clear and unambiguous. *Lowe v. Jackson*, 263 N.C. 634, 636 (1965) ("It is well settled that where the language of a contract is plain and unambiguous, it is for the court and not the jury to declare its meaning and effect."); *Lane*, 284 N.C. at 410 ("When a contract is in writing and free from any ambiguity which would require resort to extrinsic evidence, or the consideration of disputed fact, the intention of the parties is a question of law."). And "[t]he terms of an unambiguous contract are to be taken and understood in their plain, ordinary and popular sense," *Weyerhaeuser*, 257 N.C. at 719–20, and "harmoniously construed" to give "every word and every provision" effect, *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 629 (2003) (quoting *Gaston Cnty. Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299 (2000)).

"An ambiguity exists in a contract when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations." *Register v. White*, 358 N.C. 691, 695 (2004). "An ambiguity can exist when, even though the words themselves appear clear, the specific facts of the case create more than one reasonable interpretation of the contractual provisions." *Id.* If a written contract is ambiguous, the contract's meaning and effect is a factual question for the jury and parol evidence may be introduced "not to contradict, but to show and make certain what was the real agreement between the parties." *Root*, 272 N.C. at 590 (quoting *Hite v. Aydlett*, 192 N.C. 166, 170 (1926)).

Given this well-established law concerning contract construction, we turn to the written contract, the Settlement Agreement, and its terms. The Settlement Agreement, as pertinent, provides as follows:

> Snell Mediated Settlement Agreement
>
> Equitable Distribution
>
> . . . .

- Non-ED Assets/Children's Assets:

  . . . .

  - The children's life insurance policies shall be kept intact. [Defendant] will be responsible for 90% of the premiums and Melissa shall be responsible for 10% of the premiums until the child is gainfully employed. The beneficiary shall be the children's trust (see details about trust below)

Custody- see the consent order for custody

Support- Child and Spousal

. . . .

- As long as [defendant] has support obligation[s] or is obligated to pay for children's college as outlined below, he shall maintain a life insurance policy naming Melissa is [sic] as the beneficiary with a death benefit of $2 Million.
- Until Melissa no longer has an obligation to pay for college expenses, she shall maintain a life insurance policy naming [defendant] the beneficiary with a death benefit of at least $1 Million. [Defendant] at his election may maintain (as owner) at his sole expense [words lined through] life insurance policy on Melissa's life totaling $1,000,000 in death benefit.
- Additional term: the parties currently have a health insurance policy with a deductible of $10K. Prior to Melissa's flu and hospitalization, Melissa had paid almost $1K. [Defendant] shall pay as non-taxable support the sum of up to $9,000.00 in the form of payments directly to medical providers as the bills come due for the 2018 policy term.
- Children's trust- each party shall, within 90 days, set up a trust for the benefit of the minor children so that the children can receive any insurance proceeds in lieu of the other party

> being named the beneficiary. [Defendant's] brother shall be named as trustee of the children's trust established by [defendant], and Melissa's brother shall be named as trustee of the children's trust established by Melissa.
>
> . . . .
>
> College
>
> - Each party shall contribute .05% percent of his/her annual gross income (per two years' ago tax return) per child to the children's 529 accounts. By way of example, each party's obligation for the 2018 year shall be calculated using each party's AGI for 2016. This can be contributed annually or monthly, but in any case the full amount for each child's 529 shall be put into the proper account no later than April 15 for that year.
> - In the event that any child's 529 account does not cover the costs for the child to attend college, each party shall be responsible as follows: Melissa 10%, [defendant] 90%. Each party's total obligation shall be limited to the cost for in-state tuition, books, fees, etc. at UNC-Chapel Hill, for up to 8 semesters per child.

Before the Court of Appeals, plaintiff argued that the Settlement Agreement "unambiguously provides that once a party sets up a trust for the benefit of the children, the party could change the beneficiary of any insurance policy such that 'the children can receive any insurance proceeds in lieu of the other party being named the beneficiary.' " *Galloway*, 282 N.C. App. at 249 (majority opinion). In contrast, defendant argued that the Settlement Agreement "unambiguously required Melissa to 'maintain a life insurance policy naming [defendant] the beneficiary with a death benefit of at least $1 Million' until 'Melissa no longer had an obligation to pay for college expenses,' and the children's trust was to be the beneficiary of proceeds from other policies—including each of the children's life insurance policies." *Id.* In the alternative, defendant argued the Settlement Agreement is ambiguous. *Id.* The Court of Appeals held that the Settlement Agreement is ambiguous. *Id.* at 250. The dissent disagreed, *id.* at 251 (Hampson, J., dissenting), and plaintiff appealed based on the dissent.

Like the dissent, we disagree with the holding of the Court of Appeals as a matter of law. The Settlement Agreement is unambiguous as to the controversy before this Court. When the Settlement Agreement is read as a whole and the language of the Settlement Agreement is accorded its plain and ordinary meaning, "the intent of the parties at the moment of its execution emerges clearly." *Preyer v. Parker*, 257 N.C. 440, 445 (1962). "Until Melissa no longer has an obligation to pay for college expenses, she shall maintain a life insurance policy naming [defendant] the beneficiary with a death benefit of at least $1 Million," provided that after setting up a trust for the benefit of the minor children, such trust for "the children can receive *any* insurance proceeds in lieu of the other party being named the beneficiary." (Emphasis added).

The foregoing statements are in bullet points under the subheading "Support-Child and Spousal" and are the only statements under the subheading "Support- Child and Spousal" that address insurance policies where the other party is named the beneficiary. Further, the trust for the benefit of the minor children is for "any insurance proceeds in lieu of the other party being named the beneficiary." (Emphasis added). We must apply the plain and ordinary meaning to the terms of the Settlement Agreement, including to the word "any," *see Weyerhaeuser*, 257 N.C. at 719–20, and must construe the Settlement Agreement to give every word and every provision effect, *Singleton*, 357 N.C. at 629.

When used as a determiner, like in the Settlement Agreement, the word "any" is "used to refer to one or some of a thing or number of things, no matter how much or many" and "whichever of a specified class might be chosen." *Any*, *New Oxford American Dictionary* (3rd ed. 2010); *see also Any*, *The American Heritage Dictionary* (5th ed. 2018) (defining "any" as "[o]ne, some, every, or all without specification"). Defendant's interpretation would not give the term "any" its plain and ordinary meaning, and it would not give effect to the language "the children can receive any insurance proceeds in lieu of the other party being named the beneficiary." Rather, defendant's interpretation would require us to read into the Settlement Agreement limiting language to the word any that is not there, which is contrary to the requirement that a "contract must be construed to mean what on its face it purports to mean." *Hagler v. Hagler*, 319 N.C. 287, 294 (1987) (quoting *Hartford Accident & Indem. Co. v. Hood*, 226 N.C. 706, 710 (1946)).

We hold that the Settlement Agreement as it relates to this controversy is unambiguous because neither "the meaning of words [n]or the effect of provisions is uncertain or capable of several reasonable interpretations." *Register*, 358 N.C. at 695. Given the lack of

ambiguity, construction is a question of law for the court. We agree with the Court of Appeals' dissent that the construction as a matter of law is as the trial court construed it—"Melissa was permitted to name the [T]rust she set up for the benefit of the children as the beneficiary of the insurance policies she maintained to secure her college expense obligations." *Galloway*, 282 N.C. App. at 253 (Hampson, J., dissenting). Thus, the Court of Appeals should have affirmed the trial court's order granting summary judgment in plaintiff's favor on the declaratory judgment claim.

IV. Conclusion

Having reviewed the plain language of the Settlement Agreement, we conclude that the Court of Appeals erred by holding that the Settlement Agreement is ambiguous. Accordingly, we reverse the Court of Appeals' decision.

REVERSED.

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; 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;

HARPER v. HALL

[384 N.C. 292 (2023)]

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

No. 413PA21-2

Filed 28 April 2023

1. Elections—legislative redistricting—standard of review—presumption of constitutionality—political question doctrine

Legislation passed by the General Assembly, which serves as the "agent of the people for enacting laws," is presumed constitutional, and the judiciary may declare an act of the General Assembly in violation of the state constitution only when the act directly conflicts with an express provision of the constitution. Therefore, when considering the constitutionality of redistricting plans drawn by the General Assembly, the judiciary must presume the plans' constitutionality and ask whether the plans violate an express provision of the constitution beyond a reasonable doubt. When the judiciary cannot locate an express textual limitation on the legislature, the issue may present a political question that is inappropriate for resolution by the judiciary. To respect the separation of powers, courts must refrain from adjudicating a claim where there is: a textually demonstrable commitment of the matter to another branch of government, a lack of judicially discoverable and manageable standards, or the impossibility of deciding the case without making a policy determination of a kind clearly suited for nonjudicial discretion.

2. Elections—legislative redistricting—claims of partisan gerrymandering—political questions—nonjusticiable

Claims of partisan gerrymandering present political questions and therefore are nonjusticiable under the state constitution. Plaintiffs' claims of partisan gerrymandering were nonjusticiable

political questions because: The state constitution explicitly and exclusively commits redistricting authority to the General Assembly subject only to express limitations, leaving only a limited role for judicial review; the state constitution provides no judicially discernible or manageable standards for determining how much partisan gerrymandering is too much; and any attempt to adjudicate claims regarding partisan gerrymandering would require the judiciary to make numerous policy determinations for which the state constitution provides no guidance. Each factor on its own would be sufficient to render the claims nonjusticiable. Accordingly, the Supreme Court overruled *Harper v. Hall* (*Harper I*), 380 N.C. 317 (2022), withdrew *Harper v. Hall* (*Harper II*), 383 N.C. 89 (2022), and dismissed plaintiffs' claims with prejudice.

3. Elections—legislative redistricting—claims of partisan gerrymandering—free elections clause—not applicable

The free elections clause in the state constitution's Declaration of Rights—"All elections shall be free." (Article I, Section 10)—does not limit or prohibit partisan gerrymandering, or even address redistricting at all. Based on its plain meaning, its historical context, and our Supreme Court's precedent, the free elections clause means that voters are free to vote according to their consciences without interference or intimidation.

4. Elections—legislative redistricting—claims of partisan gerrymandering—equal protection clause—not applicable

Plaintiffs' claims that partisan gerrymandering will diminish the electoral power of members of a particular political party did not implicate the equal protection clause in the state constitution's Declaration of Rights (Article I, Section 19). Partisan gerrymandering has no impact upon the right to vote on equal terms under the one-person, one-vote standard; therefore, partisan gerrymandering claims do not trigger review under the state's equal protection clause.

5. Elections—legislative redistricting—claims of partisan gerrymandering—free speech and freedom of assembly clauses—not applicable

The free speech and freedom of assembly clauses in the state constitution's Declaration of Rights (Article I, Sections 12 and 14) do not limit the General Assembly's presumptively constitutional authority to engage in partisan gerrymandering. Nothing in the history of the clauses or the applicable case law supported plaintiffs' expanded interpretation of them.

6. Elections—legislative redistricting—claims of partisan gerrymandering—prior opinions overruled and withdrawn—racially polarized voting analysis

In a redistricting case, the Supreme Court overruled a prior opinion issued by a four-justice majority in *Harper v. Hall* (*Harper I*), 380 N.C. 317 (2022), and withdrew the same majority's subsequent opinion in *Harper v. Hall* (*Harper II)*, 383 N.C. 89 (2022). The Court also specifically overruled the holding from *Harper I* that required the General Assembly to perform a racially polarized voting (RPV) analysis before drawing any legislative districts.

7. Elections—legislative redistricting—claims of partisan gerrymandering—petition for rehearing—previous opinions overruled and withdrawn

It was proper for the Supreme Court to allow the legislative defendants' petition for rehearing pursuant to Appellate Procedure Rule 31 to revisit the issue of whether claims of partisan gerrymandering are justiciable under the state constitution, where the four-justice majority in *Harper v. Hall* (*Harper I*), 380 N.C. 317 (2022), expedited the consideration of the matter over the strong dissent of the other three justices, with no jurisprudential reason for doing so, and where *Harper I* and the same four-justice majority's opinion in *Harper v. Hall* (*Harper II*), 383 N.C. 89 (2022), were wrongly decided. Furthermore, *Harper I* did not meet any criteria for adhering to stare decisis. Upon rehearing, *Harper I* was overruled, and *Harper II* was withdrawn.

8. Elections—legislative redistricting—claims of partisan gerrymandering—prior opinions overruled and withdrawn—remedy

Upon rehearing a redistricting case and concluding that plaintiffs' claims of partisan gerrymandering were nonjusticiable—thus overruling and withdrawing prior opinions in the matter—the Supreme Court addressed the appropriate remedy. The Court granted the legislative defendants the opportunity to enact a new set of legislative and congressional redistricting plans, guided by federal law, the objective constraints in the state constitution located in Sections 3 and 5 of Article II, and this opinion. Neither the original redistricting plans nor the remedial plans, which were created during the course of the litigation and used in the 2022 election cycle, were "established" within the meaning of Article II, Sections 3(4) and 5(4), because both plans were a product of a misapprehension of North Carolina law, and the original plans were never used in an election.

Justice EARLS dissenting.

Justice MORGAN joins in this dissenting opinion.

On direct appeal pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure from the unanimous decision of a three-judge panel entered on 23 February 2022 in the Superior Court, Wake County, approving Legislative Defendants' Remedial House Plan and Remedial Senate Plan, rejecting their Remedial Congressional Plan, and adopting an Interim Congressional Plan. Heard in the Historic 1767 Chowan County Courthouse in Edenton, North Carolina on 4 October 2022, and opinion filed on 16 December 2022. Subsequently, this Court allowed Legislative Defendants' petition for rehearing pursuant to Rule 31(a) of the North Carolina Rules of Appellate Procedure. Heard in the Supreme Court on 14 March 2023.

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

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, Adam K. Doerr, Stephen D. Feldman, and Erik R. Zimmerman; and Jenner & Block LLP, by Sam Hirsch, pro hac vice, and Jessica Ring Amunson, pro hac vice, for Plaintiff North Carolina League of Conservation Voters.

Southern Coalition for Social Justice, by Hilary H. Klein, Mitchell Brown, Katelin Kaiser, Jeffrey Loperfido, and Noor Taj; and Hogan Lovells US LLP, by J. Tom Boer, pro hac vice, and Olivia T. Molodanof, pro hac vice, for Plaintiff Common Cause.

Nelson Mullins Riley & Scarborough LLP, by Phillip J. Strach, Thomas A. Farr, John E. Branch, III, D. Martin Warf, Nathaniel J. Pencook, and Alyssa M. Riggins; and Baker Hostetler LLP, by Mark E. Braden, pro hac vice, Katherine McKnight, pro hac vice, and Richard Raile, pro hac vice, for Legislative Defendants.

North Carolina Department of Justice, by Amar Majmundar, Senior Deputy Attorney General, Terence Steed, Special Deputy

Attorney General, *Mary Carla Babb*, *Special Deputy Attorney General*, *and Stephanie Brennan*, *Special Deputy Attorney General*, *for State Defendants.*

NEWBY, Chief Justice.

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35. Since our founding in 1776 almost 250 years ago, this provision in our state constitution has reminded us of the critical importance of remembering fundamental principles. This case now invites us to return to those principles.

The constitution is our foundational social contract and an agreement among the people regarding fundamental principles. It is for everyone, not just lawyers and judges. The state constitution is different from the Federal Constitution: the Federal Constitution is a limited grant of power while the state constitution is a limitation on power. The state constitution declares that all political power resides in the people. N.C. Const. art. I, § 2. The people exercise that power through the legislative branch, which is closest to the people and most accountable through the most frequent elections. *See id.* art. I, § 9. In the constitutional text, the people have assigned specific tasks to, and expressly limited the powers of, each branch of government. The state constitution is detailed and specific. The people speak through the express language of their constitution, and only the people can amend it. *See id.* art. XIII.

The constitution is interpreted based on its plain language. The people used that plain language to express their intended meaning of the text when they adopted it. The historical context of our constitution confirms this plain meaning. As the courts apply the constitutional text, judicial interpretations of that text should consistently reflect what the people agreed the text meant when they adopted it. There are no hidden meanings or opaque understandings—the kind that can only be found by the most astute justice or academic. The constitution was written to be understood by everyone, not just a select few.

The state constitution establishes three branches of government: legislative, executive, and judicial. It assigns specific roles to each branch. Since its inception, the constitution has provided for separation of powers: in other words, each branch is directed to perform its assigned duties and avoid encroaching on the duties of another branch. Separation of powers protects individual freedoms. The will of

the people is achieved when each branch of government performs its assigned duties. When, however, one branch grasps a task of another, that action violates separation of powers.

The judicial branch is designed to resolve legal disputes and to ensure that the other branches do not violate the constitution. Our power of judicial review, however, is not unlimited. Since the first articulation of the doctrine of judicial review in *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787), courts have refused to exercise that power if the constitution assigns the matter to another branch, or the constitution does not provide a judicially discoverable or manageable standard, or resolution of the matter involves policy choices. Such matters are deemed political questions and are nonjusticiable. The Supreme Court of the United States recognized these limitations in its seminal case, *Marbury v. Madison*, in which it first adopted the concept of judicial review:

> It is scarcely necessary for the court to disclaim all pretensions to [intermeddle with the prerogatives of another branch]. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to enquire how [other branches] perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to [another branch], can never be made in this court.

5 U.S. (1 Cranch) 137, 170 (1803).

Historically, North Carolina courts have respected their significant but restrained role of judicial review by adhering to a standard of review that sets the most demanding requirements for reviewing legislative action: courts presume that an act of the General Assembly is constitutional, and any challenge alleging that an act of the General Assembly is unconstitutional must identify an express provision of the constitution and demonstrate that the General Assembly violated the provision beyond a reasonable doubt.

Giving a fixed meaning to the constitution and using a deferential standard to review legislation ensures that courts will perform their assigned role, stay within their lane of authority, and refrain from becoming policymakers. Courts are not designed to be thrust into the midst of various political disputes. Such engagement in policy issues forces courts to take sides in political battles and undermines public trust and confidence in the judiciary. Choosing political winners and

losers creates a perception that courts are another political branch. The people did not intend their courts to serve as the public square for policy debates and political decisions. Instead, the people act and decide policy matters through their representatives in the General Assembly. We are designed to be a government of the people, not of the judges. At its heart, this case is about recognizing the proper limits of judicial power.

This matter is before this Court on rehearing. The North Carolina Rules of Appellate Procedure authorize rehearing a case when "the court has overlooked or misapprehended" a point "of fact or law." N.C. R. App. P. 31(a). In their petition for rehearing, Legislative Defendants ask the Court to revisit the crucial issue in this case: whether claims of partisan gerrymandering are justiciable under the state constitution. They assert that such claims are not justiciable. Legislative Defendants maintain that "[t]he *Harper* experiment" has failed: "*Harper II* failed . . . because *Harper I* set this Court up to fail." In support of this argument, Legislative Defendants argue that *Harper I* "fell short in concrete guidance" and "declined to disclose what standard applies." They assert that "*Harper II* reaffirms the non-justiciable and unprecedented standard set forth in *Harper I*" and, therefore, "a necessary consequence of correcting the errors in *Harper II* is to overrule *Harper I*." Legislative Defendants argue that their rehearing petition "gives this Court a much[-] needed opportunity to address the root of the problem: *Harper I* was based on profoundly flawed legal principles." Accordingly, they ask this Court to withdraw its *Harper II* opinion and overrule *Harper I*.

In this case plaintiffs claim that the General Assembly violated the state constitution by drawing legislative districts that unfairly benefited one political party at the expense of another, in other words, partisan gerrymandering.[1] Partisan gerrymandering is the practice of dividing a geographical or jurisdictional area into political units or election districts to give a particular political party or group "a special advantage." *See Gerrymandering*, Black's Law Dictionary (11th ed. 2019).

In the first opinion in this matter, four justices held that partisan gerrymandering presents a justiciable claim, *Harper v. Hall* (*Harper I*), 380 N.C. 317, 390, 868 S.E.2d 499, 551 (2022), and violates several provisions of the Declaration of Rights of our constitution, *id*. at 383, 868

1. In their complaints, plaintiffs allege that "partisan gerrymandering" violates the state constitution. Sometimes they modify this phrase with words like "extreme" or "severe." In *Rucho v. Common Cause*, the Supreme Court of the United States referred to this concept as "excessive partisan gerrymandering." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). In this opinion we will generally use the term "partisan gerrymandering" to refer to these claims.

S.E.2d at 546. The four justices then discussed certain political science tests that they claimed were judicially discoverable and manageable. *Id.* at 384–85, 868 S.E.2d at 547–48. They maintained that these political science tests could reliably identify unconstitutional partisan gerrymandering, *id.*, but they did not define how much partisan gerrymandering is too much, *id.* at 384, 868 S.E.2d at 547. In the most recent opinion in this matter, the same four members of this Court said that the General Assembly, three former jurists serving as Special Masters, the three-judge panel, and three members of this Court—in total, nine current and former jurists—all wrongly applied the approach set out in *Harper I*. *See Harper v. Hall* (*Harper II*), 383 N.C. 89, 94, 881 S.E.2d 156, 162 (2022). Thus, we must now reconsider whether a standard that only four justices know and understand, that is riddled with policy choices, and that is not mentioned in our constitution is truly judicially discoverable and manageable. That inquiry requires us to revisit the fundamental premises underlying the decisions in both *Harper II* and *Harper I*.

The issue presented in this case is whether the North Carolina Constitution prohibits partisan gerrymandering. Specifically, plaintiffs allege that legislative and congressional redistricting plans drawn by the General Assembly in 2021 and then again in 2022 on remand are partisan gerrymanders in violation of specific provisions of the constitution.

Our constitution expressly assigns the redistricting authority to the General Assembly subject to explicit limitations in the text. Those limitations do not address partisan gerrymandering. It is not within the authority of this Court to amend the constitution to create such limitations on a responsibility that is textually assigned to another branch. Furthermore, were this Court to create such a limitation, there is no judicially discoverable or manageable standard for adjudicating such claims. The constitution does not require or permit a standard known only to four justices. Finally, creating partisan redistricting standards is rife with policy decisions. Policy decisions belong to the legislative branch, not the judiciary.

Recently, the Supreme Court of the United States reviewed similar claims under the Federal Constitution and determined that "excessive" partisan gerrymandering claims involve nonjusticiable, political questions. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2491, 2507 (2019). We find the Supreme Court's analysis in *Rucho* insightful and persuasive.

For all these reasons, we hold that partisan gerrymandering claims present a political question that is nonjusticiable under the North Carolina Constitution. Accordingly, the decision of this Court in

Harper I is overruled. We affirm the three-judge panel's 11 January 2022 Judgment concluding, *inter alia*, that partisan gerrymandering claims are nonjusticiable, political questions and dismissing all of plaintiffs' claims with prejudice. This Court's opinion in *Harper II* is withdrawn and superseded by this opinion. The three-judge panel's 23 February 2022 order is vacated. Plaintiffs' claims are dismissed with prejudice.

I. Procedural History

A. Initial Litigation

As required by both our state constitution and the Federal Constitution, the General Assembly, following the 2020 census, enacted redistricting plans for the North Carolina Senate and House of Representatives and for the United States House of Representatives (2021 Plans).[2] The General Assembly enacted the 2021 Plans on 4 November 2021. The North Carolina League of Conservation Voters and a group of individual North Carolina voters (NCLCV plaintiffs), along with another group of individual North Carolina voters (Harper plaintiffs) each filed suit against the President Pro Tempore of the North Carolina Senate, the Speaker of the North Carolina House, and the Chairs of the House Standing Committee on Redistricting and the Senate Standing Committee on Redistricting and Elections (Legislative

---

2. Before drawing any maps, the General Assembly's Senate Committee on Redistricting and Elections convened a Joint Meeting of the Senate Redistricting and Elections Committee and the House Redistricting Committee on 5 August 2021 to discuss the criteria that would govern the redistricting process. Following this initial meeting, a General Assembly staff member distributed to the joint committee members a list of the legislative redistricting criteria that had been previously mandated by a three-judge panel in *Common Cause v. Lewis*—a case decided just a few years earlier in 2019. *See Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Wake County Sept. 3, 2019).

One week after its first meeting, the Joint Redistricting Committee adopted final redistricting criteria that would govern its 2021 map drawing process (Adopted Criteria). In many respects, the Adopted Criteria were nearly identical to the criteria ordered by the court in *Common Cause v. Lewis* in 2019. Notably, just like the *Lewis* criteria, the Adopted Criteria mandated that no "[p]artisan considerations [or] election results data" would be used in drawing the 2021 Plans. It appears that the Joint Redistricting Committee incorporated the criteria from *Common Cause v. Lewis* into its Adopted Criteria for the 2021 redistricting process because it believed that compliance with the *Common Cause v. Lewis* criteria was necessary to create constitutionally compliant redistricting plans. *See* Legislative Defendants-Appellees' Brief at 20–21, *Harper v. Hall*, 380 N.C. 317 (2022) (No. 413PA21-1) ("To avoid violations identified in the 2010 [redistricting] cycle," including those identified in the *Lewis* order, the General Assembly included a prohibition on the consideration of partisan election data in its Adopted Criteria.).

Defendants).[3] NCLCV plaintiffs and Harper plaintiffs challenged the legality of these plans, arguing they were unconstitutional partisan gerrymanders. Additionally, NCLCV plaintiffs alleged that the 2021 Plans "engag[ed] in racial vote dilution" in violation of the free elections clause and the equal protection clause of the North Carolina Constitution and that the 2021 Plans violated the Whole County Provisions (WCP) of the North Carolina Constitution. *See* N.C. Const. art. I, §§ 10, 19, 14, 12; *id.* art. II, §§ 3(3), 5(3). Both groups of plaintiffs also sought a preliminary injunction to enjoin use of the 2021 Plans.

The NCLCV and Harper actions were assigned to a three-judge panel of the Superior Court in Wake County and then consolidated. On 3 December 2021, the three-judge panel denied both NCLCV plaintiffs' and Harper plaintiffs' motions for preliminary injunction. Both sets of plaintiffs filed a notice of appeal with the North Carolina Court of Appeals.

The Court of Appeals denied NCLCV plaintiffs' and Harper plaintiffs' requests for a temporary stay on 6 December 2021. NCLCV plaintiffs and Harper plaintiffs then filed several documents with this Court, including 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 briefing and argument. On 8 December 2021, this Court allowed both petitions for discretionary review, granted a preliminary injunction, and temporarily stayed the candidate filing period for the 2022 election cycle until "a final judgment on the merits . . . including any appeals, is entered and a remedy, if any is required, has been ordered." In the same order, this Court expedited the matter, directing the three-judge panel to hold proceedings on the merits of plaintiffs' claims "and to provide a written ruling" on or before 11 January 2022.

Subsequently, Common Cause moved to intervene as a plaintiff in the consolidated proceedings, and the three-judge panel granted the motion on 15 December 2021. Like the NCLCV and Harper plaintiffs, Common Cause filed a complaint alleging that the 2021 Plans were unconstitutional partisan gerrymanders in violation of the free elections clause, the equal protection clause, and the free speech and freedom of assembly clauses of the North Carolina Constitution. Common Cause also

---

3. NCLCV plaintiffs and Harper plaintiffs also collectively named the State of North Carolina, the North Carolina State Board of Elections, and the Chairman, Secretary, and Members of the State Board of Elections. These defendants took "no position on the merits" of this case. State Defendants' Brief at 2, *Harper v. Hall*, 380 N.C. 317 (2022) (No. 413PA21-1).

alleged that the 2021 Plans violated North Carolina's equal protection clause by "purposefully discriminat[ing] against" African American voters through "intentional destruction of functioning crossover districts." Finally, Common Cause brought a declaratory judgment claim asking the three-judge panel to declare that the North Carolina Constitution requires the General Assembly to undertake a racially polarized voting (RPV) analysis prior to drawing any legislative districts. Hereinafter, NCLCV plaintiffs, Harper plaintiffs, and Common Cause are collectively referred to as "plaintiffs."

Legislative Defendants filed their answers on 17 December 2021, and the parties then engaged in an "expedited" two-and-one-half-week discovery period culminating in rulings on over ten discovery-related motions, designation of ten expert witnesses, and submission of over 1000 pages of expert reports and rebuttal materials. After the discovery period closed on 31 December 2021, the three-judge panel commenced a three-and-one-half-day trial on 3 January 2022 during which it received approximately 1000 exhibits into evidence and testimony from numerous fact and expert witnesses.

On 11 January 2022, the three-judge panel entered a judgment (11 January 2022 Judgment) concluding that plaintiffs' partisan gerrymandering claims presented nonjusticiable, political questions because redistricting "is one of the purest political questions which the legislature alone is allowed to answer." The three-judge panel reached this conclusion because "satisfactory and manageable criteria or standards do not exist for judicial determination" of partisan gerrymandering claims. Specifically, the three-judge panel noted that this Court already addressed the justiciability of similar claims based on North Carolina's Declaration of Rights in *Dickson v. Rucho* and concluded there was no manageable standard to assess such claims:

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

> of constitutionality," *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam) (citation omitted), plaintiffs' claims fail.

(Quoting *Dickson v. Rucho* (*Dickson I*), 367 N.C. 542, 575, 766 S.E.2d 238, 260 (2014), *vacated on federal grounds*, 137 S. Ct. 2186 (2017) (mem.) (emphasis added).) As a result, the three-judge panel concluded that "[w]ere we as a [c]ourt to insert ourselves in the manner requested, we would be usurping the political power and prerogatives of an equal branch of government. Once we embark on that slippery slope, there would be no corner of legislative or executive power that we could not reach."

Additionally, the three-judge panel concluded that the 2021 Plans did not violate the North Carolina Declaration of Rights because "[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." Finally, the three-judge panel considered NCLCV plaintiffs' and Common Cause's additional claims of racial vote dilution, racial discrimination, violation of the WCP, and request for a declaratory judgment. Specifically, the three-judge panel concluded that NCLCV plaintiffs and Common Cause "failed to satisfy" their burdens for both the racial vote dilution and racial discrimination claims under the equal protection clause and that the free elections clause is "inapplicable" to vote dilution claims. The three judge-panel then concluded that the evidence did not support NCLCV's WCP claim and that the North Carolina Constitution does not, as Common Cause alleged, require the General Assembly to undertake an RPV analysis prior to drawing legislative districts. Accordingly, the three-judge panel dismissed plaintiffs' claims with prejudice.

Pursuant to this Court's 8 December 2021 order certifying the case for review prior to determination by the Court of Appeals, all plaintiffs filed notices of appeal to this Court from the three-judge panel's 11 January 2022 Judgment. The case was argued before this Court on 2 February 2022. On 4 February 2022, in a four-to-three decision, this Court entered an order (Remedial Order) adopting the findings of fact from the 11 January 2022 Judgment but concluding that the 2021 Plans were "unconstitutional beyond a reasonable doubt under the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause of the North Carolina Constitution." The Remedial Order specifically enjoined the use of the 2021 Plans "in

any future elections." The Remedial Order also required that, in drawing new redistricting plans, the General Assembly must first conduct an RPV analysis. The Remedial Order remanded the matter to the three-judge panel for remedial proceedings and noted that a full opinion would follow. Three justices dissented to the Remedial Order.

B. *Harper I*

Ten days later, the four-justice majority issued its full opinion. *See Harper I*, 380 N.C. at 317, 404, 868 S.E.2d at 499, 558–60. The *Harper I* opinion first held that "partisan gerrymandering claims are justiciable in North Carolina courts under the . . . [North Carolina] Declaration of Rights" because the right to aggregate votes based on partisan affiliation is a fundamental right and there are "several manageable standards for evaluating the extent to which districting plans dilute votes on the basis of partisan affiliation." *Id.* at 390, 868 S.E.2d at 551. Specifically, the majority determined that various political science metrics could serve as a sufficient standard. *See id.* at 384–85, 868 S.E.2d at 547–48. It indicated that two tests in particular—the Mean-Median Difference and the Efficiency Gap—could demonstrate whether a redistricting map "is presumptively constitutional."[4] *See id.* at 386, 868 S.E.2d at 548. According to the *Harper I* majority, a 1% or less Mean-Median Difference score and a 7% or less Efficiency Gap score could serve as thresholds of constitutionality. *See id.*

Nevertheless, the *Harper I* majority refused to delineate a precise standard. *Id.* at 384, 868 S.E.2d at 547 ("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."). Instead, the majority insisted that the three-judge panel—and future trial courts adjudicating redistricting cases—would "work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation." *Id.* at 384, 868 S.E.2d at 547 (quoting *Reynolds v. Sims*, 377 U.S. 533, 578, 84 S. Ct. 1362, 1390 (1964)).

---

4. The Mean-Median Difference and Efficiency Gap tests are statistical metrics that purport to forecast partisan success under a particular redistricting plan in hypothetical, future elections. *See id.* at 385–87, 868 S.E.2d at 548–49. The Mean-Median Difference compares a party's mean vote share with its median vote share in each district and assumes that if the mean and median are equal, then the map contains no partisan skew. *See id.* at 386, 868 S.E.2d at 548. As explained in the filings before the three-judge panel, the Efficiency Gap purports to compare each political parties' "wasted votes." According to *Harper I*, a 7% Efficiency Gap score serves as a "workable . . . threshold" of constitutionality. *Id.*

The *Harper I* majority held that "[p]artisan 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" of the North Carolina Constitution. *Id.* at 383, 868 S.E.2d at 546. Specifically, the majority reasoned that these provisions reflect "the principle of political equality," *id.* at 382, 868 S.E.2d at 546, which in turn requires that "the channeling of 'political power' from the people to their representatives in government through the democratic processes . . . must be done on equal terms," *id.* at 382, 868 S.E.2d at 546. Accordingly, the majority concluded that to comport with these provisions in the Declaration of Rights, "the General Assembly must not diminish or dilute on the basis of partisan affiliation any individual's vote" because "[t]he fundamental right to vote includes the right to enjoy 'substantially equal voting power and substantially equal legislative representation.' " *Id.* at 383, 868 S.E.2d at 546 (quoting *Stephenson v. Bartlett* (*Stephenson I*), 355 N.C. 354, 382, 562 S.E.2d 377, 396 (2002)). In turn, the majority concluded that "[t]he 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." *Id.* Thus, ironically, the *Harper I* majority held that the constitution requires consideration of partisanship to remedy the perceived use of partisanship.

The majority determined that because "[t]he right to vote on equal terms is a fundamental right in this state," strict scrutiny must apply once a party demonstrates that a redistricting plan "infringes upon his or her fundamental right to substantially equal voting power" based on partisan affiliation. *Id.* at 392–93, 868 S.E.2d at 553. The majority held that to trigger strict scrutiny a party must demonstrate that a redistricting plan "makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters." *Id.* at 392, 868 S.E.2d at 552. A party may make this demonstration using a variety of political science-based tests such as

> 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.

Id. at 392, 868 S.E.2d at 552–53. Once a party makes this initial demonstration, the challenged redistricting plan is "unconstitutional [unless] the State [can] establish that it is narrowly tailored to advance a compelling governmental interest." *Id.* at 393, 868 S.E.2d at 553 (quoting *Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393). The majority opined that "compliance with traditional neutral districting principles, including those enumerated in [the WCP] of the North Carolina Constitution," might "constitute a compelling governmental interest" that would overcome strict scrutiny, but "[p]artisan advantage" does not. *Id.* at 393, 868 S.E.2d at 553.

The majority then applied these ideas to the three-judge panel's factual findings and determined that the evidence at trial demonstrated that all of the 2021 Plans were partisan gerrymanders. *Id.* at 391–92, 868 S.E.2d at 552. The majority then applied strict scrutiny to each map and concluded that the 2021 Plans were not "carefully calibrated toward advancing some compelling neutral priority." *Id.* at 396, 398, 401, 868 S.E.2d at 555, 556, 558.

The three dissenting justices concluded that plaintiffs' claims were non-justiciable. *See id.* at 413–34, 868 S.E.2d at 566–78 (Newby, C.J., dissenting). The dissent noted that our state constitution expressly assigns the redistricting responsibility to the General Assembly and that the majority failed to identify a judicially discernable, manageable standard by which to adjudicate the partisan gerrymandering claims at issue. *Id.* at 424, 868 S.E.2d at 572.

C. Remedial Process

1. Three-Judge Panel's Initial Orders

On remand, this Court's 4 February 2022 Remedial Order required the General Assembly to submit new congressional and state legislative redistricting plans "that satisfy all provisions of the North Carolina Constitution" by 18 February 2022. The Remedial Order also permitted plaintiffs to submit proposed remedial districting plans by the same deadline and allowed all parties to file comments on any of the submitted plans by 21 February 2022. The Remedial Order mandated that the

three-judge panel "approve or adopt compliant congressional and state legislative districting plans no later than noon on 23 February 2022."

In an 8 February 2022 order, the three-judge panel informed the parties of its intent to appoint Special Masters to assist in reviewing the parties' proposed remedial plans and, if needed, in developing alternative remedial plans. Pursuant to the three-judge panel's order, each party submitted suggested individuals to serve as Special Masters, but the three-judge panel appointed three other individuals of its own choosing—former jurists Robert F. Orr, Robert H. Edmunds, Jr., and Thomas W. Ross.

The three-judge panel authorized the Special Masters to hire advisors "reasonably necessary to facilitate their work." The Special Masters hired four advisors to assist in evaluating the General Assembly's new remedial redistricting plans: Dr. Bernard Grofman, Dr. Tyler Jarvis, Dr. Eric McGhee, and Dr. Samuel Wang.

2. The General Assembly's Remedial Process

The General Assembly understood *Harper I* as requiring it "to intentionally create more Democratic districts in the [Remedial Plans]." To accomplish this task, the General Assembly started with a blank slate and followed the same process to create each map. Each redistricting committee kept the county groupings used for the 2021 Plans as base maps. Accordingly, any single district county groupings from each of the 2021 Plans were carried over to the Remedial Plans, but otherwise, each map was entirely new.

Next, each redistricting committee "dr[e]w new districts and ma[d]e adjustments tailored to legitimate criteria." To do so, the General Assembly chose to utilize Caliper's Maptitude redistricting software, a "widely accepted districting program." Although expressly prohibited by its previous redistricting criteria and the court-ordered criteria from *Common Cause v. Lewis*, the General Assembly "used partisan election data as directed by the Supreme Court's Remedial Order" to achieve its goal of "intentionally creat[ing] more Democratic districts." Specifically, the General Assembly chose to utilize partisan data from the set of twelve statewide elections that plaintiffs' expert, Dr. Mattingly, used to analyze the 2021 Plans (Mattingly Election Set).

After Maptitude produced an initial set of House, Senate, and congressional maps, the General Assembly analyzed the partisan fairness of each map using two political science metrics—the Mean-Median Difference and the Efficiency Gap. The General Assembly chose these

two metrics because "they have been peer-reviewed in numerous articles by numerous scholars, and because there is some (but not uniform) agreement among scholars regarding thresholds for measuring partisanship." Additionally, the General Assembly selected these metrics because the *Harper I* majority identified them as two of the "multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander." *Harper I*, 380 N.C. at 384, 868 S.E.2d at 547 (majority opinion). For each of these metrics, the General Assembly selected threshold scores that, if achieved, would indicate that the relevant map contained an acceptable level of partisan fairness under *Harper I*. Specifically, the General Assembly selected a 1% threshold score for the Mean-Median Difference metric and a 7% threshold score for the Efficiency Gap metric.

The General Assembly selected these threshold scores based on general agreement among political scientists that a redistricting plan with a Mean-Median Difference less than 1% and an Efficiency Gap less than 7% is "presumptively constitutional." Additionally, the General Assembly selected these threshold scores because the *Harper I* majority opined that they were "possible bright-line standards" that could indicate a presumptively constitutional level of partisanship:

> [U]sing 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* [*v. Rucho*], 318 F. Supp. 3d [777,] 893 [(M.D.N.C. 2018)]. 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.
>
> 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.

Id. at 385, 386, 868 S.E.2d at 548.

After selecting its political science metrics and corresponding threshold scores, the General Assembly then adjusted each of the Remedial Plans until their Mean-Median Difference and Efficiency Gap scores were at or below the selected thresholds. Along with prioritizing the creation of more "purportedly Democratic leaning districts" and ensuring the Remedial Plans scored well on the selected metrics, the General Assembly also focused on the "neutral and traditional redistricting criteria" used in creating the 2021 Plans unless those criteria conflicted with *Harper I*.

After drawing their respective plans, each chamber presented its plan to the relevant redistricting committee. The General Assembly enacted the Remedial Plans on 17 February 2022 and submitted them to the three-judge panel on 18 February 2022. Plaintiffs then offered comments and objections to the Remedial Plans. The Special Masters transmitted a report on the Remedial Plans that was based primarily on four reports written by the advisors. Notably, in crafting their reports, none of the advisors used the General Assembly's chosen redistricting program, Maptitude, nor did they use the General Assembly's chosen Mattingly Election Set. Instead, each advisor used his own preferred data and methods.

The Special Masters' Report found that the Remedial House Plan (RHP) and Remedial Senate Plan (RSP) met the requirements of *Harper I*, but that the Remedial Congressional Plan (RCP) did not. Because the Special Masters concluded that the RCP was unconstitutional, they developed and submitted an alternative plan (Interim Congressional Plan) in consultation with one of the advisors, Dr. Bernard Grofman, for the three-judge panel to consider.

In reviewing the Remedial Plans, the three-judge panel "adopt[ed] in full the findings of the Special Masters." Like the Special Masters, the three-judge panel concluded that the RHP and RSP complied with the requirements of *Harper I* but that the RCP was "not presumptively constitutional," was "subject to strict scrutiny," and was not "narrowly tailored to a compelling governmental interest." Accordingly, the three-judge panel concluded that the RCP was unconstitutional. To support its conclusion, the three-judge panel relied primarily on "the analysis performed by the Special Masters and their advisors" and its conclusion that the RHP and RSP scored below the relevant thresholds for the Mean-Median Difference and Efficiency Gap metrics, but the RCP did not. The three-judge panel did not point to any other evidence regarding the purported level of partisan bias in the Remedial Plans. Finally, because the three-judge panel rejected the General Assembly's

RCP, it adopted the Interim Congressional Plan recommended by the Special Masters.

Following the three-judge panel's remedial order, all parties appealed to this Court. The parties petitioned this Court to stay the three-judge panel's remedial ruling, but this Court denied those petitions. Accordingly, the RSP, RHP, and Interim Congressional Plan were used in the 2022 elections.

D. *Harper II*

In June 2022, Common Cause filed a motion for expedited hearing and consideration of the three-judge panel's remedial order. On 13 July 2022, Legislative Defendants moved to dismiss their appeal of the three-judge panel's rejection of the RCP because the Interim Congressional Plan "ordered by [the three-judge panel] is only applicable to the 2022 election, and that map will apply to the 2022 election regardless of" this Court's holding on the three-judge panel's remedial order. Legislative Defs.' Mot. to Dismiss Appeal 3, *Harper v. Hall*, 380 N.C. 317 (2022) (No. 413PA21-1). Accordingly, Legislative Defendants sought to dismiss their appeal "in an effort to avoid further cost and confusion to the taxpayers and voters of North Carolina." *Id.*

In July 2022, the same four-justice majority from *Harper I* granted Common Cause's motion for expedited hearing and consideration and set oral argument for October 2022. *Harper v. Hall*, 382 N.C. 314, 315–16, 874 S.E.2d 902, 904 (2022) (order allowing motion to expedite hearing and consideration). Notably, in the same order, the Court expressly declined to address Legislative Defendants' motion to dismiss their appeal. *Id.* at 316, 874 S.E.2d at 904. The three dissenting justices from *Harper I* dissented from this order. *Id.* at 317–24, 874 S.E.2d at 904–09 (Barringer, J., dissenting) (noting that no jurisprudential reason existed to expedite consideration of the appeal).

Ultimately, the same four-justice majority from *Harper I* affirmed the three-judge panel's rejection of the RCP and its approval of the RHP and reversed the three-judge panel's approval of the RSP.[5] *Harper II*, 383 N.C. at 94, 881 S.E.2d at 162. First, the majority attempted "to clarify and reaffirm" its "constitutional standard" from *Harper I*. *Id.* at 114, 881 S.E.2d at 174. In *Harper I* the majority stated that "some combination" of political science metrics could demonstrate that "there is a significant

5. The four-justice majority issued its *Harper II* opinion on 16 December 2022 when it knew that two members of its majority would complete their terms on this Court just fifteen days later.

likelihood" that a redistricting plan "is presumptively constitutional." 380 N.C. at 384–85, 868 S.E.2d at 547–48. Specifically, the majority opined that a 1% Mean-Median Difference and a 7% Efficiency Gap could serve as "possible bright-line standards" for identifying a plan that "will give the voters of all political parties substantially equal opportunity to translate votes into seats." *Id.* at 385, 868 S.E.2d at 548.

In *Harper II*, however, the same majority reversed course and declared that no combination of political science tests or analysis could adequately identify a redistricting plan that meets their standard:

> Constitutional compliance is not grounded in narrow statistical measures, but in broad fundamental rights. Therefore, a trial court reviewing the constitutionality of a challenged proposed districting plan must assess whether that plan upholds the fundamental right of the people to vote on equal terms and 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." Put differently, it requires that "voters of all political parties [have] substantially equal opportunity to translate votes into seats.". . .
>
> Although *Harper* [*I*] mentions several potential datapoints that may be used in assessing the constitutionality of a proposed districting plan, those measures are not substitutes for the ultimate constitutional standard noted above. That is, a trial court may not simply find that a districting plan meets certain factual, statistical measures and therefore dispositively, legally conclude *based on those measures alone* that the plan is constitutionally compliant. Constitutional compliance has no magic number. Rather, the trial court may consider certain datapoints within its wider consideration of the ultimate legal conclusion: whether the plan upholds the fundamental right of the people to vote on equal terms and to substantially equal voting power.

Harper II, 383 N.C. at 114, 881 S.E.2d at 174 (first alteration in original) (citations omitted). The majority insisted that it could not delineate a particular set of metrics that would identify a constitutional redistricting

map "because our constitution speaks in broad foundational principles, not narrow statistical calculations." *Id.* at 115, 881 S.E.2d at 174.

As a result, the majority implied that the three-judge panel relied too heavily on its findings regarding the Mean-Median Difference and Efficiency Gap in reaching its ultimate legal conclusions and then "encourage[d] future trial courts . . . to specify how the evidence does or does not support the plan's alignment with the broader constitutional standard of upholding the fundamental right to vote on equal terms." *Id.* at 116, 881 S.E.2d at 175. The majority, however, provided no guidance regarding what sorts of concrete evidence might assist future trial courts in this endeavor, nor did the majority explain how to recognize and weigh it.

The *Harper II* majority then reviewed the three-judge panel's findings of fact and conclusions of law for each of the Remedial Plans. First, the majority affirmed the three-judge panel's rejection of the RCP and adoption of the Interim Congressional Plan, holding that the three-judge panel's conclusions of law were supported by the relevant findings of fact, which were in turn supported by competent evidence. *Id.* at 116–19, 881 S.E.2d at 175–77. Similarly, the majority then affirmed the three-judge panel's approval of the RHP, determining that the panel's conclusions of law were supported by the relevant findings of fact, which were in turn supported by competent evidence. *Id.* at 119–20, 881 S.E.2d at 177–78.

Lastly, the majority reversed the three-judge panel's approval of the RSP because, "unlike for the RHP," the pertinent conclusions of law were not supported by the relevant findings of fact, and some "findings of fact regarding the RSP . . . [we]re unsupported by competent evidence." *Id.* at 120–21, 881 S.E.2d at 178. As the dissent noted, however, this result was puzzling because on remand, the General Assembly "made the exact same policy choices and followed the exact same redrawing process for the RSP as it did for the RHP"; "the Special Masters made almost identical findings regarding the RHP and the RSP"; and the three-judge-panel made "specific findings regarding the RSP and RHP [that] were nearly identical." *Id.* at 150, 881 S.E.2d at 195–96 (Newby, C.J., dissenting). The dissent highlighted how this conflicting result, along with other contradictions throughout the *Harper II* opinion, demonstrated that the *Harper I* principles are not grounded in a judicially discoverable and manageable standard. *See id.* at 169–70, 881 S.E.2d at 208. The dissent concluded that in both *Harper I* and *Harper II*, the majority "intentionally stat[ed] vague standards" so that it could remain entrenched in the General Assembly's redistricting process and enthrone itself as the final

authority over which plans will be used in North Carolina elections. *Id.* at 128, 881 S.E.2d at 183.

E. Legislative Defendants' Petition for Rehearing

This Court filed its *Harper II* opinion on 16 December 2022, and the mandate issued on 5 January 2023. On 20 January 2023, Legislative Defendants timely filed a petition for rehearing under Rule 31 of the North Carolina Rules of Appellate Procedure. Legislative Defs.' Pet. for Reh'g, *Harper v. Hall*, 383 N.C. 89 (2022) (No. 413PA21). Specifically, Legislative Defendants asked this Court to rehear *Harper II* because it confirms, *inter alia*, that the standards set forth in both *Harper I* and *Harper II* are unmanageable. As a result, Legislative Defendants requested that this Court, in rehearing *Harper II* also revisit *Harper I* and the issue of whether partisan gerrymandering claims are justiciable under the North Carolina Constitution. This Court granted the petition for rehearing on 3 February 2023. *Harper v. Hall*, 384 N.C. 1, 2–4, 882 S.E.2d 548, 549–50 (2023) (order granting Legislative Defendants' petition for rehearing).

II. *Rucho v. Common Cause*

We begin our analysis with the Supreme Court of the United States' insightful and persuasive opinion in *Rucho v. Common Cause*. In that case the Supreme Court considered claims that "excessive" partisan gerrymandering violated various provisions of the Federal Constitution. *Rucho*, 139 S. Ct. at 2491. There some of the same plaintiffs in this case challenged North Carolina's congressional redistricting map and brought similar claims to those presented here. Specifically, the *Rucho* plaintiffs alleged that the challenged plan violated the Equal Protection Clause of the Fourteenth Amendment by "intentionally diluting the electoral strength of Democratic voters," violated their rights to free speech and freedom of association guaranteed under the First Amendment, exceeded the state legislature's delegated authority to prescribe the "Times, Places and Manner of holding Elections," U.S. Const. art. I, § 4, cl. 1, and "usurped the right of 'the People' to elect their preferred candidates for Congress, in violation of the requirement in Article I, § 2, of the Constitution that Members of the House of Representatives be chosen 'by the People of the several States.' "[6] *Id.* at 2492. Accordingly,

---

6. In this case plaintiffs make very similar claims under parallel provisions of our state constitution—Article I, Section 19 (equal protection), Article I, Section 12 (freedom of assembly), Article I, Section 14 (freedom of speech), and Article I, Section 10 (free elections). *Harper I*, 380 N.C. at 329–31, 868 S.E.2d at 513–14. Common Cause, for example, asserts that partisan gerrymandering violates our equal protection clause by

the Supreme Court was tasked with deciding whether partisan gerrymandering claims are " 'justiciable'—that is, properly suited for resolution by the federal courts." *Id.* at 2491. Ultimately, the Supreme Court held that partisan gerrymandering claims present nonjusticiable, political questions. *Id.* at 2506–07.

The Supreme Court first considered the historical background of partisan gerrymandering during the formation of our country. *Id.* at 2494–96. The Supreme Court noted that partisan gerrymandering existed at the time of our nation's founding and that the framers of our Constitution affirmatively considered how to address it. *Id.* at 2494. The framers "settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress." *Id.* at 2496. Specifically, the framers "addressed the election of Representatives to Congress in the Elections Clause," which "assigns to state legislatures the power to prescribe the 'Times, Places and Manner of holding Elections' for Members of Congress, while giving Congress the power to 'make or alter' any such regulations." *Id.* at 2495. "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 2496. The framers could have limited partisan gerrymandering in the Constitution or assigned federal courts a role in policing it, but they did not. As a result, the Supreme 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," that is, to state legislatures and to Congress. *Id.* at 2497.

The Supreme Court distinguished partisan gerrymandering claims from other types of redistricting claims that courts have historically adjudicated: "In two areas—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. The Court noted, however, that "[p]artisan gerrymandering claims have proved far more difficult to adjudicate" than other types of redistricting issues because "while it is illegal for a jurisdiction to depart from the one-person, one-vote rule,

---

"diminish[ing] the electoral power" of members of the Democratic Party, violates Article I, Sections 12 and 14 by burdening Democratic voters' rights to freedom of speech and freedom to "associate effectively" with the Democratic Party, and violates the free elections clause by preventing elections from reflecting the "will of the people." *See* Verified Compl. for Declaratory J. and Injunctive Relief ¶¶ 189, 200, 180, 184, *Harper v. Hall*, No. 21 CVS 015426, 2021 WL 6884973 (N.C. Super. Ct. Wake County Dec. 16, 2021).

or to engage in racial discrimination in districting, 'a jurisdiction may engage in constitutional political gerrymandering.' " *Id.* at 2497 (quoting *Hunt v. Cromartie*,[7] 526 U.S. 541, 551, 119 S. Ct. 1545, 1551 (1999)). Because some level of partisan gerrymandering is constitutional, "[t]he 'central problem' " with such claims is not determining whether a jurisdiction has engaged in any partisan gerrymandering, which is a simple, yes-or-no delineation. *Id.* (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 296, 124 S. Ct. 1769, 1787 (2004) (plurality opinion)). Rather, the problem with partisan gerrymandering claims is "determining when political gerrymandering has gone too far." *Id.* (quoting *Vieth*, 541 U.S. at 296, 124 S. Ct. at 1787). That sort of question requires more than a yes-or-no answer. Instead, it requires "a standard for deciding how much partisan dominance is too much." *Id.* at 2498 (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 420, 126 S. Ct. 2594, 2611 (2006) (opinion of Kennedy, J.)).

Because of this inherent difficulty, the Supreme Court stressed that if a standard for resolving such claims exists, it "must be grounded in a 'limited and precise rationale' and be 'clear, manageable, and politically neutral.' " *Id.* (quoting *Vieth*, 541 U.S. at 306–08, 124 S. Ct. at 1793 (Kennedy, J., concurring in the judgment)). Precise constraints on judicial review of partisan gerrymandering claims are necessary because

> "[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* [*v. Cummings*], 412 U.S. [735,] 749, 93 S.Ct. 2321 [(1973)] (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.).

---

7. In *Hunt v. Cromartie*, the Supreme Court addressed a redistricting challenge arising from North Carolina. *See Cromartie*, 526 U.S. at 543, 119 S. Ct. at 1547.

Id. (first alteration in original). Accordingly, the Supreme Court concluded that federal courts could "inject [themselves] into [such] heated partisan issues" only if a standard existed "that c[ould] reliably differentiate unconstitutional from 'constitutional political gerrymandering.' " *Id.* at 2499 (first quoting *Bandemer*, 478 U.S. at 145, 106 S. Ct. at 2817 (O'Connor, J., concurring in the judgment); and then quoting *Cromartie*, 526 U.S. at 551, 119 S. Ct. at 1551).

The Supreme Court then examined whether it could locate such a standard in the Federal Constitution. The Court explained that partisan gerrymandering claims are effectively requests for courts to allocate political power to achieve proportional representation, something that the Federal Constitution does not require:

> 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.").

Id. at 2499. Accordingly, partisan gerrymandering claims do not seek to redress a violation of any particular constitutional provisions; rather, such claims "ask the courts to make *their own political judgment* about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end." *Id.* (first emphasis added). Essentially, partisan gerrymandering claims ask courts to "apportion political power as a matter of fairness." *Id.* This judgment call is a policy choice. It is not the kind of "clear, manageable, and politically neutral" standard required for justiciable issues. *Id.* at 2498 (quoting *Vieth*, 541 U.S. at 306–08, 124 S. Ct. at 1793 (Kennedy, J., concurring in the judgment)); *see also Vieth*, 541 U.S.

at 291, 124 S. Ct. at 1784 (plurality opinion) (" '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.").

The Court elaborated that settling on a clear, manageable, and politically neutral test for "fairness" is extremely difficult because "it is not even clear what fairness looks like in this context." *Rucho*, 139 S. Ct. at 2500. Fairness could mean increasing the number of competitive districts, in which case the appropriate test would need to accurately identify and "undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates." *Id.* This definition of fairness, however, could backfire because "[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature." *Id.* (alterations in original) (quoting *Bandemer*, 478 U.S. at 130, 106 S. Ct. at 2809).

Alternatively, fairness might be measured by the number of "safe seats" each party receives, in which case the appropriate test would actually require packing and cracking in the redistricting process to ensure each party wins "its 'appropriate' share of 'safe' seats." *Id.* (citing *Bandemer*, 478 U.S. at 130–31, 106 S. Ct. at 2809). This approach, however, reduces the number of competitive districts and produces what would seem to be an "unfair" result for "individuals in districts allocated to the opposing party." *Id.*

Thus, the Supreme Court concluded that

> [d]eciding among just these different visions of fairness . . . poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts.

Id. (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 196, 132 S. Ct. 1421, 1427 (2012)).

Next, the Supreme Court concluded that, unlike one-person, one-vote claims, the Federal Constitution is also devoid of any objective, mathematical metric for measuring political fairness:

> 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 2051.

The Court noted that it is possible for a constitution to provide the explicit guidance necessary to adjudicate partisan gerrymandering claims and pointed to several state constitutions and state statutes that expressly do so. *Id.* at 2507–08. By contrast, the Federal Constitution contains no such provision.

Finding no manageable standard in the Federal Constitution, the Supreme Court then turned to the political science-based tests proposed by the *Rucho* plaintiffs. *Id.* at 2503–04. The Supreme Court found these were insufficient as well because they are not effective at predicting future election results:

> The [plaintiff]s 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. (citations omitted).

In conclusion, the Supreme Court held that partisan gerrymandering claims are nonjusticiable because there is "no plausible grant of authority in the Constitution and no legal standards to limit and direct [courts'] decisions." *Id.* at 2507. In the final words of the opinion, the Supreme Court warned that adjudication of partisan gerrymandering claims would constitute "an unprecedented expansion of judicial power," adding that:

> We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be

> unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. 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.

In *Rucho* the Supreme Court considered partisan gerrymandering claims under the Federal Constitution, but the arguments it addressed are similar to those raised here. While the current claims allege that partisan gerrymandering violates our state constitution, we find the reasoning of the Supreme Court in *Rucho* persuasive because the same arguments, concerns, and predictions have arisen here. Thus, we now turn our analysis to reviewing the applicable fundamental principles under our state constitution.

III. Fundamental Principles

A. Separation of Powers

The separation-of-powers clause is located within the Declaration of Rights of Article I of our constitution. The Declaration of Rights is an expressive yet non-exhaustive list of protections afforded to citizens against government intrusion, along with "the ideological premises that underlie the structure of government." John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 46 (2d ed. 2013) [hereinafter *State Constitution*]. "The abstractness of the Declaration of Rights has allowed most of it to survive" in our current constitution. *Id.* at 6. The placement of the separation-of-powers clause in the Declaration of Rights suggests that keeping each branch within its described spheres protects the people by limiting overall governmental power. The clause does not establish the various powers but simply states that the powers of the branches are "separate and distinct." N.C. Const. art. I, § 6. The constitutional text develops the nature of those powers. *State Constitution* 46 ("Basic principles, such as popular sovereignty and separation of powers, are first set out in general terms, to be given specific application in later articles."). Thus, the separation-of-powers clause "is to be considered as a general statement of a broad, albeit fundamental, constitutional principle," *State v. Furmage*, 250 N.C. 616, 627, 109 S.E.2d 563, 571 (1959), and must be considered with the related, more specific provisions of the constitution that outline the practical workings for

governance, *see* N.C. Const. art. II (providing the framework for legislative power); *id.* art. III (providing the framework for executive power); *id.* art. IV (providing the framework for judicial power). "Nowhere was it stated that the three powers or branches had to be equal. In fact, although the balance occasionally shifted, the preponderant power has always rested with the legislature." *State Constitution* 50.

Given that "a constitution cannot violate itself," *Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997), a branch's exercise of its express authority by definition comports with separation of powers. A violation of separation of powers only occurs when one branch of government exercises, or prevents the exercise of, a power reserved for another branch of government. *State ex rel. McCrory v. Berger*, 368 N.C. 633, 660, 781 S.E.2d 248, 265 (2016) (Newby, J., concurring in part and dissenting in part). Understanding the prescribed powers of each branch, as divided between the branches historically and by the text itself, is the basis for stability, accountability, and cooperation within state government. *See State v. Emery*, 224 N.C. 581, 584, 31 S.E.2d 858, 861 (1944) ("[Constitutions] should receive a consistent and uniform construction . . . even though circumstances may have so changed as to render a different construction desirable.").

Since 1776, our constitutions have recognized that all political power resides in the people, N.C. Const. art. I, § 2; N.C. Const. of 1868, art. I, § 2; N.C. Const. of 1776, Declaration of Rights, § I, and is exercised through their elected officials in the General Assembly, N.C. Const. art. II, § 1; N.C. Const. of 1868, art. II, § 1; N.C. Const. of 1776, § I; *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895). "The legislative power is vested in the General Assembly, so called because all the people are present there in the persons of their representatives." *State Constitution* 95. Accordingly, the General Assembly possesses plenary power as well as the responsibilities explicitly recognized in the text of the state constitution. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891–92 (1961). The structure of the bicameral legislative branch itself diffuses its power, *see Berger*, 368 N.C. at 653, 781 S.E.2d at 260–61 (Newby, J., concurring in part and dissenting in part), and the people themselves limit legislative power by express constitutional restrictions, *see Baker v. Martin*, 330 N.C. 331, 338–39, 410 S.E.2d 887, 891–92 (1991).

Most accountable to the people, *see* N.C. Const. art. II, §§ 3, 5, through the most frequent elections, *id.* art. II, §§ 2, 4, "[t]he legislative branch of government is without question 'the policy-making agency of our government. . . .' The General Assembly is the 'policy-making agency'

because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws," *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) (quoting *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956)); *see also Berger*, 368 N.C. at 653, 781 S.E.2d at 261 (Newby, J., concurring in part and dissenting in part) ("The diversity within the [legislative] branch . . . ensures healthy review and significant debate of each proposed statute, the enactment of which frequently reaches final form through compromise."). The constitutional text provides various express checks on legislative power. *See, e.g.*, N.C. Const. art. II, § 11 ("Neither house shall proceed upon public business unless a majority of all of its members are actually present."); *id.* art. II, § 22 (providing that, with certain exceptions, all bills shall be subject to the Governor's veto); *id.* art. II, § 24 (prohibiting the General Assembly from enacting various types of "local, private, or special act[s] or resolution[s]").

B. Standard of Review

[1] Unlike the United States Constitution, the North Carolina Constitution "is in no matter a grant of power." *McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891 (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," it has the presumptive power to act, *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989), and possesses plenary power along with the responsibilities explicitly recognized in the constitution, *McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891–92. The General Assembly's textual and plenary power is limited only by the express text of the constitution. *Baker*, 330 N.C. at 338–39, 410 S.E.2d at 891–92.

Therefore, the idea of the judiciary "preventing . . . the legislature, through which the people act, from exercising its power is the most serious of judicial considerations." *Berger*, 368 N.C. at 650, 781 S.E.2d at 259 (Newby, J., concurring in part and dissenting in part). Accordingly, this Court presumes that legislation is constitutional. *Id.* at 639, 781 S.E.2d at 252 (majority opinion). A constitutional limitation upon the General Assembly must be explicit and a violation of that limitation must be proved beyond a reasonable doubt. *Id.* at 639, 781 S.E.2d at 252. A statute cannot abrogate an express provision of the constitution because the constitution represents the fundamental law and the express will of the people. *Bayard*, 1 N.C. (Mart.) at 7. The judiciary performs this

role of judicial review by determining whether a law conflicts with an express provision of the constitution. *See id.* at 6.

When this Court looks for constitutional limitations on the General Assembly's authority, it looks to the plain text of the constitution just as it would look to the plain text of a statute. *State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 510 (2004). Thus, a claim that a law is unconstitutional must surmount the high bar imposed by the presumption of constitutionality and meet the highest quantum of proof, a showing that the statute is unconstitutional beyond a reasonable doubt.[8] *Baker*, 330 N.C. at 334–37, 410 S.E.2d at 8–89–90.

A proper application of this standard of review is illustrated by the landmark case of *Bayard v. Singleton*, the first reported case of judicial review in the nation. *Bayard* involved judicial review of a statute that conflicted with an express provision of the 1776 Declaration of Rights. 1 N.C. (Mart.) at 5. In 1785 the General Assembly enacted a law that abolished the right to a trial by jury for certain property disputes. *Id.* At that time, however, the Declaration of Rights expressly provided for a right to a trial by jury "in all Controversies at Law respecting property." N.C. Const. of 1776, Declaration of Rights, § XIV.

The Court in *Bayard* held that the act was unequivocally unconstitutional and void because it directly conflicted with a clear and express provision of the constitution. *Bayard*, 1 N.C. (Mart.) at 7. The Court reasoned that the General Assembly could not "repeal or alter" an express provision of the constitution by statute because the constitution represents the fundamental law and the express will of the people. *Id.* If the General Assembly could violate the constitution in this manner, it could defy the express will of the people who are the source of all political power. *Id.*; *see* N.C. Const. art. I, § 2. Thus, this Court declared the statute at issue unconstitutional. *Bayard*, 1 N.C. (Mart.) at 7.

This Court, however, did not lightly take on the role of declaring an act of the General Assembly unconstitutional. The Court noted that it felt "great reluctance" in involving itself "in a dispute with the Legislature" and took "every reasonable endeavor" to avoid "a disagreeable difference between" the two branches. *Id.* at 6. But in this instance, the Court determined that it had to declare the act void because the constitution

---

8. The majority in *Harper I* and *Harper II* and the dissent here largely ignore the well-established standard of review that our courts apply when reviewing the constitutionality of a statute. Notably, courts apply different standards of review when adjudicating other matters that do not involve the constitutionality of a statute.

was explicit: "That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury." *Id.* at 7. Accordingly, the holding of *Bayard* is clear: the judiciary performs the role of judicial review, but it only declares an act of the General Assembly void when it directly conflicts with an express provision of the constitution.

Thus, plainly stated and as applied to this case, the standard of review asks whether the redistricting plans drawn by the General Assembly, which are presumed constitutional, violate an express provision of the constitution beyond a reasonable doubt. When we cannot locate an express, textual limitation on the legislature, the issue at hand may involve a political question that is better suited for resolution by the policymaking branch. As "essentially a function of the separation of powers," the political question doctrine operates to check the judiciary and prevent its encroaching on the other branches' authority. *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962). Under this doctrine, courts must refuse to review political questions, that is, issues that are better suited for the political branches. Such issues are considered nonjusticiable.

> 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, 82 S. Ct. at 710; *see also Bacon v. Lee*, 353 N.C. 696, 716–17, 549 S.E.2d 840, 854 (2001). Accordingly, out of respect for separation of powers, a court must refrain from adjudicating a claim when any one of the following is present: (1) a textually demonstrable commitment of the matter to another branch; (2) a lack of judicially discoverable and manageable standards; or (3) the impossibility of deciding a case without making a policy determination of a kind clearly suited for nonjudicial discretion. All three of these factors are present here.

IV. Political Question

[2] The claims and arguments at issue in this case are the same as those in *Rucho*, only this time they arise under the state constitution instead of the Federal Constitution. The Declaration of Rights provisions invoked by plaintiffs in this case—the free elections clause, the equal protection clause, and the freedom of speech and assembly clauses, N.C. Const. art. I, §§ 10, 12, 14, 19,—are our state constitution's counterparts to the Federal Constitutional provisions invoked in *Rucho*—Article I, Section 4 (Elections Clause); Article I, Section 2 (composition of the U.S. House of Representatives); the Equal Protection Clause of the Fourteenth Amendment; and the First Amendment, which protects the rights to free speech and freedom of association, *see Rucho*, 139 S. Ct. at 2491. The dissent in *Harper I* explained in great detail that, due to the striking similarities between this case and *Rucho*, we should have followed the Supreme Court's guidance and declared plaintiffs' claims nonjusticiable. *See Harper I*, 380 N.C. at 414–24, 868 S.E.2d at 566–72 (Newby, C.J., dissenting). The dissent in *Harper II* reiterated that *Rucho* was persuasive precedent from our nation's highest court and illustrated how all of the justiciability pitfalls warned of in *Rucho* permeated the remedial proceedings in this case. *See Harper II*, 383 N.C. at 166–70, 881 S.E.2d at 206–08 (Newby, C.J., dissenting).

Four justices on this Court "misapprehended" the *Rucho* analysis in *Harper I*. *See* N.C. R. App. P. 31(a). The remedial proceedings at issue in *Harper II* confirm that those four justices were wrong to condemn *Rucho* as inapplicable to the case at hand. *See Harper II*, 383 N.C. at 144–66, 881 S.E.2d at 193–206; *Harper I*, 380 N.C. at 356–62, 868 S.E.2d at 529–33 (majority opinion). Today we correct that error. Under the North Carolina Constitution, redistricting is explicitly and exclusively committed to the General Assembly by the text of the constitution. The executive branch has no role in the redistricting process, and the role of the judicial branch is limited by the principles of judicial review. Moreover, like the Federal Constitution, our constitution does not provide any judicially discernible or manageable standards for determining how much partisan gerrymandering is too much. *See Rucho*, 139 S. Ct. at 2500. Any attempt to adjudicate such claims forces this Court to make numerous policy determinations for which there is no constitutional guidance. We are not authorized or equipped to make these determinations. For all of these reasons, we hold that claims of partisan gerrymandering are nonjusticiable, political questions under the North Carolina Constitution.

A. Textual Commitment

One prominent characteristic of a political question is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (quoting *Baker*, 369 U.S. at 217, 82 S. Ct. at 710). The text of our state constitution, as well as that of the Federal Constitution, expressly assigns the task of redistricting[9] to the General Assembly. Reviewing the historical context of our redistricting and elections process is necessary to properly understand that our state constitution has committed the issue of redistricting to the General Assembly for hundreds of years.

North Carolina has had some form of elected, representative body since 1665. As early as 1663, the Lords Proprietors could enact laws in consultation with the freemen 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* 20–23 (William L. Sanders ed., 1886) [hereinafter 1 *Colonial and State Records*]. In 1665 certain "concessions" by the Lords Proprietors allowed for the formation of the predecessor to the General Assembly and the election of freemen representatives. Concessions and Agreement Between the Lords Proprietors of Carolina and William Yeamans, et al. (Jan. 7, 1665), in 1 *Colonial and State Records* 79–81. The 1669 Fundamental Constitutions of Carolina apportioned those representatives into counties and the counties into precincts. The Fundamental Constitutions of Carolina (Mar. 1, 1669), in 1 *Colonial and State Records* 188. The assembly met and stood for election every two years. *Id.* at 199–200. Thus, long before the 1776 constitution, the qualified voters in Carolina were electing their representatives in districts.

Leading up to the enactment of the 1776 constitution, in 1774 the delegates of the First Provincial Congress were elected by geographic location, either by town, which were also known as boroughs, or by county. *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, a gathering of the people through their elected representatives, 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. Representatives in the House of Commons were also elected annually, but each county received two representatives and certain enumerated

9. "Districting" and "redistricting" are sometimes referred to as "apportionment" and "reapportionment."

towns received one as well. *Id.* § III. Only six towns were initially given separate representation in the House of Commons, *id.*, but other towns were later added. The 1776 constitution did not contain a specific provision regarding redistricting. Nonetheless, redistricting occurred through the creation of new counties—as part of its plenary power, the General Assembly established the boundaries of the counties from which Senators and Representatives were elected. *See, e.g.*, Act of Apr. 8, 1777, An Act for dividing Rowan County, and other Purposes therein mentioned, ch. XIX, 1777 N.C. Sess. Laws 33 (dividing Rowan County to carve out a new Burke County). Notably, the 1776 Declaration of Rights contained the free elections and freedom of assembly clauses. N.C. Const. of 1776, Declaration of Rights, §§ VI, XVIII.

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) [hereinafter *Constitutional History*]. Nonetheless, the eastern region received additional representation through the strategic creation and division of counties. *Id.* at 1770. The General Assembly created smaller counties in the east and larger ones in the piedmont and west, keeping the distribution of representatives in favor of the east despite population growth trends in other areas. *Id.* 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. *See id.* This malapportionment led to civil unrest and a crisis that culminated with the 1835 constitutional convention. *State Constitution* 3, 13. During that time, no one argued that the provisions of the Declaration of Rights or the 1776 constitution made the legislative apportionment acts unconstitutional. Rather, North Carolinians ultimately recognized the need to amend the text itself to address the apportionment problem.

In 1835 a constitutional convention met to, among other things, change the representative system to better address differences in population. *See id.* That convention resulted in amendments that provided for a total of fifty senators and 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. These amendments also included the predecessor of the WCP, *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.

The 1835 amendments provided for 120 House seats. *Id.* art. I, § 2. These amendments eliminated representation for the borough towns, *see generally id.*, instead allotting all 120 House seats to counties based

roughly on population, *id*. This framework allowed the more populated counties to have additional representatives, but each county was entitled to at least one representative. *Id*. These amendments alleviated the problem of disproportionate representation in the eastern counties. The General Assembly was instructed to reconsider the apportionment of the counties every twenty years and to base reapportionment on population according to the census taken by order of Congress. *Id*. art. I, § 3. 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.

Following the constitutional convention of 1868, the Senate became apportioned by population. N.C. Const. of 1868, art. II, § 5. Along with the express limitation imposed by the WCP, the 1868 amendments required senatorial districts to be contiguous and to be redrawn in connection with the decennial census. *Id*. Apportionment of House seats remained the same—allotted to counties based on population with each county given at least one representative. *Id*. art. II, § 6. 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. Previously, the General Assembly elected judges, N.C. Const. of 1776, § XIII, but now judges in North Carolina became directly accountable to the people through elections, N.C. Const. of 1868, art. IV, § 26.

For almost one hundred years, apportionment remained unchanged until the 1960s. At that time, the Speaker of the House received the authority to apportion House districts. N.C. Const. of 1868, amends. of 1961, art. II, § 5. Then, to comply with the federal 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 1967, art. II, § 5. By the end of the 1960s, the same criteria for proper districts—equal population, contiguous territory, the WCP, and reapportionment in conjunction with the decennial census—applied to both Senate and House districts. *See id*. art. II, §§ 4, 6.

The current version of our constitution, ratified by the people at the ballot box in 1970, took effect in 1971 and came about as a "good government measure." *State Constitution* 32. This 1971 constitution represented an attempt to modernize the 1868 constitution and its subsequent

amendments with editorial and organizational revisions and amendment proposals. *See*, *e.g.*, N.C. State Const. Study Comm'n, *Report of the North Carolina State Constitution Study Commission* 8–12 (1968). Today our constitution expressly assigns the legislative redistricting authority to the General Assembly subject to specific enumerated restraints:

> The Senators shall be elected from districts. The 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 senate districts and the apportionment of Senators among those districts, subject to the following requirements:
>
> (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.

N.C. Const. art. II, § 3. Article II, Section 5 establishes the same grant of authority and limitations for the state House of Representatives. Thus, while the constitution commits the redistricting responsibility to the General Assembly, it does not leave the General Assembly completely unrestrained. The constitution expressly requires that any redistricting plan conform to its explicit criteria.

Notably, there is no provision in the state constitution regarding redistricting of congressional districts. The Federal Constitution, however, commits 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. This provision makes clear that the redistricting power is expressly committed to the state legislative branch.

Additionally, both our constitution and the General Statutes expressly insulate the redistricting power from intrusion by the executive and judicial branches. The governor has no role in the redistricting process because the constitution explicitly exempts redistricting legislation from the governor's veto power.[10] N.C. Const. art. II, § 22(5)(b)–(d). Moreover, the General Statutes provide a limited role of judicial review for courts in reviewing redistricting plans. *See* N.C.G.S. §§ 120-2.3 to -2.4 (2021). The General Assembly enacted these statutory provisions in 2003 to clarify and codify the existing process by which courts already had been reviewing redistricting plans. Act of Nov. 25, 2003, An Act to Establish House Districts, Establish Senatorial Districts, and Make Changes to the Election Laws and to Other Laws Related to Redistricting, S.L. 2003-434, §§ 7–9, 2003 N.C. Sess. Laws (1st Extra Sess. 2003) 1313, 1415–16. The General Assembly drafted these statutes in response to this Court's decisions in *Stephenson I*, 355 N.C. 354, 562 S.E.2d 377, and *Stephenson v. Bartlett* (*Stephenson II*), 357 N.C. 301, 582 S.E.2d 247 (2003). This Court unanimously upheld these statutory provisions as proper limitations on the judiciary's role in the redistricting process in *Stephenson v. Bartlett* (*Stephenson III*), 358 N.C. 219, 230, 595 S.E.2d 112, 119–20 (2004) ("[R]edistricting is a legislative responsibility . . . . Not only do these statutes allow the General Assembly to exercise its proper responsibilities, they decrease the risk that the courts will encroach upon the responsibilities of the legislative branch.").

Section 1-267.1 requires that a three-judge panel hear challenges to redistricting plans. N.C.G.S. § 1-267.1 (2021). Specifically, under Section 120-2.3, courts may review challenges regarding whether a redistricting plan is "unconstitutional or otherwise invalid." *Id.* § 120-2.3. If a court finds a redistricting plan is unconstitutional, it must specify the precise defects and give the General Assembly an opportunity to remedy any identified defect by enacting a new redistricting plan. *Id.* § 120-2.4(a). By

10. The North Carolina governor did not gain the veto power until the people approved an amendment to the North Carolina Constitution in 1996—over two hundred years after the adoption of our first constitution in 1776. *See* Act of Mar. 8, 1995, An Act to Provide For A Referendum to Amend the Constitution to Provide for a Gubernatorial Veto, ch. 5, 1995 N.C. Sess. Laws 6. At that time, the people of North Carolina extended to the governor the authority to veto many types of legislative enactments but specifically withheld the authority to veto redistricting legislation. *Id.* That provision remains unchanged today.

statute, a court may not impose a remedial redistricting plan of its own unless "the General Assembly does not act to remedy" those defects. *Id.* § 120-2.4(a1). Even then, a court-imposed redistricting plan may differ from the General Assembly's enacted plan "only to the extent necessary to remedy" the defects identified by the court and will only be used for the next general election. *Id.* After the next general election, the General Assembly will replace the court-imposed map with a new, legislatively enacted map. A court-imposed map is only used for one election cycle because it is not "established" as that term is used in Article II, Sections 3(4) and 5(4). *See* N.C. Const. art. II, §§ 3(4), 5(4) ("When established, the senate [and representative] districts and the apportionment of Senators [and Representatives] shall remain unaltered until the return of another decennial census of population taken by order of Congress."). This limited role of judicial review comports with the fact that our constitution expressly assigns the redistricting authority to the General Assembly. *See Stephenson III*, 358 N.C. at 230, 595 S.E.2d at 119.

Article II, Sections 3 and 5 commit the redistricting authority to the General Assembly and set express limitations on that authority. In the landmark case *Stephenson I*, this Court considered the express limitations on redistricting in Article II, Sections 3 and 5, and applied them in conformity with federal law. *See Stephenson I*, 355 N.C. at 358, 562 S.E.2d at 381. That case dealt with the interplay between the objective restraints contained in the state constitution and federal redistricting authorities—namely, Section 2 of the Voting Rights Act (VRA) and the one-person, one-vote principle.[11] *See id.* at 359, 562 S.E.2d at 382.

The plaintiffs challenged the 2001 state legislative redistricting plans (2001 Plans) as unconstitutional in violation of the WCP of Article II, Sections 3 and 5. *Id.* at 358, 562 S.E.2d at 381; N.C. Const. art. II, §§ 3, 5 ("No county shall be divided in the formation of a senate [or representative] district."). The defendants argued that these constitutional provisions were "wholly unenforceable because of the requirements of the [VRA]." *Stephenson I*, 355 N.C. at 361, 562 S.E.2d at 383–84. Thus, before addressing whether the 2001 redistricting plans violated the WCP, this Court first had to address "whether the WCP is now entirely unenforceable, as [the] defendants contend, or, alternatively, whether the WCP

11. "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." *Id.* at 363, 562 S.E.2d at 385. The one-person, one-vote principle simply requires that districts, to the extent practicable, contain an equal number of voters. *Brown v. Thomson*, 462 U.S. 835, 841, 103 S. Ct. 2690, 2695 (1983).

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. In other words, we recognized that the WCP is one of the clear and express limitations or "objective constraints" on legislative redistricting in our constitution. *Id.* at 371, 562 S.E.2d at 390. We concluded that the WCP was enforceable to the extent it did not conflict with the one-person, one-vote principle or the VRA because "the people of North Carolina" expressly chose to limit the General Assembly in this way. *Id.* at 371, 374–75, 562 S.E.2d at 390, 391–92; *id.* at 372–74, 562 S.E.2d at 390–91 ("[T]he WCP remains valid and binding upon the General Assembly during the redistricting and reapportionment process . . . except to the extent superseded by federal law. . . . Where . . . the primary purpose of the WCP can be effected to a large degree without conflict with federal law, it should be adhered to by the General Assembly to the maximum extent possible.").

Notably, we stated that "[t]he General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions." *Id.* at 371, 562 S.E.2d at 390. We supported this statement with a citation to the Supreme Court's decision in *Gaffney v. Cummings*, 412 U.S. 735, 93 S. Ct. 2321 (1973). In that case the Supreme Court observed that

> [i]t would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary. The very essence of districting is to produce a different—a more "politically fair"—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. *Politics and political considerations are inseparable from districting and apportionment.*

Id. at 752–53, 93 S. Ct. at 2331 (emphasis added) (citations omitted). Thus, in *Stephenson I* we recognized that partisan considerations are inherently a part of the redistricting process in our state. We then expressed that the discretionary consideration of partisan advantage and incumbency protection must be done "in conformity with the State Constitution." *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 390. In other words, the General Assembly's discretionary considerations are constrained by the express limitations found in Article II, Sections 3 and 5. "To hold otherwise," we explained, "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 390. By "constitutional limitations," we meant the specific constraints in Article II, Sections 3 and 5.

Having held that the WCP remained enforceable to the extent not preempted by or otherwise superseded by federal law, we then held that the 2001 Plans violated the WCP by unduly dividing numerous counties. *Id.* at 371, 562 S.E.2d at 389–90. Specifically, the 2001 Plans divided fifty-one of the State's one hundred counties in the Senate plan and seventy of the one hundred counties in the House plan. *Id.* at 360, 562 S.E.2d at 383. We were able to make this determination because the standard provided by the WCP is express, clear, and easily applied.

Once we found that the 2001 Plans violated the still-valid WCP, we then crafted detailed criteria harmonizing the WCP and the other express constraints in Article II, Sections 3 and 5, with the VRA and the federal one-person, one-vote principle. These standards were clear and manageable because they were based on the express provisions found in our constitution or in federal law. For example, one of the *Stephenson I* criteria required that

> [i]n 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.

Id. at 383–84, 562 S.E.2d at 397 (emphasis added). The requirement that the General Assembly group "whole, contiguous" counties together when necessary to create a district that meets the ideal population requirement is a function of the WCP and the requirement that "[e]ach [legislative] district shall at all times consist of contiguous territory." N.C. Const. art. II, §§ 3(3), 5(3), 3(2), 5(2). Similarly, this Court recognized that when the General Assembly must group counties together in this way, the resulting districts in that county grouping might cross over the "interior county lines"—that is, the county lines that do not create the exterior boundaries of the county grouping. *See Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397. Such crossovers would violate the WCP but may be necessary to comply with the one-person, one-vote principle. Thus, in order to enforce "[t]he intent underlying the WCP . . . to the maximum extent possible," *Stephenson I* required that districts in multi-county groupings be "compact" and account for "communities of interest."[12] *Id.* at 384, 562 S.E.2d at 397. Compactness and communities of interest are also important factors under the VRA. *See Thornburg v. Gingles*, 478 U.S. 30, 50–51, 106 S. Ct. 2752, 2766 (1986).

Stephenson I also required that "[i]n 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

---

12. The Court in *Stephenson I* recognized that the "impetus" underlying the WCP was a long-standing respect for counties as "political subdivisions" that "provide essential services" and " 'effectuate the political organization and civil administration of the state' " at the local level. *Id.* at 365–66, 562 S.E.2d at 385–86 (quoting *White v. Comm'rs of Chowan Cnty.*, 90 N.C. 437, 438 (1884)). Accordingly, counties were kept whole because they naturally promote a "clear identity and common interests" among county residents. *Id.* at 366, 562 S.E.2d at 386. Recognizing that some counties would need to be divided or grouped together to comply with federal redistricting requirements, and in order to comply with the underlying intent of the WCP "to the maximum extent possible," *id.* at 384, 562 S.E.2d at 397, *Stephenson I* required the General Assembly to consider compactness and communities of interest whenever it had to group multiple counties together.

federal 'one-person, one-vote' requirements." 355 N.C. at 383, 562 S.E.2d at 397. This requirement is "relatively easy to administer as a matter of math."[13] *Rucho*, 139 S. Ct. at 2501. This requirement also ensures compliance with Article II, Sections 3(1) and 5(1), which provide that each senator and representative "shall represent, as nearly as may be, an equal number of inhabitants." N.C. Const. art. II, §§ 3(1), 5(1).

Although this Court was very detailed in stating its *Stephenson I* criteria, each criterion clearly reflects the fact that the constitution textually commits the redistricting authority to the General Assembly and only limits that authority in the ways enumerated in federal law and in Article II, Sections 3 and 5. This Court harmonized federal redistricting requirements and the directives of our state constitution, but it did not place any limitations on redistricting that were not derived from those two sources of law.

In sum, throughout our history our constitutions have invariably committed redistricting authority to our General Assembly. The General Assembly exercises that authority subject to the express limitations in our constitution and in federal law. When the General Assembly acts within the scope of these express limitations, it is performing its constitutionally assigned role. When the General Assembly properly performs its constitutionally assigned role, its discretionary decisions present a political question that is nonjusticiable. Ultimately, the role of our courts is limited to identifying a redistricting plan that violates those express limitations and requiring the General Assembly to remedy the specified defects.

---

13. *Stephenson I*'s plus or minus five percent standard is derived directly from Supreme Court precedent holding that a population deviation range of ten percent (plus or minus five percent) generally satisfies the federal one-person, one-vote requirement. *See Brown*, 462 U.S. at 842, 103 S. Ct. at 2696 (" '[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment . . . .' 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." (internal citations omitted) (quoting *Gaffney*, 412 U.S. at 745, 93 S. Ct. at 2327)); *see also Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 259, 136 S. Ct. 1301, 1307 (2016) ("We have further made clear that 'minor deviations from mathematical equality' do not, by themselves, 'make out a prima facie case of invidious discrimination under the Fourteenth Amendment . . . .' We have defined as 'minor deviations' those in 'an apportionment plan with a maximum population deviation under 10%.' " (internal citations omitted) (first quoting *Gaffney*, 412 U.S. at 745, 93 S. Ct. at 2327; and then quoting *Brown*, 462 U.S. at 842, 103 S. Ct. at 2696)); *Evenwel v. Abbott*, 578 U.S. 54, 59–60, 136 S. Ct. 1120, 1124 (2016) (same); *Voinovich v. Quilter*, 507 U.S. 146, 160–61, 113 S. Ct. 1149, 1159 (1993) (same); *Connor v. Finch*, 431 U.S. 407, 418, 97 S. Ct. 1828, 1835 (1977) (same).

B. Judicially Discoverable and Manageable Standards

Another factor that indicates the presence of a political question is the lack of a judicially discoverable and manageable standard for assessing the matter at hand. Like the Federal Constitution, our constitution does not provide judicially discernible or manageable standards for adjudicating partisan gerrymandering claims. The North Carolina Constitution could contain a provision that expressly prohibits or limits partisan gerrymandering, and perhaps then our courts could be "armed with a standard that can reliably differentiate" between constitutional and unconstitutional partisan gerrymandering. *See Rucho*, 139 S. Ct. at 2499. Our constitution, however, contains no such provision.

Almost one hundred years ago, this Court's opinion in *Leonard v. Maxwell* indicated that courts should cautiously consider redistricting claims. 216 N.C. 89, 99, 3 S.E.2d 316, 324 (1939). In that case the plaintiff argued that the General Assembly was malapportioned because it had not reapportioned itself at the first session after the 1930 census, as required by the constitution. *Id.* at 98, 3 S.E.2d at 324. As a result, the plaintiff argued that the 1937 General Assembly was powerless to act including, "it [wa]s suggested," to reapportion itself. *Id.* This Court rejected that argument, observing that "[t]he question is a political one, and there is nothing the courts can do about it. [Courts] do not cruise in nonjusticiable waters." *Id.* at 99, 3 S.E.2d at 324 (internal citation omitted).

Moreover, this Court has previously recognized that the Declaration of Rights generally does not provide judicially manageable standards for claims related to gerrymandering. In *Dickson I* a group of North Carolina voters challenged redistricting plans passed by the General Assembly in 2011 (2011 Plans) under both federal and state law. *Dickson I*, 367 N.C. at 546, 766 S.E.2d at 242, *vacated and remanded on federal grounds*, 575 U.S. 959 (2015) (mem.). Among other claims, the plaintiffs argued that the 2011 Plans violated the " 'Good of the Whole' clause found in Article I, Section 2" of the North Carolina Constitution's Declaration of Rights. *Id.* at 575, 766 S.E.2d at 260. Article I, Section 2 states:

> 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, § 2. The plaintiffs argued that the last clause of this provision constitutes "a specific limitation on the powers of the General Assembly with regard to redistricting" because the General Assembly " 'institutes' a new form of government" when it reapportions the legislative

districts after every decennial census. Pl.-Appellants' Br. at 178–79, *Dickson I*, No. 201PA12-2, 2013 5669654 (N.C. Sup. Ct. Oct. 11, 2013).

This Court rejected that claim as nonjusticiable, however, determining that Article I, Section 2 of the Declaration of Rights did not provide a judicially manageable standard:

> We do not doubt that plaintiffs' proffered maps represent their good faith understanding of a plan that they believe best for our State as a whole. However, the maps enacted by the duly elected General Assembly also represent an equally legitimate understanding of legislative districts that will function for the good of the whole. Because plaintiffs' argument is not based upon a justiciable standard, and because acts of the General Assembly enjoy "a strong presumption of constitutionality," *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam) (citation omitted), plaintiffs' claims fail.

Dickson I, 367 N.C. at 575, 766 S.E.2d at 260. We affirmed the trial court's conclusion that "the General Assembly applied traditional and permissible redistricting principles to achieve partisan advantage and that no constitutional violations resulted." *Id.* at 546, 766 S.E.2d at 242. Notably, the trial court in that case specifically stated that partisan gerrymandering is nonjusticiable:

> Redistricting in North Carolina is an inherently political and intensely partisan process that results in political winners and, of course, political losers. . . .
>
> Political losses and partisan disadvantage are not the proper subject for judicial review, and those whose power or influence is stripped away by shifting political winds cannot seek a remedy from courts of law, but they must find relief from courts of public opinion in future elections. Our North Carolina Supreme Court has observed that "[w]e do not believe the political process is enhanced if the power of the courts is consistently invoked to second-guess the General Assembly's redistricting decisions."

Dickson v. Rucho, Nos. 11 CVS 16896, 11 CVS 16940, 2013 WL 3376658, at *1–2 (N.C. Super. Ct. Wake County July 8, 2013) (quoting *Pender County v. Bartlett*, 361 N.C. 491, 506, 649 S.E.2d 364, 373 (2007),

aff'd sub nom. Bartlett v. Strickland, 556 U.S. 1, 129 S. Ct. 1231 (2009)). We affirmed the trial court's analysis. *See Dickson I*, 367 N.C. at 575, 766 S.E.2d at 260; *see also Dickson v. Rucho* (*Dickson II*), 368 N.C. 481, 534, 781 S.E.2d 404, 440–41 (2015) (reiterating our prior holding that Article I, Section 2 of the North Carolina Declaration of Rights does not provide a justiciable standard).

The four-justice majority in *Harper I* should have followed the analysis in *Dickson I*. Nevertheless, the *Harper I* majority departed from this precedent and insisted that our Declaration of Rights plainly provides a standard for identifying partisan gerrymandering. Even within that opinion, however, the majority could not consistently enunciate what that standard supposedly is. The Court described a "constitutional right[ ] of the people to vote on equal terms and to substantially equal voting power," as well as an "individual right[ ] of voters to cast votes that matter equally." *Harper I*, 380 N.C. at 323–24, 868 S.E.2d at 510. The *Harper I* majority also stated that the constitution protects "the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views." *Id.* at 378, 868 S.E.2d at 544. In another part of the *Harper I* opinion, the majority noted a districting plan violates the constitution when it "systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size." *Id.* at 379, 868 S.E.2d at 544. In other parts of *Harper I*, however, the majority characterized the standard as a right to aggregate votes "on the basis of partisan affiliation." *Id.* at 390, 392, 868 S.E.2d at 551, 552.

These vague and inconsistent standards are not derived from any express provision in the constitution. Instead, these standards seem to be grounded in a desire for some form of proportionality and reflect a judicially created notion of how much representation is "fair" without explaining what fairness is or how to manage it. The Supreme Court reached the same conclusion regarding the claims in *Rucho*:

> Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. . . .
>
> 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."

Rucho, 139 S. Ct. at 2499 (quoting *Bandemer*, 478 U.S. at 159, 106 S. Ct. at 2824 (O'Connor, J., concurring in the judgment)). These vague notions of fairness do not answer how to measure whether groups of voters are treated "fairly" or how to predict the results an election would produce. Moreover, as forewarned by the Supreme Court in *Rucho*, these vague notions of fairness did not produce a discernable or workable standard during the remedial proceedings in this case. *See id.* at 2499–500 (" '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 [and] to meaningfully constrain the discretion of the courts . . . ."(first alteration in original) (quoting *Vieth*, 541 U.S. at 291, 124 S. Ct. at 1784 (plurality opinion))).

In the remedial phase, the General Assembly attempted to apply the *Harper I* standard in drawing the Remedial House Plan (RHP), Remedial Senate Plan (RSP), and Remedial Congressional Plan (RCP). The General Assembly followed the same process in enacting each plan, yet the Special Masters recommended, and the three-judge panel concluded, that only the RHP and RSP met the *Harper I* standard. Accordingly, the three-judge panel struck the RCP. On appeal, however, the same four justices from *Harper I* also struck the RSP as unconstitutional, *see Harper II*, 383 N.C. at 94, 881 S.E.2d at 162, indicating that neither the General Assembly, the three-judge panel, the three Special Masters, nor three justices of this Court could properly understand and apply their standard set forth in *Harper I*. Constitutional compliance should not be so difficult. *See Rucho*, 139 S. Ct. at 2499 (noting that courts can only adjudicate partisan gerrymandering claims if they are "armed with a standard that can reliably differentiate unconstitutional from 'constitutional political gerrymandering.' " (quoting *Cromartie*, 526 U.S. at 551, 119 S. Ct. 1545)).

The four-justice majority in *Harper I* did not explain what its standard means or how it could be reliably met because it could not answer basic questions like how much partisan gerrymandering is too much and how can courts consistently and reliably measure partisanship in a redistricting plan. *See Harper I*, 380 N.C. at 384, 868 S.E.2d at 547 ("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."). Nevertheless, just as the plaintiffs in *Rucho* argued, *see Rucho*, 139 S. Ct. at 2503, the *Harper I* majority indicated that political science metrics could serve as "possible bright-line standards" for measuring partisan fairness. 380 N.C. at 385–86, 868 S.E.2d at 548 (stating that "a [M]ean-[M]edian [D]ifference of 1% or less when analyzed using a representative sample of past elections is presumptively constitutional" and "[i]t is entirely workable to consider the seven percent [E]fficiency [G]ap threshold as a presumption of constitutionality").

Although the *Harper I* majority insisted that "[l]ower courts can and assuredly will work out more concrete and specific standards," *id.* at 384, 868 S.E.2d at 547 (alteration in original) (quoting *Reynolds*, 377 U.S. at 578, 84 S. Ct. at 1390), on remand, the selected tests and corresponding scores—as predicted—proved insufficient as a clear and manageable standard. The General Assembly and the three-judge panel attempted to use the Mean-Median Difference and Efficiency Gap metrics to review the General Assembly's Remedial Plans. But the majority's application of these two seemingly straightforward tests led to inconsistent results.

For example, because the *Harper I* majority indicated that a 1% Mean-Median Difference and a 7% Efficiency Gap could serve as "possible bright-line standards" for measuring partisan fairness, *id.* at 385, 868 S.E.2d at 548, the three-judge panel relied heavily on the advisors' findings regarding each plan's Mean-Median Difference and Efficiency Gap scores in making its findings of fact on remand. Four out of seven advisors and experts calculated a Mean-Median Difference of less than 1% for both the RHP and the RSP, and all seven advisors and experts calculated an Efficiency Gap of less than 7% for both plans. *Harper II*, 383 N.C. at 153, 881 S.E.2d at 198 (Newby, C.J., dissenting). Accordingly, the three-judge panel held that both plans were "satisfactorily within the statistical ranges set forth in [*Harper I*]."

Similarly to the RSP and RHP, five out of eight advisors and experts found that the RCP had a Mean-Median Difference of less than 1% and an Efficiency Gap of less than 7%. *Id.* at 158, 881 S.E.2d at 201. The three-judge panel, however, concluded without explanation that the RCP was "not satisfactorily within the statistical ranges set forth in [*Harper I*]." A majority of advisors and experts found that all three plans fell within the thresholds set by the *Harper I* majority, yet for some reason—a reason that the three-judge panel did not articulate—only the RCP was unconstitutional. Why was this range of data acceptable for the RSP and RHP, but not for the RCP? The three-judge panel could not explain its inconsistent results because these tests do not provide a clear, judicially manageable standard. Instead, as cautioned by *Rucho*, these tests

"ask[ ] judges to predict how a particular districting map will perform in future elections [which] risks basing constitutional holdings on unstable grounds outside judicial expertise." *Rucho*, 139 S. Ct. at 2503–04.

Just like the three-judge panel, the same four-justice majority from *Harper I* found their own standard unmanageable when they tried to apply it in *Harper II*. For example, in declaring the RSP unconstitutional, the *Harper II* majority believed that "all but one [a]dvisor" calculated the RSP's Mean-Median Difference score as greater than 1%. *Harper II*, 383 N.C. at 121, 881 S.E.2d at 178.[14] According to those four justices, this evidence supported a conclusion that the RSP did not meet the statistical thresholds identified in *Harper I*. *Id.* The same number of advisors, however, found that the RHP scored above the 1% Mean-Median Difference threshold as well. Inexplicably, the four-justice majority in *Harper II* concluded that this fact weighed against a finding that the RSP was constitutional but supported a finding that the RHP was constitutional. Those justices did not say why the same evidence supported contrary conclusions for two different maps.

Similarly, the *Harper II* majority believed that the RHP was constitutional because, collectively, "[t]he [ ] [a]dvisors determined that the RHP yields an average [E]fficiency [G]ap of about 2.88%, [and] an average [M]ean-[M]edian [D]ifference of about 1.27%." *Id.* at 119–20, 881 S.E.2d at 177. The advisors' average scores for the RSP were very close to their averages for the RHP. For the RSP, the average of the advisors' Efficiency Gap scores was 3.81% and the average of their Mean-Median Difference scores was 1.29%. Thus, both plans had an average Efficiency Gap score that was well below the 7% threshold identified in *Harper I* as presumptively constitutional. *Harper I*, 380 N.C. at 386, 868 S.E.2d at 548. Moreover, the average Mean-Median Difference scores for the RSP and RHP were within two-one-hundredths of a percentage point of each other. The *Harper II* majority did not say why an average Mean-Median Difference of 1.27% weighed in favor of the RHP's constitutionality but an average Mean-Median Difference of 1.29% weighed against the RSP's constitutionality. If there was something significant about that minute difference, the *Harper II* majority did not or could not explain it.[15]

---

14. This statement that "all but one [a]dvisor" calculated a Mean-Median Difference greater than 1% is inaccurate. Half of the advisors, not one, calculated the RSP's Mean-Median Difference score as less than 1%.

15. Both the RHP and RSP were used during the 2022 election cycle. Significantly, under the RHP approved by the four-justice majority in *Harper II*, Republican candidates won 59% of the house races while receiving about 58% of the aggregate statewide vote. *See* North Carolina State Board of Elections, https://er.ncsbe.gov/?election_dt=11/08/2022&

This standard is not "clear" or "judicially manageable" because, during the remedial phase of this case, no one—not even the four justices who created it—could apply it to achieve consistent results. *Rucho*, 139 S. Ct. at 2500, 2499 (internal citations and quotations omitted). A constitutional standard must be clear and easily applied by the branch assigned the duty in question. The approach created by the four justices in *Harper I* is neither. *See id.* at 2498, 2499 (noting that a justiciable issue has a "clear, manageable, and politically neutral" standard that can "reliably differentiate" an unconstitutional from a constitutional action (quoting *Vieth*, 541 U.S. at 306–08, 124 S. Ct. at 1793 (Kennedy, J., concurring in the judgment))). The remedial proceedings in this case demonstrate that neither the criteria created in *Harper I* nor our constitution provide a judicially discoverable or manageable standard to address claims of partisan gerrymandering.

The dissent argues that a court's reviewing a legislatively enacted redistricting statute for claims of partisan gerrymandering is similar to a court's examining a speedy trial claim under the constitution or determining a motion to dismiss criminal charges. This approach, however, contains a fundamental error: it fails to recognize that the constitution assigns the responsibility of redistricting to the General Assembly, not to the courts. It forgets this Court's time-honored standard of review for legislation. The dissent seems to ignore that the General Assembly fulfills its redistricting responsibility by enacting laws. Such legislation is entitled to a presumption of constitutionality and requires a showing that the legislation violates an express provision of the constitution beyond a reasonable doubt. A court's applying a constitutional provision to particular facts or evaluating the quality of certain evidence is fundamentally different than assessing the constitutionality of a statute through judicial review.

Perhaps the dissent's analogies reveal a more fundamental misunderstanding of a court's role in the redistricting process. The majority in *Harper I* and the dissent here seem to imagine a future where redistricting is a court-managed process: a future where courts endlessly supervise the redistricting process and impose their own standards in the same way that courts assess which criminal trials are speedy enough. As previously explained, however, our framers chose a different approach.

---

county_id=0&office=NCS&contest=0 (last visited Apr. 13, 2023) . Under the RSP, which the *Harper II* majority found unconstitutional, Republican candidates won 60% of the Senate races while receiving about 59% of the aggregate statewide vote. *Id.* It is unclear why this small difference of approximately one percentage point rendered the RHP constitutional and the RSP unconstitutional.

They committed redistricting decisions to the wisdom and judgment of the legislative branch. In short, the dissent's analogies further reinforce that there is no judicially discoverable and manageable standard.

A judicially discoverable and manageable standard is necessary for resolving a redistricting issue because such a standard "meaningfully constrain[s] the discretion of the courts[ ] and [ ] win[s] public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking." *Rucho*, 139 S. Ct. at 2500 (first quoting *Vieth*, 541 U.S. at 306–08, 124 S. Ct. at 1793 (Kennedy, J., concurring in the judgment); and then quoting *id.* at 291, 124 S. Ct. at 1784 (plurality opinion)). Here the standard set forth in *Harper I* does not constrain the discretion of our courts at all. Instead, it invites limitless judicial involvement because it is so difficult to apply and leads to inconsistent results. Only the four justices who enunciated the *Harper I* standard can say for certain whether their standard has been met. Accordingly, under the *Harper I* framework, every redistricting decision the General Assembly makes would be subject to judicial oversight. This framework does not constrain judicial discretion; rather, it requires that judicial decisionmaking dominate the entire redistricting process.

The approach mandated by *Harper I* would not simply apply to statewide redistricting decisions. At oral argument, counsel for plaintiffs stated that the *Harper I* principles would apply to "all elections" throughout the State because "it stems from a constitutional principle that speaks to all elections." *See* Oral Argument at 49:35, *Harper v. Hall*, (413PA21-2) (Mar. 14, 2023), https://www.youtube.com/watch?v=cpzlPxuu2I (last visited Apr. 20, 2023). This result would embroil the judiciary in every local election in every county, city, and district across the state.[16] Municipalities, counties, local boards of education, and special districts frequently hold hundreds, if not thousands, of local elections. Under the *Harper I* standard, our courts would need to ensure that each of these elections provides each member of the relevant local electorate a sufficient "opportunity to aggregate [his or her] vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views." 380 N.C. at 383, 868 S.E.2d at 546. This process would involve endless litigation that would task our judges with ensuring that the political makeup of every city council, county commission,

16. North Carolina has 100 counties, 552 municipalities, numerous "special districts," such as sewer and water districts, and many local boards of education. *See How NC Cities Work*, N.C. League of Municipalities, https://www.nclm.org/advocacy/how-nc-cities-work (last visited Apr. 20, 2023).

or local board of education adequately reflected the distribution of Republicans and Democrats in the corresponding locality.

In addition to involving our courts in countless redistricting lawsuits, the *Harper I* standard does not provide any guidance for several potential issues that could arise in these cases. Where the standard does not provide guidance, our courts would have to utilize their own policy preferences. For example, the *Harper I* standard does not tell courts how to account for voters who are affiliated with a political party other than Republican or Democrat or who are not affiliated with a party at all. Our judges would have to address these concerns without any "clear, manageable, [or] politically neutral" guidance. *Rucho*, 139 S. Ct. at 2498 (quoting *Vieth*, 541 U.S. at 306–08, 124 S. Ct. at 1793 (Kennedy, J., concurring in the judgment)). *Harper I* provides no guidance to courts on these issues. Instead, it requires courts to use their discretion to "work out" these questions in future litigation. *Harper I*, 380 N.C. at 384, 868 S.E.2d at 547. This type of unmoored discretion is a quintessential characteristic of an unmanageable standard and a nonjusticiable, political question. As the Supreme Court has noted:

> Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by [ ] courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan. From the very outset, we recognized that the apportionment task, dealing as it must with fundamental "choices about the nature of representation," *Burns v. Richardson*, 384 U.S. [87,] 92, [1965], is primarily a political and legislative process.

Gaffney, 412 U.S. at 749, 93 S. Ct. at 2329.

C. Policy Decisions

Along with failing to provide a discernible and manageable standard, the approaches created in *Harper I* and *Harper II* involve a host of "policy determination[s] of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217, 82 S. Ct. at 710. Initially, since the state constitution does not mention partisan gerrymandering, the four justices in *Harper I* first had to make a policy decision that the state constitution

prohibits a certain level of partisan gerrymandering. Tellingly, the majority was unable to articulate how much partisan gerrymandering is too much. Essentially, the majority chose to insert into our constitution a requirement for some type of statewide proportionality based on their view of political "fairness." Like the Federal Constitution, however, our constitution does not contain a proportionality requirement. *See Rucho*, 139 S. Ct. at 2499. Instead, the creation of this proportionality requirement was a monumental policy determination made by the *Harper I* majority on its own initiative and equated to a judicial amendment to our constitution.

Then, those four justices determined that our constitution mandates the use of certain political science tests as a measure of this newly created constitutional requirement. As the Supreme Court noted in *Rucho*, however, the definition of "fairness" and how to measure it "poses basic questions that are political, not legal." *Id.* at 2500. For example, the *Harper I* majority stated that political science tests could identify an unconstitutional redistricting plan when "using a representative sample of past elections." 380 N.C. at 386, 868 S.E.2d at 548. In doing so, the four-justice majority in *Harper I* unilaterally determined that past election results can accurately predict how individual voters will vote in the future. But there is no reason to presume this is true because individual voters may vote inconsistently at different times in their life for a variety of reasons. As the Supreme Court noted in *Rucho*, voters select candidates based 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." 139 S. Ct. at 2503. Each of these factors is different for each election, and it is not clear how past election results can possibly predict how each of these factors may affect individual voters in future elections. The decision to use certain political science tests, which tests to use, which scores are required, and which past election results are most predictive of future electoral behavior involve policy choices that are untethered to the law.

Additionally, in determining that past election results should be used to calculate political science metrics, the *Harper I* majority made the policy determination that past elections are a "better" source of partisan election data than other potential sources. The *Harper I* majority even preferred certain past elections over others. Some might argue, however, that data from past elections does not measure the distribution of voters among various political groups, but that instead, it measures the rate of voter turnout. Instead of using past election results,

the *Harper I* majority might have required partisan data from current voter registration information. In theory this data set might be a more accurate representation of how voters might vote in an upcoming election because it reflects current party affiliation statistics instead of past voter turnout. Selecting between past elections, current voter registration information, or some other data as the "best" source for garnering partisan election data, however, is exactly the sort of non-judicial policy determination warned of in *Rucho*. *See Rucho*, 139 S. Ct. at 2500 ("Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral.").

Moreover, simply the decision to use these political science metrics at all requires policy determinations that are not grounded in any constitutional guidance. Because these tests purport to measure "partisan fairness," use of these tests assumes that the chosen past election results are the most relevant factor for predicting future election results and assumes that voters will continue to vote for the same party that they have in the past. This is not true since many other considerations influence a voter's selection of a candidate. For example, representative government is grounded in the concept of geographic representation. Though partisanship may influence a 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. Indeed there are countless policy issues, and voters and representatives of the same political party may be likeminded on some issues but not others. The constitution cannot guarantee that a representative will have identical political objectives as a given constituent because that 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. Partisan fairness metrics do not—and cannot—measure or quantify these intangible characteristics. The decision to use these "partisan fairness" tests is a policy determination because it presumes that a voter's or a candidate's partisan affiliation—over all other factors—is the most relevant factor in predicting future election outcomes.

After making the policy decision that political science tests must be used to measure partisan fairness, the *Harper I* majority made yet another policy choice by selecting two particular political science tests—the Mean-Median Difference and Efficiency Gap metrics—to serve as its

"bright-line standards." *See Harper I*, 380 N.C. at 385, 868 S.E.2d at 548. The *Harper I* majority was aware of numerous other potential tests; yet it chose these two as the best measures of its definition of fairness. *See id.* at 384, 868 S.E.2d at 547 (recognizing "close-votes, close-seats analysis" and "partisan asymmetry analysis" as other potential fairness metrics).

Furthermore, utilization of these two tests—Mean-Median Difference and Efficiency Gap—requires a host of policy determinations. During the remedial process, the General Assembly and each of the four advisors calculated a Mean-Median Difference and Efficiency Gap score for each of the Remedial Plans. Each calculated slightly different scores, however, because each utilized different redistricting software, partisan election data, and calculation methods. The General Assembly, for example, calculated their scores using Maptitude, a "widely accepted" redistricting software, and a set of twelve statewide elections selected by plaintiffs' expert, Dr. Mattingly (Mattingly Election Set). Notably, neither the Special Masters, the three-judge panel, nor the *Harper II* majority gave any deference to the General Assembly's approach. Each of the advisors selected different redistricting software and elections sets from those chosen by the General Assembly and by each other. In turn, the three-judge panel had to weigh each combination of redistricting software, partisan election data, and calculation methods and determine which was "best." Each of these choices constitutes a policy determination that courts are not equipped to make.

For example, each of the advisors used different redistricting software from the others, and none chose to use Maptitude, as had the General Assembly. Dr. Grofman used Dave's Redistricting App to calculate the Remedial Plans' Mean-Median Difference and Efficiency Gap scores, and Dr. McGhee used a web-based redistricting software called PlanScore. It is not clear from Dr. Grofman's or Dr. McGhee's reports how these technologies calculate the relevant metrics or whether they do so differently from Maptitude.

Likewise, each of the advisors used different sets of elections as their sources of partisan data to measure the Remedial Plans. Once again, none chose the same set of elections as each other or as the General Assembly. The General Assembly used the Mattingly Election Set, which consisted of twelve statewide elections from 2016 and 2020 chosen by one of plaintiffs' experts. Alternatively, Dr. Jarvis pulled partisan election data from eleven statewide elections. Nine of these elections matched the General Assembly's Mattingly Election Set, but two others did not. Dr. Grofman used "major statewide races [in] 2016–2020" but did not specify how many elections or which ones. Dr. Wang, on the

other hand, varied the vote totals in each of these elections "above and below an average [vote total]" in order to "evaluat[e] a range of future [vote total] scenarios that may arise in the coming decade." Dr. Wang also created a composite of vote totals by averaging together three data points: (1) the average two-party vote share of the 2016 and 2020 presidential elections; (2) the average two-party vote share of the 2016 and 2020 United States Senate elections; and (3) the average two-party vote share of the 2020 elections for Governor and Attorney General.

Additionally, Dr. McGhee took a very "different approach" to calculating the Mean-Median Difference and Efficiency Gap scores. Instead of analyzing which party's candidate would win a proposed new district under prior election contests, Dr. McGhee used PlanScore to "predict" potential partisan outcomes in the future. Dr. McGhee did not explain which elections PlanScore applied to predict future election results, nor did he explain the criteria used by PlanScore to make such predictions. Dr. McGhee also calculated two sets of Mean-Median Difference and Efficiency Gap scores. He calculated one set from a simulated election that assumed that no incumbents ran for reelection and another set from a simulated election that assumed that all incumbents ran for reelection in the proposed district containing their residence. He did not explain why he made these unrealistic assumptions.

As a result, the General Assembly and each advisor calculated different scores for the Remedial Plans, even though they all used the same tests. These varying results prove that the use of two seemingly straightforward fairness metrics actually involves a multitude of policy choices—the kind of policy choices the Supreme Court warned of in *Rucho*. *Rucho*, 139 S. Ct. at 2503–04 ("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."). Because there are "no legal standards discernible in the [c]onstitution" that describe statewide proportionality or that instruct which tests to use or how to calculate them, each party and expert simply calculated his scores in whatever way he saw fit. *Id.* at 2500. Each of these differences illustrates the numerous policy choices that are inherent in applying the metrics selected in *Harper I*.

The standard set forth in *Harper I* is clearly rife with policy determinations that our courts are not equipped to make. *See Baker*, 369 U.S. at 217, 82 S. Ct. at 710. Accordingly, the claims at issue—partisan gerrymandering claims—are nonjusticiable. Moreover, when a court engages in policy determinations like these, it ignores our long-standing standard of review that presumes that acts of the General Assembly are

constitutional. *See Berger*, 368 N.C. at 639, 781 S.E.2d at 252. In part, the existence of policy choices indicates that a given issue may be nonjusticiable because the legislative branch—not the judicial branch—is "without question 'the policy-making agency of our government.' " *Rhyne*, 358 N.C. at 169, 594 S.E.2d at 8 (quoting *McMichael*, 243 N.C. at 483, 91 S.E.2d at 234). If a court engages in policy questions that are better suited for the legislative branch, that court usurps the role of the legislature by deferring to its own preferences instead of the discretion of the people's chosen representatives. For this reason, and to protect against this result, the proper starting point in cases challenging an act of the General Assembly is to assume the General Assembly's policy choices are constitutional unless proved otherwise "beyond any reasonable doubt." *Jenkins v. State Bd. of Elections*, 180 N.C. 169, 172, 104 S.E. 346, 348 (1920).

Thus, all the policy choices made by the four-justice majority in *Harper I* and *Harper II* demonstrate how that majority utterly ignored the well-established presumption of constitutionality. By making these policy choices, the majority replaced the General Assembly's discretionary policymaking authority with its own.[17] This approach flipped the presumption of constitutionality on its head and usurped the role of the General Assembly—the policymaking branch of government.

In sum, a matter is nonjusticiable if the constitution expressly assigns responsibility to one branch of government, or there is not a judicially discoverable or manageable standard by which to decide it, or it requires courts to make policy determinations that are better suited for the policymaking branch of government. All three elements are present in the claims at issue in this case. 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 proportionality or 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. Accordingly, plaintiffs' claims of partisan gerrymandering are nonjusticiable, political questions that are "beyond the reach of" our courts. *Rucho*, 139 S. Ct. at 2506.

---

17. As illustrated here, reliance on the tests set forth in *Harper I* invariably results in redistricting by a judicial redistricting commission made up of court-appointed special masters and advisors, which is not authorized anywhere in the constitution. Notably, the only North Carolina races that did not reflect the statewide voting trends in the 2022 election cycle were North Carolina's congressional races held under the Interim Congressional Plan drawn by the Special Masters and Dr. Grofman.

V. Declaration of Rights

Like the plaintiffs in *Rucho*, plaintiffs here allege that various constitutional provisions prohibit partisan gerrymandering. In place of the Federal Constitutional provisions invoked in *Rucho*, plaintiffs instead argue that comparable state constitutional provisions expressly limit partisan considerations in redistricting. Plaintiffs are mistaken; these state constitutional provisions do not expressly limit the General Assembly's redistricting authority or address partisan gerrymandering in any way. Where there is no express limitation on the General Assembly's authority in the text of the constitution, this Court presumes an act of the General Assembly is constitutional. *Berger*, 368 N.C. at 639, 781 S.E.2d at 252. As previously stated, courts determine the meaning of a constitutional provision by discerning the intent of its drafters when they adopted it. Courts look first to the plain language of the text, keeping in mind the historical context of the text's adoption.

Our Declaration of Rights first appeared in the 1776 constitution and provides "a statement of general and abstract principles." *State Constitution* 6. The "abstractness" of the Declaration of Rights has "allowed most of it to survive." *Id.* "Because of their abstractness," many provisions of the Declaration of Rights do not give rise to "justiciable rights." *Id.* at 48; *see*, *e.g.*, *Dickson I*, 367 N.C. at 575, 766 S.E.2d at 260 (stating that the "Good of the Whole" clause in Article I, Section 2 of the constitution does not provide a "justiciable standard"). Rather, the Declaration of Rights sets out "[b]asic principles" in "general terms," and these basic terms are "given specific application in later articles." *State Constitution* 46. Here two of the provisions cited by plaintiffs—the free elections clause and the freedom of assembly clause—are from our 1776 Declaration of Rights. The other two—the equal protection clause and free speech clause—first appeared in our 1971 constitution.

A. Free Elections Clause

[3] Article I, Section 10 states that "[a]ll elections shall be free." N.C. Const. art. I, § 10. The clause first appeared in the 1776 constitution, which stated that the "Elections of Members, to serve as Representatives in [the] General Assembly, ought to be free." N.C. Const. of 1776, Declaration of Rights, § VI. The 1868 constitution restated the free elections clause as "[a]ll elections ought to be free." N.C. Const. of 1868, art. I, § 10. In the 1971 constitution, the provision became "[a]ll elections shall be free," N.C. Const. of 1971, art. I, § 10, the form that it retains today. *See* N.C. Const. 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 was 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" and 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.

As with all "[b]asic principles" contained within the Declaration of Rights, we must consider the free elections clause in the context of later articles that give more specific application to Article I, Section 10. *Id.* at 46. The terms "elections" and "free," N.C. Const. art. I, § 10, must be read, for example, in the context of Article VI, entitled "Suffrage and Eligibility to Office," *see id.* art. VI. The first five sections of Article VI address the right to vote, and the last five sections concern eligibility to hold office. *See id.* Even though "elections shall be free," they are nonetheless restricted in many ways by 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.* art. VI, § 2(1)–(2) (placing residency requirements on voters); *id.* art. VI, § 2(3) (placing restrictions on felons' voting rights); *id.* art. VI, § 3 (allowing for conditions on voter registration as prescribed by statute); *id.* art. VI, § 5 (requiring that votes by the people be by ballot); *id.* art. VI, § 7 (requiring public officials to take an oath before assuming office); *id.* art. VI, § 8 (outlining certain disqualifications from holding public office); id. art. VI, § 9 (prohibiting dual office holding); *id.* art. VI, § 10 (allowing an incumbent to continue in office until a successor is chosen and qualified).

Likewise, even though our 1776 constitution stated that elections were "free," N.C. Const. of 1776, Declaration of Rights, § VI, other provisions limited the scope of that phrase. Notably, "free elections" did not mean that everyone could vote, N.C. Const. of 1776, § VII (limiting the right to vote for senators to "freemen" who were at least twenty-one years old, lived in their county of residence for at least one year, and owned at least fifty acres of land in the same county for the preceding six months); *id.* § VIII (limiting the right to vote for Representatives in the House of Commons to "freemen" who were twenty-one years old,

lived in their county of residence for at least one year, and paid public taxes); that anyone could run for office, *id.* § V (only men who lived in their county of residence for one year and owned at least three hundred acres of land in fee for one year could serve in the Senate); *id.* § VI (only men who lived in their county for at least one year and owned at least one hundred acres of land in fee or for life for at least six months could serve in the House of Representatives); that the people were free to vote for all governmental officers, *see id.* § XIII (empowering the General Assembly to elect Judges of the Supreme Court and the Attorney General); *see also id.* § XV (empowering the General Assembly to elect the Governor); or that the General Assembly was restricted from apportioning itself by dividing existing counties, *id.* §§ II, III (providing each county one senator and two representatives with no limitations on the General Assembly's discretion to create new counties). Clearly, when our framers intended to limit or clarify the scope of "free elections," they did so with express provisions in the text. They did not, however, add anything to our 1776 constitution about partisan gerrymandering.

With respect to the history of the clause, its original intent and inclusion was to protect against abuses of executive power. Our free elections clause was not intended to protect the people from their representatives who frequently face election by the people. Under colonial rule, the English crown appointed the governor for an indefinite period of time. Charles Lee Raper, *North Carolina: A Study in English Colonial Government* 27 (1904). As a result, the governor "was very naturally disposed," *id.* at 186, to indulge the interests of the crown as opposed to those of "the people whose affairs he was to administer," *id.* at 27.

Additionally, the governor exercised broad executive, judicial, and legislative functions. *See id.* at 28–32. The governor was the "head of the whole administrative machinery of the province," *id.* at 29, and could issue land grants that were legal "even against the king himself," *id.* at 28. He also possessed the authority to create and establish the colony's judicial system with any courts of law and equity that he saw fit and could remove any judge or justice for "sufficient reason." *Id.* at 37. In the legislative realm, the governor possessed a veto power as no law "could be passed without his assent." *Id.* at 35. The governor could call the General Assembly whenever "occasion demanded it," *id.* at 34, and could dissolve it if he saw fit, *id.* at 35. Additionally, as the three-judge panel found, the Royal Governor "could require counties and towns to obtain charters of incorporation prior to being able to elect representatives to the legislature," a power which inserted the governor squarely into the issue of apportionment. Moreover, North Carolina colonists were also

accustomed to the English king exercising broad and oppressive executive powers as well. *See Our First Revolution: The Remarkable British Upheaval that Inspired America's Founding Fathers* 167 (2007) [hereinafter *Our First Revolution*].

For these reasons, there were tensions between North Carolina's House of Burgesses and the governor between 1729 and 1776. The two clashed over representation in the General Assembly, *id.* at 90–91, the creation of counties, *id.* at 89–90, 217, the number of members needed to constitute a quorum in the General Assembly, *id.* at 216–18, the appointment of agents to England, *id.* at 206–08, and the appointment of judges, *id.* at 207–09, among other issues. Accordingly, by 1776 North Carolinians were inclined to replace "[o]verbearing colonial governors" with a much weaker executive officer. *Constitutional History* 1764. As the three-judge panel found in its 11 January 2022 Judgment,

> [i]t was the experience of the people of the State of North Carolina that was the most important source for the creation of the 1776 Constitution. By far, the greatest change in the structure of North Carolina's government, other than elimination of the parliament and the Crown, was the vast reduction in the powers of the Governor and the substantial increase in the powers of the General Assembly. These changes were made to make "the governor that figurehead in law which in fact the colonial legislature had long sought to make him."

(Quoting Earle H. Ketcham, *The Sources of the North Carolina Constitution of 1776*, 6 N.C. Hist. Rev. 215, 230 (1929).) Thus, under the 1776 constitution, the General Assembly, not the people, chose the governor, N.C. Const. of 1776, § XV, the members of the council of state, *id.* § XVI, the state treasurer, *id.* § XXII, the state secretary, *id.* § XXIV, the attorney general, *id.* § XIII, and all judges, *id.* The governor had no veto power under the 1776 constitution, *see id.* §§ XVII–XX, and "he took no formal role in legislation" because "bills became laws when passed by both houses and signed by the speakers," *Constitutional History* 1764. Additionally, representation in both the Senate and House of Commons was by county. N.C. Const. of 1776, § II (granting each county one senator); *id.* § III (granting each county two representatives and the borough towns of Edenton, New Bern, Wilmington, Salisbury, Hillsborough, and Halifax one representative each). Because the General Assembly had the power to create counties, it also had the power to determine how

much representation each portion of the State received. *See, e.g.*, Act of Apr. 8, 1777, An Act for dividing Rowan County, and other Purposes therein mentioned, ch. XIX, 1777 N.C. Sess. Laws 33 (splitting off part of Rowan County to create Burke County).

Our free elections clause was placed in the 1776 Declaration of Rights at the same time as other constitutional provisions that both limited executive power and increased legislative power. Accordingly, any argument that the people added the free elections clause to the 1776 constitution for the purpose of limiting the General Assembly's apportionment authority is inconsistent with this historical context. Instead, the free elections clause was intended to address abuses of executive power and to protect against interference and intimidation in the voting process. The historical context occurring in England less than one hundred years earlier confirms this meaning of the free elections clause.

Our 1776 Declaration of Rights was modeled in part after the English Bill of Rights, a product of the Glorious Revolution in England in 1688. *See* Hugh Talmage Lefler & Albert Ray Newsome, *The History of a Southern State: North Carolina* 221 (3d ed. 1973). "Today everyone in Britain and the United States is in a sense a residuary beneficiary of the [Glorious] Revolution, although we can at present take this for granted since the issues involved now form the accepted bases of our institutions and societies." J.R. Jones, *The Revolution of 1688 in England* 8 (Jack P. Greene 1972) [hereinafter *Revolution of 1688*].

In the 1670s and 1680s, numerous European countries, including England, were moving towards absolutist monarchies. This trend "seemed the way of the future" throughout the continent. *Our First Revolution* 7. In England, however, conflict swelled between King James II and Parliament as the king took various actions beyond the limits of his authority in order to achieve his legislative agenda.[18] King James II also sought to strengthen the crown by increasing the size of the standing army and continuing regiments that had been raised temporarily for the purpose of opposing rebellions. *Revolution of 1688* 61. James hoped to achieve these goals by creating a compliant Parliament; but by 1685, he realized he could not do so "without first changing the local officials . . . who conducted and effectively controlled the elections,

18. In the modern American context, we might refer to such encroachments as a separation-of-powers violation. *See Berger*, 368 N.C. at 660, 781 S.E.2d at 265 (Newby, J., concurring in part and dissenting in part) ("A violation of separation of powers occurs when one branch of government exercises the power reserved for another branch of government.").

and without changing the franchise in many boroughs."[19] *Our First Revolution* 109–10. King James shifted local authority by adjusting a county's or borough's charter to embed the king's agents and ensure a favorable outcome for the king in the 1685 election. R. H. George, A.M., Ph.D., Fellow of the Royal Hist. Soc'y, Parliamentary Elections and Electioneering in 1685 176–78 (Oct. 8, 1935). In some instances, these adjustments altered who could vote in order to limit the franchise to those most likely to support the king's preferred candidates. *See id.* at 176. In other cases, the adjustments secured for the king's agents the most powerful political offices and gave them "complete control of the situation." *Id.* at 177. Once in power, the agents fully and immediately exercised their influence on behalf of the king. *See id.* at 177, 182, 194–95.

The king's agents used various tactics to manipulate and intimidate local officials, would-be parliamentarians, and local business leaders into supporting the king's plans. *See id.* at 168, 188. They intimidated locals through physical scuffles, threats, demonstrations of force, and beatings, *id.* at 173–75, and coerced businesses to support King James's preferred candidates, some altogether foreign to the locale, by promising gifts, bribes, or patronage in exchange for compliance or by threatening to revoke their license to operate, *id.* at 176–78, 184, 188–90. When the time for election came, local agents of the king who conducted the polling used devious polling practices to open, close, and reopen polling to ensure a certain electoral outcome. *Id.* at 182, 185, 188.

After the elections of 1685, the resulting Parliament was "agreeable" to King James at first, *id.* at 168, but once James presented his legislative agenda, many parliamentary representatives interpreted his goals "as a danger to constitution and liberties," *Revolution of 1688* 62. Accordingly, King James met with opposition and, as a result, he discontinued the session of Parliament in November 1685 so he could unilaterally act to achieve his legislative agenda. *See id.* at 64–66. Once

---

19. The process for selecting members of Parliament varied greatly among counties and boroughs during this time. Some counties elected two members and others, one. *Our First Revolution* 55. Some boroughs elected as many as four members, while others only selected two or one. *Id.* There was also disparity between the localities regarding who could vote. "In some, the right to vote was attached to the ownership of certain pieces of property; in some it was limited to officers of the borough corporation; in many, all freemen, that is adult males not bound to service, could vote." *Id.* at 56. Moreover, in the boroughs, the size of the electorate varied widely. *Id.* at 57. Local officials and large landowners "exerted great influence over local elections" in both the counties and boroughs. *Id.* These local differences "were the result of ancient practice" that had "grown up in response to the demands of particular communities and private interests" and "reflected a bewildering variety of local customs." *Id.* at 58.

he discontinued the session of Parliament, he immediately put that agenda into motion. *See id.* at 65–74. He repeatedly postponed the next Parliamentary session in an effort to convince representatives to support his legislative objectives. *See id.* When those efforts proved unsuccessful, *id.*, however, he dissolved Parliament in July 1687 and began a second "campaign to pack" it with members that would support his legislative agenda, *id.* at 128, 131, 151; *see also Our First Revolution* 109. The king's campaign "represented a move to make this power complete, total, and permanent," *Revolution of 1688* 151, and was seen as "an attempt to move England toward 'some form of absolutism,' " *Our First Revolution* 109 (quoting *Revolution of 1688* 11–12).

King James once again set about intimidating and manipulating local officials. *Id.* at 109–10. He sent agents to canvass justices of the peace and other local officials to ascertain whether they would support the king's legislative goals. *Id.* The king used their responses to create his short list of "approved parliamentary candidates," *Revolution of 1688* 135, and to purge local officials who did not agree to support his plans, *see id.* at 132–33. King James dismissed thousands of county and borough officials who gave "unsatisfactory" responses. *Our First Revolution* 110. Additionally, the king's agents ensured that local sheriffs attended borough and county elections to intimidate candidates who were hostile to royal policies. *Revolution of 1688* 147.

King James's tactics of commandeering his subjects' support to ensure an obedient Parliament were entirely unfamiliar to the English people and their representatives.

> Contemporaries were well aware that James was ruling in a new way, a new way heavily modeled on the methods and practices of Louis XIV [of France]. Both James's enemies and his friends marveled at the rapid increase in royal power. James II's "power swelled so fast," recalled the Whig critic Lord Delamere, "that he quickly makes all people to feel the intolerable burden of an unbounded prerogative." Barillon agreed that "the royal authority increases everyday by means of the firm conduct of the King of England." James, all concurred, took his measures from Louis XIV. "The French precedent was too exactly followed," lamented one pamphleteer in 1688. "Our King in imitation of his brother of France," wrote another pamphleteer drawing a similar parallel, "strives to bring all the offices and magistracy of the kingdom,

> that were legally of the people's choice, to be solely and immediately depending on his absolute will for their being."

Steve Pincus, *1688*: *The First Modern Revolution* 160–62 (2009). Ultimately, however, King James II's absolutism did not prevail in England. *Our First Revolution* 7. Instead, through the Glorious Revolution and the English Bill of Rights, Englishmen chose an "alternative . . . constitutional monarchy with limits on government[and] guaranteed rights." *Id.*

The drafters of the English Bill of Rights very clearly intended to address King James's overreaches of executive power and to return authority to Parliament. In the eyes of the drafters, King James had, among other wrongdoings, subverted "the laws and liberties of th[e] kingdom" by "assuming and exercising [the] power of dispensing with and suspending of laws, and the execution of laws, without consent of [P]arliament." Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.). King James had exercised "pretended power[s]" beyond the limits of his executive authority by levying taxes for "the use of the crown" without the permission of Parliament, "raising and keeping a standing army . . . without the consent of [P]arliament," "violating the freedom of election of members to serve in [P]arliament," prosecuting crimes that were within Parliament's jurisdiction in the "court of King's bench" instead, requiring "excessive bail" to "elude . . . laws made for the liberty of the subjects," and imposing "excessive fines" and "cruel and unusual punishments." *Id.* The drafters of the English Bill of Rights characterized James's actions as "utterly and directly contrary to the known laws and statutes, and freedom of this realm." *Id.*

Accordingly, after James fled England, the people selected new representatives, as was their "right," and the new representatives met "in a full and free representative of th[e] nation." Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.). These new representatives drafted the English Bill of Rights to ensure that their "religion, laws, and liberties" would no longer "be in danger of being subverted" and to "vindicat[e] and assert[ ] their ancient rights and liberties." *Id.* In many instances, they expressly prohibited the king from acting under "pretended power"—that is, power he never in fact possessed—without the consent of Parliament.[20]

---

20. Specifically, the English Bill of Rights clarified that the king could not "suspend [ ]" or "dispens[e] with" laws, levy money for his own use, or raise a standing army in times of peace without the consent of Parliament. *Id.* The king also could not require excessive bail, impose excessive fines, or inflict cruel and unusual punishments. *Id.*

The drafters of the English Bill of Rights not only clarified the limits on the king's executive power; they also memorialized their "ancient rights and liberties"— rights that King James had violated and that, the drafters declared, would no longer be subverted:

> [I]t is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.
>
> . . . .
>
> [E]lection of members of parliament ought to be free.
>
> [T]he freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.
>
> . . . .
>
> [F]or the redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently.

Id. Each of these declarations responded to a specific behavior of King James. The enumeration of the right to petition the king "direct[ly] rebuke[d]" King James's violations of that right. *Our First Revolution* 192. Under King James, many who attempted to petition for exemption from certain laws were instead met with prosecution. *Id.* The demand for frequent meetings of Parliament responded to "James's practice of ruling during most of the 1680s without a Parliament." *Id.* The declaration that elections of Parliamentary members ought to be free had been the "central tenet" and rallying cry of King James II's political opponent, William of Orange, *id.* at 193:

> [A]ccording to the ancient constitution of the English government and immemorial custom, all elections of Parliament men ought to be made with an entire liberty, without any sort of force, or requiring the electors to choose such persons as shall be named unto them, and the persons, thus freely elected, ought to give their opinions freely upon all matters that are brought before them, having the good of the nation ever before their eyes, and following in all things, the dictates of their conscience . . . .

William Henry, Prince of Orange, Declaration of the Prince of Orange (Oct. 10, 1688), *reprinted* in *Our First Revolution* 265. By this declaration, the drafters of the English Bill of Rights sought to secure a "free [P]arliament," a Parliament where the electors could vote for candidates of their choice, and the members, once elected, could legislate according to their own consciences without threat of intimidation or coercion from the monarch.[21] *Our First Revolution* 230. The Glorious Revolution ensured that Parliamentary elections would be frequent and free from threat and intimidation. For English citizens, the promises of the English Bill of Rights were fulfilled immediately and continuously: British Parliament has met every year since 1689. *Id.* at 231.

In the years leading up to the Glorious Revolution, King James II also sought to strengthen his control in the American colonies by using tactics similar to those he used in England, including the elimination of colonial representative assemblies. *Id.* The Glorious Revolution set the stage for similar conflicts in Carolina. After the Glorious Revolution, all colonies reinstated their representative assemblies but still endured authoritative royal governors. *Id.* This dynamic catalyzed the American Revolution because the British colonists saw themselves as Englishmen. They understood that the English Bill of Rights protected them from overreaches of executive power and secured for them a right to representative government and free elections. *Id.* at 231–32.

Accordingly, Carolina colonists saw their Royal Governors' abuses of executive power as exercises of the same "pretended power," Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.), that "had been stripped from" the king in the English Bill of Rights, *Our First Revolution* 232. Thus, when the colonists rebelled and our framers drafted the 1776 Declaration of Rights, "they were seeking to preserve in their own states

---

21. The historical context of the English Bill of Rights indicates that the English free elections clause was in no way intended to address gerrymandering in apportionment. Rotten Boroughs—boroughs containing very few residents that elected the same number of parliamentary members as heavily populated boroughs—existed in England for at least one hundred years prior to the framing of our constitution. Rotten Boroughs were prevalent in England before, during, and well after the Glorious Revolution and the signing of the English Bill of Rights in 1689. At that time, the English people added a free elections clause to their English Bill of Rights to address threats, coercion, and intimidation in their elections: "Th[e] election of members of Parliament ought to be free." Bill of Rights 1689, 1 W. & M. Sess. 2 c. 2 (Eng.). Nevertheless, the Rotten Boroughs continued to exist in England until at least 1832. As the three-judge panel found, the continued existence of these Rotten Boroughs at the time of the signing of the English Bill of Rights and their continued use thereafter suggests that the English people did not intend to address apportionment issues with their free elections clause.

what they believed the [Glorious] Revolution had established."[22] *See id.* This historical context produced our free elections clause and freedom of assembly clause.

Given the historical context of the English Bill of Rights, our framers did not intend the adoption of the free elections clause to limit the General Assembly's redistricting authority or to address apportionment at all. As previously noted, North Carolina experienced issues with apportionment both before and well after the drafters first placed the free elections clause in the 1776 Declaration of Rights. These early issues continued until 1835 when the people held a constitutional convention to, among other things, address the apportionment issues. *State Constitution* 13. At that time, they made various changes to their system of representation, *see generally* N.C. Const. of 1776, amends. of 1835, but they did not alter the free elections clause, *see id.* Thus, the historical context of our free elections clause—both colonial and English—indicates that "free elections" refers to elections free from interference and intimidation.

Although the free elections clause has been a part of our constitution since 1776, this Court has rarely been called upon to interpret this provision because its language is plain: it protects voters from interference and intimidation in the voting process. We addressed the merits of a free election claim 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 that

---

22. *Compare* Bill of Rights 1689, 1 W. & M., 2d sess., c. 2 ("That the pretended power of suspending of [and dispensing with] the laws, or the execution of laws, by regal authority, without consent of parliament, is illegal."), *and id.* ("That levying money for or to the use of the crown . . . without grant of parliament . . . is illegal."), *and id.* ("That the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law."), *and id.* ("That election of members of parliament ought to be free."), *and id.* ("That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."), *and id.* ("And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliaments ought to be held frequently."), *with* N.C. Const. of 1776, Declaration of Rights, § V ("That all Powers of Suspending Laws, or the Execution of Laws, by any Authority, without Consent of the Representatives of the People, is injurious to their rights, and ought not to be exercised."), *and id.* § XVI ("That the People of this State ought not to be taxed . . . without the Consent of themselves, or their Representatives in General Assembly, freely given."), *and id.* § XVII ("That the People have a right to bear Arms, for the Defence of the State . . . ."), *and id.* § VI ("That Elections of Members, to serve as Representatives in General Assembly, ought to be free."), *and id.* § X ("That excessive Bail should not be required, nor excessive Fines imposed, nor cruel or unusual punishments inflicted."), *and id.* § XX ("That, for redress of Grievances, and for amending and strengthening the Laws, Elections ought to be often held.").

included 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 141, 134 S.E.2d at 169. We held that a portion of 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 *deterrant* [sic] *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 without restriction by prior commitment. Nonetheless, an inquiry into the sincerity of one's desire to change parties did not violate the clause.

We also considered the free elections clause 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. 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 Const. 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). We interpreted "free," therefore, to mean the right to vote according to one's conscience and to have that vote accurately counted.

Based upon its plain meaning as confirmed by its history and by this Court's precedent, the free elections clause means a voter is deprived of a "free" election if (1) 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, or (2) the votes are not accurately counted, *see Poplin*, 211 N.C. at 702, 191 S.E. at 747. Thus, we hold that the meaning of the free elections clause, based

on its plain language, historical context, and this Court's precedent, is that voters are free to vote according to their consciences without interference or intimidation. Plaintiffs' partisan gerrymandering claims do not implicate this provision.

B. Equal Protection Clause

[4] 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. The equal protection clause was added as part of the ratification of the 1971 constitution. *State Constitution* 68. The addition of the equal protection clause, while a substantive change, was not meant to "bring about any fundamental change" to the power of the General Assembly. *Report of the North Carolina State Constitution Study Commission* 10.

Our understanding of the equal protection clause has been informed by federal case law interpreting the Federal Equal Protection Clause. *See Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 10–11, 269 S.E.2d 142, 149 (1980) (relying almost entirely on Federal Equal Protection jurisprudence in analyzing a claim under Article I, Section 19).

Here plaintiffs present the same arguments under our equal protection clause as were made under the Federal Equal Protection Clause in *Rucho*. *Compare* Verified Compl. for Declaratory J. and Injunctive Relief ¶ 189, *Harper I*, No. 21 CVS 015426, 2021 WL 6884973 (N.C. Super. Ct. Wake County Dec. 16, 2021) ("Partisan gerrymandering violates the State's obligation to provide all persons with equal protection of the law . . . by seeking to diminish the electoral power of supporters of a disfavored party."), *with Rucho*, 139 S. Ct. at 2492 ("[Plaintiffs] alleged that the Plan violated the Equal Protection Clause of the Fourteenth Amendment by intentionally diluting the electoral strength of Democratic voters."). In *Rucho* the Supreme Court determined that the plaintiffs' partisan gerrymandering claims did not implicate the Federal Equal Protection Clause. *See* 139 S. Ct. at 2502–04. As the Supreme Court observed, "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 2507. We find this analysis persuasive. Under our constitution, a claim of vote dilution allegedly based on one's affiliation with a political party does not raise a claim under our equal protection clause.

This Court has previously 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) (citations omitted). Several of our cases indicate that the fundamental right to vote on equal terms simply means that each vote must have the same weight. This 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." N.C. Const. art. II, §§ 3(1), 5(1). This is a simple mathematical calculation. *See Rucho*, 139 S. Ct. at 2501. Party affiliation, however, is not mentioned in Article II, Sections 3 or 5.

Early on in its history, North Carolina moved towards representation roughly based on population, first in the House, *see* N.C. Const. of 1776, amends. of 1835, art. I, § 2, and later in the Senate, *see* N.C. Const. of 1868, art. II, § 5. It was not until after *Baker v. Carr* instituted the one-person, one-vote requirement based on the Federal Equal Protection Clause, *see Baker*, 369 U.S. at 210, 82 S. Ct. at 706, however, that apportionment became a strictly population-based system in North Carolina, *see* N.C. Const. of 1868, amends. of 1967, art. II, § 5. The 1971 North Carolina Constitution incorporated these concepts into the text of Article II, *see* N.C. Const. of 1971, art. II, §§ 3(1), 5(1), and our courts have applied these concepts in interpretating our equal protection clause in the context of apportionment, *see* N.C. Const. art. II, § 19. Several cases arising after this chronological progression are helpful when reviewing equal protection claims arising in the context of apportionment.

This Court's decision in *Northampton County* illustrates the concept of numerically equal voting strength. In that case, a certain drainage district lay partly in Northampton County and partly in Hertford County. 326 N.C. at 744, 392 S.E.2d at 354. By statute, the Clerk of Superior Court in Northampton County—who was elected only by Northampton County residents—appointed all the drainage district commissioners. *Id.* at 744, 392 S.E.2d at 354. In a suit brought by the drainage district to recover assessments made against the landowners in Hertford County, this Court held that the electoral scheme of this drainage district violated the equal protection clause of Article I, Section 19 because the Hertford County landowners could not vote for the elected official who appointed all the commissioners, but the landowners in Northampton County could. *Id.* at 746, 392 S.E.2d at 355. This arrangement infringed on the Hertford County landowners' fundamental right "to vote on equal terms" because some members of the district could vote for their elected official, and some could not. *See id.* at 746, 392 S.E.2d at 355.

Likewise, in *Blankenship v. Bartlett*, 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. 518, 527, 681 S.E.2d 759, 766 (2009). We explained that the above showing implicated the fundamental "right to vote on equal terms in representative elections—a one-person, one-vote standard," *id.* at 522, 681 S.E.2d at 762–63, and we thus employed a heightened scrutiny analysis, *id.* at 523, 681 S.E.2d at 763.

Similarly, in *Stephenson I* this Court addressed what the fundamental right to vote on equal terms means when considering the use of multi-member and single-member districts. *See* 355 N.C. at 378, 562 S.E.2d at 393. In that case we first found that the challenged legislative plans—the 2001 Plans—violated the WCP. *Id.* at 371, 562 S.E.2d at 389–90. 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." *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 394–95. In other words, "substantially equal voting power"

meant that each legislator should represent a similar number of constituents, which was impossible when using both single-member and multi-member districts in the same map. This is an application of the one-person, one-vote concept.

In *Harper I*, however, four justices expanded the scope of "substantially equal voting power" from mathematically equal representation under the one-person, one-vote concept and misconstrued it to create an "opportunity to aggregate one's vote with likeminded citizens" based on partisan affiliation. 380 N.C. at 378, 868 S.E.2d at 544. This idea is not supported by our precedent.

Stephenson I recognized that partisan considerations are permitted in the redistricting process. 355 N.C. 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"). The ultimate holding of our *Stephenson I* decision was that the WCP of Article II, Sections 3 and 5 must be enforced to the extent compatible with the VRA and one-person, one-vote principles. Thus, when understanding *Stephenson I* 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, not to a prohibition or limitation on partisan considerations.

Unlike the classifications in *Northampton County*, *Blankenship*, and *Stephenson I*, partisan gerrymandering has no 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 individual *voting power* so long as each voter is 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, following the guidance of the Supreme Court in *Rucho*, we hold that a partisan gerrymandering claim does not trigger review under our equal protection clause. *See Gaffney*, 412 U.S. at 745 (holding that certain claims were "insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State"). Claims that a redistricting plan diminishes the electoral power of members of a particular political party do not violate Article I, Section 19 of our constitution.

C. Free Speech and Freedom of Assembly Clauses

[5] The freedom of assembly and free speech clauses are found in Article I, Section 12 and Article I, Section 14 respectively. 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. Like the equal protection clause, the free speech clause was added to our Declaration of Rights as part of the 1971 constitution. N.C. Const. of 1971, art. I, § 14. The addition of the free speech clause, while a substantive change, was not meant to "bring about any fundamental change" to the power of the General Assembly. *Report of the North Carolina State Constitution Study Commission* 10. Our understanding of the free speech clause is informed by federal interpretation of the similar provision in the First Amendment to the Federal Constitution. *See State v. Petersilie*, 334 N.C. 169, 183, 432 S.E.2d 832, 840 (1993) (adopting "doctrines developed by the United States Supreme Court in interpreting the Free Speech Clause of the United States Constitution . . . for purposes of applying the Free Speech Clause of the North Carolina Constitution").

The freedom of assembly clause first appeared in the 1776 Declaration of Rights 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." N.C. Const. of 1776, Declaration of Rights, § XVIII. The freedom of assembly clause was modified by the 1868 constitution by deleting "that," the first word of the clause. N.C. Const. of 1868, art. I, § 25. In the 1971 constitution, the freedom of assembly clause was re-written to the form it has today. N.C. Const. of 1971, art. I, § 12. As with the 1971 changes to the free speech clause, the most recent change to the freedom of assembly clause was

not meant as a substantive change, nor was it meant to "bring about any fundamental change" to the power of the General Assembly. *Report of the North Carolina State Constitution Study Commission* 10.

The right to free speech is violated when "restrictions are placed on the espousal of a particular viewpoint," *Petersilie*, 334 N.C. at 183, 432 S.E.2d at 840, or where retaliation motivated by the content 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, 478, 574 S.E.2d 76, 89 (2002) (explaining that a viable 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).

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)).

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 (Newby, J., concurring in part and dissenting in part). As such, opponents of a redistricting plan are free to voice their opposition.

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 or the applicable case law that supports plaintiffs' expanded interpretation of them. 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 the existence of similar express protections for speech and assembly rights in the Federal Constitution. *Rucho*, 139 S. Ct. at 2505–07.

In summary, none of the constitutional provisions cited by plaintiffs prohibit the practice of partisan gerrymandering. Each provision 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 four express limitations on the General Assembly's otherwise explicit redistricting authority, none of which address partisan gerrymandering.

VI. *Stephenson I* and the VRA

[6] Because we are overturning *Harper I*, we must briefly revisit another of Common Cause's claims that was based on a holding in that opinion. In its 11 January 2022 Judgment, the three-judge panel concluded that although *Stephenson I* requires the General Assembly to draw VRA districts prior to non-VRA districts, it does not require the General Assembly to conduct an RPV analysis "prior to making a decision as to whether VRA districts are necessary." Accordingly, the three-judge panel dismissed this claim with prejudice. In *Harper I* the four-justice majority reversed this portion of the 11 January 2022 Judgment and held that our constitution and *Stephenson I* require the General Assembly to conduct an RPV analysis before drawing any legislative districts. *See Harper I*, 380 N.C. at 401, 868 S.E.2d at 558. Accordingly, on remand, the General Assembly performed an RPV analysis, and the three-judge panel found that this analysis satisfied this Court's directive from *Harper I*. Common Cause challenged this finding of fact in its appeal from the three-judge panel's remedial order.

The holding from *Harper I* that required the General Assembly to perform an RPV analysis before drawing any legislative districts was based on an inaccurate reading of *Stephenson I*. In *Stephenson I* 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." 355 N.C. at 363, 562 S.E.2d at 385 (first citing 42 U.S.C. §§ 1973a, 1973b (1994); and then citing *Gingles*, 478 U.S. at 43, 106 S. Ct. at 2762). 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 WCP and the VRA because the legislative defendants in *Stephenson I* argued that "the constitutional provisions mandating that counties not be divided are wholly unenforceable because of the requirements of the [VRA]." *Id.* at 361, 562 S.E.2d at 383–84. Thus, the Court in *Stephenson I* was not forcing the legislative defendants to conduct an RPV 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 WCP.

Because the North Carolina Constitution does not require the General Assembly to conduct an RPV analysis before enacting a redistricting plan, Common Cause's arguments regarding the General Assembly's RPV analysis are inapposite. Plaintiffs essentially ask this Court to "impose a judicially-mandated preclearance requirement" where no such requirement exists in our constitution. If Common Cause believed that the General Assembly was incorrect that no VRA districts were required, it could have brought a claim under Section 2 of the VRA. Common Cause did not bring such a claim in this case. Accordingly, the holding in *Harper I* that required the General Assembly to undertake an RPV analysis is overruled, and the portion of the 11 January 2022 Judgment dismissing Common Cause's declaratory judgment claim with prejudice is affirmed.[23]

VII. Petitions for Rehearing Under Rule 31 and Stare Decisis

[7] Rule 31 of the North Carolina Rules of Appellate Procedure states that

> [a] petition for rehearing may be filed in a civil action within fifteen days after the mandate of the court has

23. While we do not specifically address the issue of standing here, we note this Court has addressed the test for standing in *Community Success Initiative v. Moore*, 384 N.C. 194, 866 S.E.2d 16 (2023), issued concurrently with this opinion. We overrule the analysis of standing set forth in *Harper I* to the extent it conflicts with the decision in Community Success. *See Harper I*, 380 N.C. at 353–55, 868 S.E.2d at 528–29.

> been issued. The petition shall state with particularity the points of fact or law that, in the opinion of the petitioner, the court has overlooked or misapprehended and shall contain such argument in support of the petition as petitioner desires to present.

N.C. R. App. P. 31(a). This rule contemplates that, at times, this Court may need to revisit a recent decision to correct a mistake. We have never hesitated to rehear a case when it is clear that the Court "overlooked or misapprehended" the law. *See, e.g.*, *Jones v. City of Durham*, 360 N.C. 367, 367, 629 S.E.2d 611, 611 (2006) (order granting rehearing); *Smith Chapel Baptist Church v. City of Durham* (*Smith Chapel I*), 349 N.C. 242, 242, 514 S.E.2d 272, 272 (1998) (same); *Whitford v. Gaskill*, 345 N.C. 762, 762, 489 S.E.2d 177, 178 (1997) (same); *Clay v. Emp. Sec. Comm'n*, 340 N.C. 83, 87, 458 S.E.2d 198, 199 (1995) (same); *Alford v. Shaw*, 318 N.C. 703, 703, 351 S.E.2d 738, 738 (1987) (same); *Lowe v. Tarble*, 313 N.C. 176, 176, 326 S.E.2d 32, 32 (1985) (same); *Hous., Inc. v. Weaver*, 304 N.C. 588, 588, 289 S.E.2d 832, 832 (1981) (same). Several of these rehearings resulted in new opinions that differed substantially from the Court's initial opinion in the case. *See, e.g.*, *Jones v. City of Durham*, 361 N.C. 144, 146, 638 S.E.2d 202, 202 (2006) (per curiam); *Smith Chapel Baptist Church v. City of Durham* (*Smith Chapel II*), 350 N.C. 805, 806, 517 S.E.2d 874, 876 (1999); *Clay v. Emp. Sec. Comm'n*, 340 N.C. 83–84, 457 S.E.2d 725, 726 (1995); *Alford v. Shaw*, 320 N.C. 465, 467, 358 S.E.2d 323, 324 (1987) (on rehearing, withdrawing the Court's original opinion and reviewing the case "de novo"). It is not uncommon that rehearing of a case coincides with a change in personnel on the Court who provide a fresh legal perspective. *See, e.g.*, *Smith Chapel II*, 350 N.C. at 807, 821, 517 S.E.2d at 876, 883–84. Our decision today simply adheres to these principles. *See Sidney Spitzer & Co. v. Comm'rs of Franklin Cnty.*, 188 N.C. 30, 32, 123 S.E. 636, 638 (1924) ("There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment." (internal citations omitted)). A petition for rehearing is particularly appropriate here because the four-justice majority in *Harper I* expedited the consideration of this matter over the strong dissent of the other three justices on this Court. *See Harper v. Hall*, 382 N.C. 314, 316, 874 S.E.2d 902, 904–05 (2022) (order granting motion to expedite hearing and consideration). There was no "jurisprudential reason" to force an expedited consideration of this case. *Id.* at 317, 874 S.E.2d at 904 (Barringer, J., dissenting) ("Given the absence of any identifiable jurisprudential reason, the majority's decision today appears to reflect deeper partisan biases that have no place in a judiciary dedicated to the impartial administration of justice and the rule of law.").

The "doctrine of *stare decisis* . . . proclaims, in effect, that where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed in similar cases." *State v. Ballance*, 229 N.C. 764, 767, 51 S.E.2d 731, 733 (1949) (internal citations omitted). This doctrine reflects the idea that "the law must be characterized by stability," and courts should not change the law to reach particular results. *Id.* at 767, 51 S.E.2d at 733. When adhering to the doctrine would "perpetuate error," however, this Court has never hesitated to refuse to apply it. *Sidney Spitzer & Co.*, 188 N.C. at 32, 123 S.E. at 638 ("There is no virtue in sinning against light or in persisting in palpable error, for nothing is settled until it is settled right."); *see also Mial v. Ellington*, 134 N.C. 131, 139, 46 S.E. 961, 964 (1903) (noting the necessity of overturning a prior decision of this Court where it stood "without support in reason" and was "opposed to the uniform, unbroken current of authority" in the state); *Ballance*, 229 N.C. at 767, 51 S.E.2d at 733 ("[*S*]*tare decisis* will not be applied in any event to preserve and perpetuate error and grievous wrong."); *Rabon v. Rowan Mem'l Hosp., Inc.*, 269 N.C. 1, 29, 152 S.E.2d 485, 502 (1967) (Lake, J., dissenting) (conceding that "a proper exercise of [judicial] power . . . is the result of its determination that its former decision was an erroneous statement of the law when the decision was rendered"); *Wiles v. Welparnel Constr. Co.*, 295 N.C. 81, 85, 243 S.E.2d 756, 758 (1978) ("[*S*]*tare decisis* will not be applied when it results in perpetuation of error or grievous wrong, since the compulsion of the doctrine is . . . moral and intellectual, rather than arbitrary and inflexible." (internal citation omitted)).

Sometimes this Court explicitly overrules prior decisions. *See, e.g.*, *State v. Elder*, 383 N.C. 578, 603, 881 S.E.2d 227, 245 (2022) (overruling a portion of this Court's prior decision in *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982)); *Cedarbrook Residential Ctr., Inc. v. N.C. DHHS*, 383 N.C. 31, 56–57, 881 S.E.2d 558, 576–77 (2022) (overruling *Nanny's Korner Day Care Ctr., Inc. v. N.C. DHHS*, 264 N.C. App. 71, 825 S.E.2d 34 (2019)); *State v. Kelliher*, 381 N.C. 558, 581–83, 873 S.E.2d 366, 383–84 (2022) (abrogating *State v. Green*, 348 N.C. 588, 502 S.E.2d 819 (1998)); *Connette ex rel. Gullatte v. Charlotte-Mecklenburg Hosp. Auth.*, 382 N.C. 57, 71–72, 876 S.E.2d 420, 430–31 (2022) (reversing, with three votes, which is less than a majority of this Court, the ninety-year-old opinion in *Byrd v. Marion Gen. Hosp.*, 202 N.C. 337, 162 S.E. 738 (1932)). Other times this Court overrules prior decisions by implication. *See, e.g.*, *McAuley v. N.C. A&T State Univ.*, 383 N.C. 343, 355, 881 S.E.2d 141, 149 (2022) (Barringer, J., dissenting) (noting that the majority opinion "refuse[d] to follow . . . [ninety] years of this Court's precedent established in *Wray v. Carolina Cotton & Woolen Mills Co.*, 205 N.C. 782,

783, 172 S.E. 487, 488 (1934)); *State v. Styles*, 362 N.C. 412, 415–16, 665 S.E.2d 438, 440–41 (2008) (effectively abrogating *State v. Ivey*, 360 N.C. 562, 633 S.E.2d 459 (2006)).

As demonstrated, this Court has not hesitated to revisit and overrule prior decisions that are erroneous. Regardless, *Harper I* does not meet any criteria for adhering to *stare decisis*—it is neither long-standing nor has it been relied upon in other cases. *See Ballance*, 229 N.C. at 767, 51 S.E.2d at 733. *Harper I* was wrongly decided and, as a result, *Harper II* was also wrongly decided. Legislative Defendants filed a timely petition under Rule 31 of the Rules of Appellate Procedure, and *Harper II* was properly reheard. *Harper I* is overruled, and *Harper II* is withdrawn and superseded by this opinion.

VIII. Remedy

[8] In their petition for rehearing, Legislative Defendants asked that if this Court concludes that plaintiffs' partisan gerrymandering claims are nonjusticiable, that the Court also address the appropriate remedy—in other words, what set of maps, if any, were constitutionally "established" and, therefore, must be used. Article II, Sections 3(4) and 5(4) provide that "[*w*]*hen established*, the senate [and representative] districts shall . . . remain unaltered" until the next federal census. N.C. Const. art. II, §§ 3(4), 5(4) (emphasis added). Because "a constitution cannot violate itself," *Leandro*, 346 N.C. at 352, 488 S.E.2d at 258, we must construe the meaning of the phrase "[w]hen established," N.C. Const. art. II, §§ 3(4), 5(4), in harmony with the rest of the constitution.

Looking first to the plain meaning, to "establish" means "[t]o settle, make, or fix firmly; to enact permanently." *Establish*, Black's Law Dictionary (11th ed. 2019). This meaning connotes something more than the passage of a redistricting act by the General Assembly. The General Assembly could certainly amend a redistricting act up until the time it is used. Once passed and used in the next election, however, the districts are "established" until the next decennial census unless a court finds them constitutionally infirm. This understanding of "[w]hen established" is consistent with our precedent that allows the General Assembly an opportunity to redraw districts when necessary to remedy court-identified infirmities. *See*, *e.g.*, *Pender County*, 361 N.C. at 510, 649 S.E.2d at 376 ("leav[ing] to the General Assembly the decision" of how to redraw a district that was held to be constitutionally infirm and declining "to specify the exact configuration" of how the districts should be redrawn). Accordingly, "[w]hen established" refers to establishment consistent with the constitution. *See* N.C. Const. art. II, §§ 3, 5 (providing

textual limitations); N.C.G.S. §§ 120-2.3 to -2.4 (providing for limited judicial review); *see also* N.C. Const. art. II, §§ 22(5)(b)-(d) (exempting restricting legislation from gubernatorial veto).

In our order granting Legislative Defendants' petition for rehearing, we specifically asked for briefing on appropriate remedies. *See Harper*, 384 N.C. at 4, 881 S.E.2d at 550 (order granting Legislative Defendants' petition for rehearing). As we did in *Stephenson I*, "we must now consider the practical consequences of our holding and address any required remedial measures." *Stephenson I*, 355 N.C. at 375, 562 S.E.2d at 392; *see also Scott v. Germano*, 381 U.S. 407, 409, 85 S. Ct. 1525, 1527 (1965) ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."). Legislative Defendants maintain that neither the remedial 2022 Plans nor the original 2021 Plans were "established" as intended in Article II, Sections 3(4) and 5(4). We agree.

In *Harper I* four members of this Court wrongly held that partisan gerrymandering claims are justiciable and violate provisions of the Declaration of Rights in the North Carolina Constitution. This Court then also erroneously declared that the 2021 Plans were unconstitutional partisan gerrymanders and "enjoin[ed] the use of [the 2021 Plans] in any future elections." The 2021 Plans should not have been enjoined, and this Court should not have ordered the General Assembly to draw remedial plans using the erroneous standards set forth in *Harper I*. Nonetheless, this Court's *Harper I* decision forced redistricting criteria upon the General Assembly that our constitution does not require. Accordingly, the 2022 Plans are a product of a misapprehension of the law and of *Harper I*'s violation of separation of powers.

Because *Harper I*'s misapprehension of our constitutional law generated the 2022 Plans, they were never "established" as that word is used in Article II, Sections 3(4) and 5(4). Additionally, by statute the General Assembly is not required to utilize the 2022 Plans for future elections. *See also* N.C.G.S. § 120-2.4(a1) (providing that a court-imposed remedial map may only be used in the next general election).

Thus, if the 2022 Plans are no longer in force, the question arises whether the original 2021 Plans are reinstated. In their petition for rehearing and supplemental brief, Legislative Defendants argued that the 2021 Plans were likewise never "established" pursuant to Article II, Sections 3(4) and 5(4). Legislative Defendants point out that the 2021 Plans lasted just over a month before this Court enjoined their use in the

remedial order in *Harper I* and that the 2021 Plans were never used in an election. As a direct result of the *Harper I* decision, the 2022 Plans were drawn, elections were held based on those remedial districts, and new legislators took their seats in the General Assembly. Legislative Defendants point out that because the 2022 Plans were used in the 2022 election cycle, use of the 2021 Plans for the next election cycle would "double-bunk" many legislators.[24] Legislative Defendants point to the long history of our cases directing that, when necessary, the General Assembly must be given the opportunity to redraw constitutionally compliant districts. *See*, *e.g.*, *Stephenson II*, 357 N.C. at 303, 582 S.E.2d at 248–49; *Stephenson I*, 355 N.C. at 385, 562 S.E.2d at 398. We agree with Legislative Defendants' analysis.

Moreover, when reviewing the history behind the General Assembly's adoption of the first set of redistricting plans challenged in this case (2021 Plans), it becomes clear that these plans are also a product of a misapprehension of North Carolina law. In 2018, just a few years before the enactment of the 2021 Plans, the North Carolina Democratic Party and a group of North Carolina voters brought a state court action challenging remedial legislative redistricting plans drawn by the General Assembly the previous year (2017 Plans).[25] *See generally* Compl., *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Wake County Sept. 3, 2019). The plaintiffs in that case brought the exact claims that are at issue in this case—they argued that the 2017 Plans were partisan gerrymanders in violation of the free elections clause, the equal protection clause, and the freedom of speech and assembly clauses of North Carolina's Declaration of Rights. *Id.* at 60–68.

Despite having the benefit of the Supreme Court's decision in *Rucho*, the three-judge panel in *Common Cause v. Lewis* agreed with the plaintiffs that these Declaration of Rights provisions prohibit partisan gerrymandering, *Lewis*, 2019 WL 4569584, at *3, *108–24, *129, and that the General Assembly's use of partisan election data to assign voters to districts violated these provisions. *See id.* at *121. The panel in *Lewis* concluded that partisan gerrymandering claims are justiciable

---

24. The dissent concedes that incumbency protection—that is, avoiding the double-bunking of incumbent legislators, is a permissible, neutral redistricting criteria.

25. The General Assembly enacted the 2017 Plans after a federal district court found that several of the legislative districts in the 2011 Plans were racially gerrymandered. *See Covington v. North Carolina*, 283 F. Supp. 3d 410, 413 (M.D.N.C. 2018), *aff'd in part and rev'd in part*, 138 S. Ct. 2548 (2018) (per curiam).

under the North Carolina Declaration of Rights.[26] *Id.* at *126. The *Lewis* order clearly represents a mistaken understanding of the North Carolina Constitution—the same mistaken understanding made by four members of this Court in *Harper I* and corrected by this Court today.

The panel in *Lewis* ordered the General Assembly to redraw the 2017 Plans using specific redistricting criteria and methods enumerated in the *Lewis* order. *Id.* at *136. Many of the required or prohibited criteria in the *Lewis* order are not derived from the express language of the constitution. Notably, to prevent partisan gerrymandering, the *Lewis* panel explicitly prohibited the General Assembly from considering any partisan election data in its remedial process.[27] *Id.* As demonstrated by our opinion today, however, this proscription on the use of partisan data constituted judicial error because our constitution does not address the use of partisan data in the redistricting process.

Nevertheless, to comply with the *Lewis* order the General Assembly proceeded under the assumption that it could not consider any partisan election data in its redistricting process without risking a constitutional violation. In 2021, when the General Assembly first began drawing the 2021 Plans, it convened a Joint Meeting of the Senate Redistricting and Elections Committee and the House Redistricting Committee. For purposes of discussing the criteria that would govern the 2021 redistricting process, each Committee member received a copy of the criteria mandated by the *Lewis* panel in 2019. One week later, the Joint Redistricting Committee adopted finalized criteria for its 2021 map drawing process (Adopted Criteria). The Adopted Criteria were nearly identical to the criteria mandated by the *Lewis* panel. Specifically, the Adopted Criteria, just like the criteria from *Lewis*, included a prohibition on consideration of partisan election data. Legislative Defendants suggest that the Joint Redistricting Committee incorporated this requirement into its Adopted Criteria because it believed that requirement was necessary to create constitutionally compliant redistricting plans. *See* Legislative

---

26. The *Lewis* panel reached these conclusions even though it had the benefit of the Supreme Court's *Rucho* opinion, which was issued slightly over two months before the *Lewis* order. These conclusions also conflicted with this Court's holdings in *Dickson I* and *Dickson II* that suggested that the Declaration of Rights generally does not provide judicially manageable standards for claims related to gerrymandering. *See Dickson I*, 367 N.C. at 575, 766 S.E.2d at 260; *Dickson II*, 368 N.C. at 534, 781 S.E.2d at 440–41. Of note, the three-judge panel in *Lewis* and the three-judge panel in *Dickson I* consisted of the same three superior court judges.

27. Ironically, the *Harper I* majority struck the 2021 Plans and then required the General Assembly to use partisan data in redrawing the plans.

Defendants-Appellees' Brief at 20–21, *Harper v. Hall*, 380 N.C. 317 (2022) (No. 413PA21-1) (noting that "[t]o avoid violations identified in the 2010 [redistricting] cycle," including those identified in the *Lewis* order, the General Assembly included prohibition on the consideration of partisan election data in its Adopted Criteria).

As demonstrated by today's opinion, however, that prohibition does not exist. Our constitution does not speak to partisan considerations—or any other considerations not explicitly addressed in the text of our constitution or federal law—in the redistricting process. Just as this Court's *Harper I* decision forced the General Assembly to draw the 2022 Plans under a mistaken interpretation of our constitution, the *Lewis* order forced the General Assembly to draw the 2021 Plans under the same mistaken interpretation of our constitution. Accordingly, the districts were not constitutionally "established." To hold otherwise would perpetuate the same violation of separation of powers that we have attempted to cure today. Thus, the 2021 Plans are not "established," as that phrase is used in Article II, Sections 3(4) and 5(4).

The General Assembly shall have the opportunity to enact a new set of legislative and congressional redistricting plans, guided by federal law, the objective constraints in Article II, Sections 3 and 5, and this opinion. "When established" in accordance with a proper understanding of the North Carolina Constitution, the new legislative plans "shall remain unaltered until the return of" the next decennial census. N.C. Const. art. II, §§ 3(4), 5(4).

IX. Conclusion

For 200 years our Supreme Court has faithfully sought to implement the intent of the drafters of our state constitution by interpreting that foundational document based on its plain language and the historical context in which each provision arose. Recently, this Court has strayed from this historic method of interpretation to one where the majority of justices insert their own opinions and effectively rewrite the constitution. Today we return to the text of the state constitution, correct our course, and come back to the proper understanding and application of our fundamental constitutional principles. Apportionment is textually committed to the General Assembly, and apportionment legislation is entitled to our long-standing standard of review—a presumption of constitutionality and a required showing that the legislation is unconstitutional beyond a reasonable doubt. There is no judicially manageable standard by which to adjudicate partisan gerrymandering claims. Courts are not intended to meddle in policy matters. In its decision

today, the Court returns to its tradition of honoring the constitutional roles assigned to each branch.

This case is not about partisan politics but rather about realigning the proper roles of the judicial and legislative branches. Today we begin to correct course, returning the judiciary to its designated lane.

> The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

Baker, 369 U.S. at 267, 82 S. Ct. at 737–38 (Frankfurter, J., dissenting).

We have recognized that our constitution allows the General Assembly to enact laws unless expressly prohibited by the constitutional text. This Court will no longer change the time-honored meaning of various portions of our constitution by interpreting the text with the singular aim of reaching a desired outcome. As explicitly stated in our constitution, the people have the authority to alter their foundational document, not this Court. The people alone have the final say.

This Court's opinion in *Harper I* is overruled. We affirm the three-judge panel's 11 January 2022 Judgment concluding, *inter alia*, that claims of partisan gerrymandering present nonjusticiable, political questions and dismissing all of plaintiffs' claims with prejudice. This Court's opinion in *Harper II* is withdrawn and superseded by this opinion. The three-judge panel's 23 February 2022 order addressing the Remedial Plans is vacated. Plaintiffs' claims are dismissed with prejudice.

VACATED.

Justice EARLS dissenting.

Following the 2010 census and prior to the United States Supreme Court's decision in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), one of the Republican co-chairs of the General Assembly's redistricting committee, Representative David Lewis, explained his rationale in presenting redistricting plans that disproportionately favored Republicans: "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." *Id.* at 2491.

Though jarring in its irreverence to democracy, Representative Lewis simply admitted what all of the evidence subsequently showed about redistricting maps enacted by the North Carolina General Assembly in recent years: They stifle the will of North Carolina voters by rigging the system against one party in favor of another. Representative Lewis's views carried the day. The General Assembly adopted a "partisan advantage" redistricting criterion that required the districts to maintain a ten to three Republican/Democrat congressional delegation. *See Common Cause v. Rucho*, 318 F. Supp. 3d 777, 807 (M.D.N.C. 2018), *overruled by Rucho*, 139 S. Ct. 2484. Those maps were ultimately held to be unconstitutional under the North Carolina Constitution in a ruling that was never appealed to this Court. *See Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *2 (N.C. Super. Ct. Sept. 3, 2019) (holding that, when these maps were created, "partisan intent predominated over all other redistricting criteria resulting in extreme partisan gerrymander[s]").

When the General Assembly attempted to enact a new extreme partisan gerrymander just a few years later following the release of 2020 census data, this Court rejected the idea that the voters of this state must be hostage to the partisan objectives of the ruling party in the General Assembly. And for a brief window in time, the power of deciding who is elected to office was given to the people, as required by the state constitution. *See Harper v. Hall* (*Harper I*), 380 N.C. 317, 339, *cert. granted sub nom. Moore v. Harper*, 142 S. Ct. 2901 (2022), *vacated*, *Harper v. Hall*, No. 413PA21-2 (N.C. Apr. 28, 2023); *Harper v. Hall* (*Harper II*), 383 N.C. 89 (2022), *vacated*, *Harper v. Hall*, No. 413PA21-2 (N.C. Apr. 28, 2023). In *Harper I*, this Court ensured that all North Carolinians, regardless of political party, were not denied their "fundamental right to vote on equal terms." *Harper I*, 380 N.C. at 378 (cleaned up).

Today, the majority strips the people of this right; it tells North Carolinians that the state constitution and the courts cannot protect their basic human right to self-governance and self-determination. In so doing, the majority ignores the uncontested truths about the intentions behind partisan gerrymandering and erects an unconvincing façade that only parrots democratic values in an attempt to defend its decision. Despite its lofty prose about the need for principled adherence to the state constitution, the majority follows none of these principles today. Nor does the majority even pay passing reference to the anti-democratic nature of extreme partisan gerrymandering. These efforts to downplay the practice do not erase its consequences and the public will not be gaslighted. Our constitution provides that "[a]ll political power is vested in and derived from the people; all government of right originates from

the people, is founded upon their will only." N.C. Const. art. I, § 2. But when Republican lawmakers are free to gerrymander redistricting plans without constitutional guardrails to ensure their party's indefinite political domination, this constitutional requirement is abandoned.

Unchecked partisan gerrymandering allows the controlling party of the General Assembly to draw legislative redistricting plans in a way that dilutes the voting power of voters in the disfavored party. In so doing, those who hold political power can guarantee that they remain in office for decades, making them impervious to the popular will. Thus, rather than allowing "the people . . . [to] choose whom they please to govern them," as Alexander Hamilton once described as "the true principle of a republic," 2 Debates on the Constitution 257 (J. Elliot ed. 1891), members of the General Assembly make this choice for the people, favoring Republicans because they believe that electing Republicans is better for the country. This is not how democracy should function.

What is more, the majority abolishes the fundamental right to vote on equal terms regardless of political party through a process driven by partisan influence and greed for power. Let there be no illusions about what motivates the majority's decision to rewrite this Court's precedent. Today's result was preordained on 8 November 2022, when two new members of this Court were elected to establish this Court's conservative majority. To the Court's new majority, the parties' briefing after rehearing was granted did not matter.[1] The oral argument held after rehearing was granted did not matter. The merits of Plaintiffs' arguments do not matter. For at stake in this case is the majority's own political agenda. Today, the Court shows that its own will is more powerful than the voices of North Carolina's voters.

To be clear, this is not a situation in which a Democrat-controlled Court preferred Democrat-leaning districts and a Republican-controlled Court now prefers Republican-leaning districts. Here, a Democratic-controlled Court carried out its sworn duty to uphold the state constitution's guarantee of free elections, fair to all voters of both parties. This decision is now vacated by a Republican-controlled Court seeking

1. Exhibiting its disregard for the merits of the arguments like those presented by Plaintiffs, the Court denied two parties' motions for leave to file amicus curie briefs in support of Plaintiffs. *See Harper v. Hall*, 2022-NCSC-121 (March 9, 2023) (order on motion of Governor Roy Cooper and Attorney General Joshua H. Stein for leave to file amicus brief in support of plaintiffs-appellants); *Harper v. Hall*, 2022-NCSC-121 (March 9, 2023) (order on motion of the Brennan Center for Justice at N.Y.U. School of Law for leave to file amicus curiae brief in support of plaintiffs-appellants on rehearing). I would have allowed the motions.

to ensure that extreme partisan gerrymanders favoring Republicans are established.[2]

In a single blow, the majority strips millions of voters of this state of their fundamental, constitutional rights and delivers on the threat that "our decisions are fleeting, and our precedent is only as enduring as the terms of the justices who sit on the bench." *See Harper v. Hall*, No. 413PA21, 2023 WL 1516190 (N.C. Feb. 3, 2022) (order allowing motion for rehearing) (Earls, J., dissenting) [hereinafter *Harper Order*].

I. Background

Though the majority explains the history of this case in depth, it neglects to make any mention of the practical effect of the maps that sparked and perpetuated this litigation. In the cases that the majority vacates and overturns today, *Harper I* and *Harper II*, the Court explained at great length the severity of the partisan gerrymanders that the General Assembly crafted. *See Harper I*, 380 N.C. at 333–46; *Harper II*, 383 N.C. at 100–111, 114–23. I therefore summarize only briefly where this litigation began.

Following the 2020 Decennial Census, the North Carolina General Assembly enacted new redistricting plans for the North Carolina House of Representatives, the North Carolina Senate, and the U.S. House of Representatives (2021 Plans). In November 2021, North Carolina League of Conservation Voters, Inc. (NCLCV) and Harper Plaintiffs challenged the plans as unconstitutional partisan gerrymanders in separate suits that were assigned to the same three-judge panel and consolidated in December 2021. That same month, Plaintiff Common Cause moved to intervene in the litigation, and the three-judge panel granted the motion.

In a 258-page opinion issued in January 2022, the three-judge panel unanimously found that the 2021 Plans constituted extreme partisan gerrymanders. Specifically, the trial court found that the 2021 Congressional Plan was an "intentional, and effective, pro-Republican partisan redistricting" that all but guaranteed Republicans ten out of fourteen seats in the U.S. House of Representatives. The trial court further found

2. For instance, the majority in *Harper I* recognized that "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." *Harper I*, 380 N.C. at 323. By contrast, today's majority believes that its responsibility is to protect the plans that the trial court found to be "egregious and intentional partisan gerrymanders, designed to enhance Republican performance, and thereby give a greater voice to those voters than to any others." *Id.* at 324.

that "the enacted congressional map is more carefully crafted to favor Republicans than at least 99.9999% of all possible maps" using nonpartisan redistricting criteria. *Harper I*, 380 N.C. at 339. These results were no accident, the trial court concluded. Instead, "the 2021 Congressional Plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation." The trial court further explained that "Legislative Defendants offered no defense of the 2021 Congressional Plan. No expert witness opined that it was not the product of an intentional partisan redistricting."

The state legislative districts fared no better. For example, the trial court found that the enacted State Senate Plan

> effectuate[d] 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.

Harper I, 380 N.C. at 341.

Similarly, the trial court concluded 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 . . . persists even when voters clearly express a preference for Democratic candidates." *Id.* The trial court also concluded that "[t]he 2021 House Plan's partisan bias creates firewalls protecting the Republican supermajority and majority in the House."

So, this is where we started. And when confronted with three different legislative redistricting plans that were all found to have been intentional attempts to consolidate Republican power and suppress the will of the voters, this Court chose to protect the democratic ideals enshrined in our state constitution and the voters themselves over the political and partisan motivations of a select few in the General Assembly. Today, the Court reverses course and chooses the latter. Even beyond this particular decision, the majority has already repeatedly revealed itself to be on a mission to pursue the agenda of this select few in the legislature. *See Holmes v. Moore*, No. 342PA19-3 (N.C. Apr. 28, 2023); *Cmty. Success*

Initiative v. Moore, No. 331PA21 (N.C. Apr. 28, 2023). Its allegiances need no further explanation.

II. Analysis

A. Remedy

Though it may seem out of order, I begin by addressing the remedy the majority provides Legislative Defendants today as it is a primer for the lawlessness that recurs throughout this opinion. The majority makes repeated declarations that "[t]he constitution is interpreted based on its plain language"—that "[t]he constitution was written to be understood by everyone, not just a select few." But the majority also consistently struggles to apply those principles itself. Nowhere is this more evident than in the remedy the majority awards Legislative Defendants.

What Legislative Defendants want is a do over—a chance to go back in time and draw even more egregiously gerrymandered maps than they did before this litigation began. Because of the majority's decision today, they now have the assurance that they will get away with it. And as they correctly predicted, what Legislative Defendants want, the majority will provide. The majority's self-congratulatory exercise of judicial restraint suddenly vanishes when Legislative Defendants seek a remedy that the state constitution expressly prohibits. Though the constitutional text may be an inconvenience to the majority's desire to carry out Legislative Defendants' political agenda, it is not something that can be so easily disregarded at will.

There is a strict constitutional limitation on the General Assembly's power to draw state legislative districts. Article II, sections 3 and 5 expressly provide 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 senate and the representative] districts and the apportionment of [senators and representatives] among those districts." N.C. Const. art. II, §§ 3, 5 (emphasis added). But these sections further provide that, "[w]hen established," both the apportionment of members of the state senate and house of representatives and their districts "shall remain unaltered until the return of another decennial census of population taken by order of Congress." N.C. Const. art. II, §§ 3(4), 5(4). The meaning of this requirement is simple: Once the districts have been established, or passed, by the General Assembly, the districts and apportionment of members of the General Assembly are fixed until the next census.

This Court has applied the provisions strictly. Shortly after the provisions were ratified in their original form, this Court held that they prohibited the mid-decade redrawing of the border between Franklin County and Granville County, even though the border as drawn violated another constitutional provision requiring that "no county shall be divided in the formation of a Senate district." N.C. Const. of 1868, art. II, § 5; *Comm'rs of Granville Cnty. v. Ballard*, 69 N.C. 18, 20–21 (1873). But the plain text of article II, sections 3(4) and 5(4) and the history of these provisions simply will not do for the majority.

Step one in the majority's scheme is therefore to do away with the remedial maps (2022 Plans) that *Harper I* ordered the General Assembly to draw. To that end, the majority must first redefine what the word "established" means. The majority relies on Black's Law dictionary to define the term "established" as "[t]o settle, make, or fix firmly; to enact permanently." *Establish*, Black's Law Dictionary (11th ed. 2019). The majority reasons that, using this definition, the 2022 Plans were not "established" for purposes of article II, sections 3(4) and 5(4) because this definition "connotes something more than the passage of a redistricting act by the General Assembly" because the General Assembly was free to amend the maps until they were used in an election.

But this definition creates a problem for the majority. Not only were the 2022 Plans validly enacted by the General Assembly during its first regular session following the 2020 Census, they were also *used* in the 2022 primaries and general election. That means that the 2022 Plans fall squarely within the majority's own definition of the word "established" as used in article II, sections 3(4) and 5(4). Thus, the majority must create an exception to its definition of the term "established" that lacks any basis in the constitutional text. Specifically, the majority reasons that, because the 2022 plans were based on a misapprehension of law, "they were never 'established' as that word is used in article II, sections 3(4) and 5(4)."

Interestingly, nowhere in the majority's definition of the term "established" is there an exception for such a misapprehension of law—the majority itself holds that a redistricting plan is established when, as here, it is enacted by the General Assembly and used in an election. The majority does not provide any legal support for the idea that a change in the law justifies the redistricting redo that Legislative Defendants seek, nor that such a permission is consistent with the text, purpose, or history of the state constitution's mid-decade redistricting prohibition.

That is because there is no legal basis for throwing out the 2022 Plans in the middle of the decade.[3]

But the majority does not stop there. Cue step two in the majority's efforts to carry out Legislative Defendants' bidding. The majority concludes that, not only must the 2022 Plans be thrown out, so too must the 2021 Plans that the General Assembly enacted following the 2020 census *before* this litigation ever began. Its reasoning is stunning—the 2021 Plans must be thrown out, it explains, because both because using the 2021 maps would not sufficiently protect seats for incumbent candidates and because these plans were allegedly based on a misapprehension of law from a *different* case decided years earlier. *See Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019). As to the first point, that incumbents could be better protected through a different map is not a basis for ignoring the constitutional mandate against mid-decade redistricting. The state constitution does not authorize legislative districts to be redrawn in the middle of a decade simply to allow the General Assembly to better account for a particular redistricting criteria and certainly not for the dubious purpose of better protecting incumbent legislators.

With the respect to the majority's latter point that the 2021 maps were based on a misapprehension of law, it relies on a superior court decision that was never heard by a North Carolina appellate court. *Lewis*, 2019 WL 4569584 at *2–3. In *Lewis*, the plaintiffs brought similar partisan gerrymandering claims against different legislative maps. *Id.* The trial court held that the maps were extreme partisan gerrymanders and violated the state constitution. *Id.* at 3. But according to the majority, because of that decision, which is unrelated to this litigation, unrelated to the 2021 Plans, and was not decided by this Court, when Legislative Defendants enacted the 2021 Plans over a year later, they were enacted under "a mistaken understanding of the North Carolina Constitution." Somehow this mistaken understanding equates to a failure to establish

---

3. The majority also makes the false assertion that "by statute[,] the General Assembly is not required to utilize the 2022 Plans for future elections." *See* N.C.G.S. § 120-2.4(a1). This is a blatant mischaracterization of the statute. N.C.G.S. § 120-2.4(a1) provides that, when the legislature is required to enact a remedial map but fails to "act to remedy any identified defects" within the timeframe that has been prescribed by a court, the court may impose an interim plan that will be used in the next election only. N.C.G.S. § 120-2.4(a1). The court-imposed plan is only "interim" if the General Assembly fails to enact a remedial map on its own accord. That is not what happened here, as the General Assembly itself passed the remedial 2022 Plans during its first regular legislative session. Its enacted remedial plans have the same force and effect as any other redistricting plans that it validly enacts, and they are treated the same.

the legislative plans. In other words, the majority believes that because it might be possible to enact an even more extreme partisan gerrymander than was enacted in 2021, the General Assembly should be allowed to do so, despite the prohibition on mid-decade redistricting of state legislative districts.

The majority points to the fact that in 2021, when the General Assembly started the map drawing process after census data was first released, among the districting criteria that the General Assembly adopted was the requirement that partisan election data not be considered in defining legislative districts. The majority credits Legislative Defendants assertion to this Court in *Harper I* that the General Assembly adopted "this requirement . . . because it believed that requirement was necessary to create constitutionally compliant redistricting plans." Notably, Legislative Defendants' single, vague assertion that the majority hinges its conclusion on does not argue that the 2021 maps were free of intentional partisan bias. Such a claim would have been untrue. But the majority refuses to examine any of the evidence in the record that demonstrates the role partisan considerations played in the creation of the 2021 Plans and proves that this this criterion was adopted in name only. This is not surprising—recognizing as much would require the majority to acknowledge that the General Assembly already took advantage of the opportunity to enact maps containing extreme partisan gerrymanders.

As has been discussed, almost every shred of evidence in the record shows that the 2021 maps were extreme partisan gerrymanders, which is why the trial court specifically found as much. But not only did the 2021 Plans themselves evince that they were drawn to disproportionately favor Republicans, so too did the events leading to their enactment. For example, Legislative Defendants claimed that potential maps must be drawn and submitted in committee hearing rooms using software that did not account for partisan election data. Defendant Representative Destin Hall, the Chair of the House Redistricting Committees assured his colleagues that the "House as a whole" would "only consider maps that are drawn in this committee room, on one of the four stations" located in the committee room.

Contrary to these assurances, however, legislators and their staff were able to use partisan data to draw gerrymandered maps on unofficial devices both inside and outside of the committee rooms. Evidence at trial revealed that Representative Hall repeatedly met with members of his staff to review "concept maps" that were created on unofficial computers using unknown redistricting software and data. Representative

Hall testified that he would then rely on these concept maps when drawing proposed maps on the committee room computers. In fact, on several occasions, when drawing maps on the official terminals in the committee rooms, Representative Hall even brought along a smartphone containing images of the concept maps so that he could copy the concept map into the public terminal.

Legislative Defendants denied that they used any non-public materials as part of their map-drawing activities at first, but they were eventually forced to admit that this was false. The trial court ordered Legislative Defendants to produce the "concept maps" and related materials. Legislative Defendants failed to do so, and instead claimed that "the concept maps that were created were not saved, are currently lost and no longer exist." Based on this history as well as the extremity of the maps themselves, the majority's suggestion that the 2021 Plans were based on the "incorrect" notion that partisan gerrymandering violates the state constitution is plainly false.

Even if it were true that the General Assembly did not consider partisan data in drawing the 2021 Plans, it would not matter. As already explained, the constitution proscribes mid-decade redistricting after districts are *established*. There is no constitutional caveat providing that a district might become "un-established" if a change in the law means the districts could have been drawn differently the first time around. If this were true, legislative redistricting plans would never officially be established for purposes of article II, sections 3 and 5. The potential for a future hypothetical change in the law would permanently leave every redistricting plan enacted by the General Assembly in a state of limbo. The state constitution does not afford Legislative Defendants a do-over simply because they believe that they can do a better job of manipulating election outcomes this time around.

Finally, the General Assembly has already expressed its intent that the 2021 Plans should take effect if the 2022 Plans were to be thrown out. Specifically, the 2022 enactments establishing the 2022 Plans (*i.e.*, the remedial plans) for both the North Carolina Senate and House of Representatives explained that should the Court's decision in *Harper I* be "made inoperable . . . or ineffective," the 2021 Plans would, by operation of law, become "again effective." An Act to Realign the North Carolina Senate Districts Pursuant to the Order of the North Carolina Supreme Court in Harper v. Hall, S.L. 2022-2, § 2, 2022 N.C. Sess. Laws 14, 19 (Senate plan); An Act to Realign North Carolina House of Representatives Districts Pursuant to Order of the North Carolina Supreme Court in Harper v. Hall, S.L. 2022-4, § 2, 2022 N.C. Sess. Laws

30, 43 (House plan). Thus, this Court need not speculate about what the General Assembly intended if, for some reason, the 2022 Plans became "ineffective." By ordering that the 2021 Plans be disregarded, this Court violates the intent of the General Assembly expressed by the body as a whole through formal legislation, rather than a few of its members involved in this litigation.

None of this matters to the majority. Reason, common sense, and the rule of law are lost on those who do not care about interpreting the constitution in good faith. This holding is not a mere error in legal interpretation—I do not think that even the majority believes itself to be complying with the constitutional text where this remedy is concerned, as demonstrated by its lack of effort in attempting to support its radical decision. The remedy afforded here demonstrates how divorced from the law the majority's decision is in its entirety. It shatters the notion that the majority is applying the constitution "based on its plain language" or that "[t]his case is not about partisan politics." Put simply, the majority today instructs the General Assembly to violate the North Carolina constitution. In so doing, it puts on display just how far this Court has fallen.

B. Partisan Gerrymandering Violates the State Constitution

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Blankenship v. Bartlett*, 363 N.C. 518, 522 (2009) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)). As James Madison explained in the Federalist Papers, "[R]epublican liberty" requires "not only that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people." *Rucho*, 139 S. Ct. at 2512 (Kagan, J., dissenting) (quoting The Federalist No. 37, at 4 (James Madison) (J. & A. McLean ed., 1788)). This principle applies not just to the federal government but to our state as well, for it "is the foundation of democratic governance." *Id.* at 2511–12. Indeed, this very principle is enshrined in our state constitution, which commands that "[a]ll 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, § 2.

The extreme partisan gerrymanders that this Court addressed in *Harper I* and *Harper II* made a mockery of those principles and "enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction." *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting). In so doing, these

partisan gerrymanders "deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives." *Id.* By violating these rights, the plans at issue and the politicians who manipulated them "debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people." *Id.* With the practice now condoned by this Court's current majority, the select few in the General Assembly who crafted the plans, themselves elected under gerrymandered maps, will make every attempt to entrench their party in the General Assembly indefinitely, regardless of what North Carolinians have to say about it. *See, e.g.*, *Lewis*, 2019 WL 4569584, at *8–9, *14–18.

Not only does the majority fail to recognize the anti-democratic nature of these realities. It goes a step further than any opinion of the full U.S. Supreme Court has gone before and concludes that, not only is partisan gerrymandering nonjusticiable, it is actually *permitted* by the state constitution. As James Madison once cautioned, the majority misplaces political power "in the Government over the people." 4 Annals of Cong. 934 (1794).

Harper I painstakingly laid out the history, requirements, and guarantees of the constitutional rights that are implicated here—the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause. I do not here repeat *Harper I*'s correct interpretation of these rights, as the principles and history that *Harper I* articulated are far more enduring than the majority's monopoly on the judicial power. I do, however, address the butchered and curtailed definition of the free elections clause the majority adopts today and share a few additional observations about the state's equal protection clause.

1. The Free Elections Clause

The majority proclaims that "[t]he constitution is interpreted based on its plain language" and that "[t]he constitution was written to be understood by everyone, not just a select few." It appears that the majority and I agree on at least two points, in principle at least; we just disagree about what these concepts look like in practice. The majority's interpretation of the free elections clause highlights the point. Article I, section 10 of the North Carolina constitution, known as the free elections clause, states very simply that "[a]ll elections shall be free." N.C. Const. art. I, § 10. That is all. While this clause may seem easy enough for "everyone" to make sense of, not so in the majority's view. It takes the Court over twenty pages of convoluted legal reasoning to explain

why the word "free" does not actually mean what one might think it does. This does not mean that brevity begets accuracy. But neither does the majority's odyssey to redefine a simple and explicit requirement in the North Carolina constitution.

I begin where the majority does: with the dictionary definition of the word "free." Moreover, I use the same dictionary definition as does the majority, as the Court omits a few notable considerations. Black's Law Dictionary defines the term "free" as, among other things, "[h]aving legal and political rights; enjoying political and civil liberty"; "[n]ot subject to the constraint or domination of another; enjoying personal freedom; emancipated"; "[*c*]*haracterized by choice*, rather than by compulsion *or* constraint." *Free*, Black's Law Dictionary (11th ed. 2019) (emphases added). Merriam Webster's provides additional guidance, encapsulating the definitions identified above but adding that "free" means "not determined by anything beyond its own nature or being: choosing or capable of choosing for itself." *Free*, Merriam-Webster's Collegiate Dictionary (11th ed. 2022).

With this in mind, we can explore what the free elections clause demands on its face. In violation of the concept of "free" elections, partisan gerrymandering is a form of vote dilution—"the devaluation of one citizen's vote as compared to others," *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting)—that imposes a "constraint" on a voter's will. *See Free*, Black's Law Dictionary. Justice Kagan explained this process succinctly in her dissent in *Rucho*:

> A mapmaker draws district lines to "pack" and "crack" voters likely to support the disfavored party. He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map. In short, the mapmaker has made some votes count for less, because they are likely to go for the other party.

Id. at 2513–14 (citations omitted). And when done properly, which modern technology all but assures, it puts representatives, like Legislative Defendants here, in the business of "rigging elections." *Vieth v. Jubelirer*, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring in the judgment).

A rigged election is not, in any sense of the word, a free election. Nor is an election in which a voter's voice is worthless because the election's results have been preordained by whoever wields political power in the General Assembly. The majority itself acknowledges that the free elections clause was inspired by the English Bill of Rights, which in turn sought to respond to practices that attempted "to ensure a certain electoral outcome." Though the modes of "ensur[ing]" certain electoral outcomes may have improved with the advent of technology, an election in which the result is determined by advanced and manipulative map drawing is not, "[c]haracterized by choice," as the term "free" requires, but by "constraints" that are contrived by the legislature alone. *See Free*, Black's Law Dictionary.

The majority next turns to the history of the free elections clause. Notably, the majority does not challenge much of the history surrounding the clause as recounted in *Harper I*. In fact, it reiterates much of what *Harper I* already explained. Instead, it disagrees with some of the conclusions that *Harper I* drew from that history. Because *Harper I* already successfully completed the task of explaining the historical underpinnings of the free elections clause, I do not rehash these events here. *See Harper I*, 380 N.C. at 373–76. I note only that history cannot be retroactively modified by the majority.

The majority's historical analysis warrants a brief comment, however. Specifically, in analyzing the roots of the free elections clause, the majority examines a narrow political issue that preceded the clause and the 1776 Declaration of Rights, namely the tension between North Carolina's governor and the House of Burgesses from 1729 until 1776. According to the majority, the free elections clause "was placed in the 1776 Declaration of Rights at the same time as other constitutional provisions that both limited executive power and increased legislative power." As a result of these contemporaneous provisions, the majority concludes that "any argument that the people added the free elections clause to the 1776 constitution for the purpose of limiting the General Assembly's apportionment authority is inconsistent with this historical context."

This conclusion presents two glaring problems. First, it ignores that the free elections clause, when first adopted, spoke to the elections of members to the General Assembly specifically; it did not concern the various disputes that the majority describes between the governor and the House of Burgesses. Any provisions adopted to address the balance of power between the governor and the legislative body are distinct from a provision that demanded the free "election[ ] of members . . . to [the] General Assembly." N.C. Const. of 1776, Declaration of Rights, § 6.

Second, and relatedly, was this ongoing feud really the only historically relevant event that happened in the years leading up to 1776? Can the majority truly not conceive of *anything* else that may have driven the people of North Carolina to embrace the words "election[ ] of members to serve as Representatives in the General Assembly, ought to be free," as the clause provided in 1776? N.C. Const. of 1776. Moreover, might other historical events have inspired an evolved understanding of the clause as it as well as other constitutional provisions were modified and added throughout the state's history, including in 1868? *See Harper I*, 380 N.C. at 369 ("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.").

History can, when used properly and appropriately, be useful in giving context to a constitution. But the majority demonstrates how historical analysis can be weaponized to paint a distorted picture of a constitution's historical understanding. In this way, "it is a magnificent disguise. The judge can do the wildest things, all the while presenting himself as the passive agent of the sainted Founders—don't argue with me, argue with Them." Richard A. Posner, *Bork and Beethoven*, 42 Stan. L. Rev. 1365, 1379 (1990). But "bad originalism" has never been a legitimate means of constitutional interpretation. *See id.* at 1378.

Finally, the majority attempts to use precedent to support its constrained view of the free elections clause. As the majority notes, there are few cases that have interpreted the clause. First, there was *Clark v. Meyland*, 261 N.C. 140 (1964). There, the plaintiff sought to change his party affiliation in order to vote in the Republican primary. *Id.* at 141. But in order to do so, he was required by statute to take an oath pledging his allegiance to the new party, including by supporting the nominees from that party in the subsequent election. *Id.* Any individual who took the oath falsely was guilty of a felony. *Id.* This Court struck down the part of the oath that required an individual to support the party's nominees in the future because it "violate[d] the principle of freedom of conscience. It denies a free ballot—one that is cast according to the dictates of the voter's judgment." *Id.* at 142. The Court concluded 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.*

Next, the majority cites *State ex rel. Swaringen v. Poplin*, 211 N.C. 700 (1937), in which the plaintiff—a candidate for office—claimed that the Wilkes County Board of Elections fraudulently altered the vote count, leading to the plaintiff's defeat. *Id.* at 700–01. Citing the free elections

clause and rejecting the Board of Elections's argument that it had the sole authority to determine the result of an election, this Court held that judicial intervention was appropriate and explained that "[a] free ballot and a fair count must be held inviolable to preserve our democracy." *Id.* at 702.

Based on these two cases alone, the majority somehow concludes the free elections clause encompasses only the right to vote "according to one's conscience and to have that vote accurately counted." This interpretation is confounding. Neither of these cases in any way limits the free elections clause to the two situations identified by the majority. The cases that have happened to rule on a specific and limited issue do not, without more, define the entire scope of a constitutional provision. In attempting to justify its interpretation of the free elections clause with such an elementary error in interpreting this Court's precedent, the majority only emphasizes how baseless its decision today is. In fact, these errors are so egregious that they hardly need be explained—they are so glaring that the majority accomplishes the task on its own.

What is more, if the majority is correct that these cases limit the free elections clause to only these two scenarios, then these cases would conflict with the majority's own historical analysis of the clause. Again, the majority explains that the Declaration of Rights was modeled after the English Bill of Rights, which was in turn an effort to respond to various abuses committed by King James II. But many of the abuses that the English Bill of Rights sought to address, and therefore the Declaration of Rights contemplates, do not fit in to the majority's cabined interpretation of the free elections clause. For example, the majority explained that, under King James II, "[w]hen the time for [an] election came, local agents of the king who conducted the polling used devious polling practices to open, close, and reopen polling places" to manipulate election outcomes. Under the majority's newly minted interpretation of the free elections clause, such a practice would not be proscribed, and it is certainly not addressed by any other provision in the Declaration of Rights.

2. The Equal Protection Clause

Not only does partisan gerrymandering obstruct the constitution's promise of free elections, it also deprives individuals of the "fundamental right to vote on equal terms," which is derived from North Carolina's equal protection clause.[4] *Stephenson v. Bartlett* (*Stephenson I)*, 355 N.C. 354, 378 (2002). That right "can be denied by a debasement or

4. North Carolina's equal protection clause states that:

> [n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled,

dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). The majority correctly notes that this Court has stepped in to prevent this consequence through its one-person, one-vote cases. *See Stephenson I*, 355 N.C. 354; *Blankenship v. Bartlett*, 363 N.C. 518 (2009); *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742 (1990). These cases recognize that "[e]qual protection 'requires that all persons similarly situated be treated alike.' " *Blankenship*, 363 N.C. at 521. Malapportionment—the practice of inequitably apportioning representatives, allowing certain voters to wield more influence than others—violates this principle because it deprives individuals of "substantially equal voting power." *Stephenson I*, 355 N.C. at 379.

The majority attempts to convince us that this principle of protecting "substantially equal voting power" is limited to the one-person, one-vote context because the state constitution specifically contemplates this requirement in article II, sections 3(1) and 5(1). These sections state that each state senator and each state representative "shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each [senator or representative] 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." N.C. Const. art. II, §§ 3(1), 5(1). The majority asserts that "[p]arty affiliation . . . is not mentioned in Article II, Sections 3 or 5."

Interestingly, however, article II, sections 3(1) and 5(1) apply *only* to state senators and members of the North Carolina House of Representatives. Neither of these provisions nor any other constitutional provision requires that other statewide offices represent similarly sized constituencies. Even so, in *Blankenship*, this Court held that "the right to vote in superior court elections on substantially equal terms" is protected by North Carolina's equal protection clause. *Blankenship*, 363 N.C. at 526. Moreover, this Court reached this interpretation under the state equal protection clause even though "federal courts [had] articulated that the 'one-person, one-vote' standard [was] inapplicable to judicial elections." *Id.* at 522. Thus, this Court in *Blankenship* found that North Carolina's equal protection clause prohibits a certain practice

---

> or in any manner deprived of his life, liberty, or property, but by the law of the land. No 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.

that was neither mentioned in the state constitution explicitly nor prohibited by the Federal Constitution.[5]

Putting the majority's weak attempt at line drawing aside, partisan gerrymandering is, in effect, indistinguishable from malapportionment. The only practical difference is that, rather than diluting votes based on "where [a voter] happen[s] to reside," *see Reynolds*, 377 U.S. at 563, partisan gerrymandering dilutes votes based on whom an individual happens to vote for. Thus, as with malapportionment, partisan gerrymandering deprives voters of "substantially equal voting power" and violates the North Carolina constitution's equal protection clause.

The majority's equal protection analysis warrants one final correction. In particular, the majority implies that the U.S. Supreme Court in *Rucho* concluded that partisan gerrymandering does not implicate the federal Equal Protection Clause. This it did not do, and the majority's characterization is incorrect. The Supreme Court's decision in *Rucho* was limited to the question of justiciability. *Rucho* specifically held that, despite the fact that "such gerrymandering is incompatible with democratic principles . . . partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Rucho*, 139 S. Ct. at 2506–07 (cleaned up).[6] The majority may wish to downplay its legal extremism by analogizing its action today to that of the nation's highest court. But it may not accomplish this task by plainly misstating what the U.S. Supreme Court held.

C. Partisan Gerrymandering is Justiciable

"It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution." *Leandro v. State*, 346 N.C. 336, 345 (1997). This duty holds true where partisan gerrymandering claims are concerned. The majority, however, invokes

---

5. What is more, article II, sections 3(1) and 5(1)—the provisions on which the majority relies—also textually contemplate the use of single-member and multi-member districts within the same redistricting plans. *See* N.C. Const. art. II, §§ 3(1), 5(1). But as discussed in depth, *see* Section II.C.3, in *Stephenson I*, this Court held that the use of multi-member districts violates the state constitution's equal protection clause "unless it is established that inclusion of multi-member districts advances a compelling state interest." *Stephenson I*, 355 N.C. at 381. Thus, *Stephenson I* further demonstrates that this Court has relied on the state constitution's equal protection clause previously in cabining a power that the state constitution explicitly assigns to the General Assembly.

6. In fact, the dissent in *Rucho* criticized the majority's refusal to address the claims at issue in light of the constitutional rights that were implicated by partisan gerrymandering. *See Rucho*, 139 S. Ct. at 2509 ("For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.").

the political question doctrine to conclude that partisan gerrymanders are nonjusticiable political questions. The majority errs in applying the doctrine to such claims. Indeed, "[t]he doctrine of which we treat is one of 'political questions,' not one of 'political cases.' The courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority." *Baker v. Carr*, 369 U.S. 186, 217 (1962). The majority's conclusion otherwise was wrong when it was first drawn by the dissent in *Harper I*, and it is wrong today.

1. A Brief History of Partisan Gerrymandering Jurisprudence

Though the justiciability of partisan gerrymandering claims in the federal courts has long been debated, a majority of the U.S. Supreme Court only recently decided that such claims are nonjusticiable. In fact, for several decades, the opposite view prevailed, and partisan gerrymandering claims were considered justiciable. *See, e.g.*, *Vieth*, 541 U.S. at 317 (Stevens, J., dissenting) ("[F]ive Members of the Court . . . share the view that . . . it would be contrary to precedent and profoundly unwise to foreclose all judicial review of [partisan gerrymandering] claims that might be advanced in the future."); *Davis v. Bandemer*, 478 U.S. 109, 143 (1986) (plurality opinion) (holding that "political gerrymandering claims are properly justiciable under the Equal Protection Clause"), *abrogated by Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Then, in 2019, the U.S. Supreme Court changed course. In *Rucho*, the Court held "that partisan gerrymandering claims present political questions beyond the reach of the federal courts." 139 S. Ct. at 2506–07.

The evolution of the U.S. Supreme Court's partisan gerrymandering jurisprudence is not, of course, biding on this Court. *Rucho* itself was clear that "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply." *Id.* at 2507. But these cases demonstrate that for decades, U.S. Supreme Court Justices from both sides of the ideological spectrum agreed that "severe partisan gerrymanders [are incompatible] with democratic principles," *Vieth*, 541 U.S. at 292, and further that their "legislative classifications 'reflec[t] *no* policy, but simply arbitrary and capricious action[,]" *id.* at 316 (Kennedy, J., concurring in the judgment); *see id.* at 312 (Kennedy, J., concurring in the judgment) (recognizing that "the rapid evolution of technologies in the apportionment field suggests yet unexplored possibilities" with respect to the standards that may emerge to govern partisan gerrymandering claims).

Times have changed, however, and it is no secret that "ideology in Supreme Court appointments" has become increasingly important,

ushering in a new era of political polarization on the nation's highest court. *See*, *e.g.*, Neal Devins and Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 Sup. Ct. Rev. 301, 319–20 (2017) (explaining that "it appears that Republican-appointed Justices are more strongly conservative than the Court's Democratic-appointed Justices are liberal" and highlighting that, as of 2016, legal scholars had "rank[ed] four Roberts Court Republican-appointed Justices as among the most conservative Justices ever to sit on the Court"). In light of this increased polarization, it is unsurprising that the previous understanding regarding partisan gerrymandering's justiciability became a position of the past by the time *Rucho* was decided.

But the U.S. Supreme Court is not the only institution in the country that has become collateral damage in increasingly partisan battles surrounding voting rights. Indeed, the decision today demonstrates that this Court has met the same fate. Just as *Rucho* followed closely on the heels of a shift in the U.S. Supreme Court's makeup, the Court's decision here follows a midterm election that altered its political composition. Notably, this Court's decision to vacate *Harper I* and *Harper II* is not based on a change in or misunderstanding of the controlling law or facts. Instead, the Court, now armed with the influence of a conservative majority, has an intellectual disagreement with *Harper I*'s interpretation of the law. Not only is such a disagreement not an appropriate basis to vacate a prior decision under these circumstances, the Court's decision, which was designed to protect the power of partisan legislators rather than North Carolina's voters, stamps a seal of approval on flagrant violations of the state constitution.

2. Judicially Manageable Standards

The majority reasons that "our constitution does not provide judicially discernable or manageable standards for adjudicating partisan gerrymandering claims" as part of its conclusion that such claims are nonjusticiable political questions. The majority's reasoning is largely cribbed from the U.S. Supreme Court decision in *Rucho*. Given the majority's reliance on *Rucho*, I address the line of reasoning that was first adopted by the U.S. Supreme Court and is now echoed by this Court as to why political gerrymandering claims lack judicially manageable standards. Condensed to its simplest form, the reasoning proceeds as follows.

First, the thinking goes that the Framers of the state and federal constitutions were aware of the concept of gerrymandering, but neither

constitution expressly prohibited the practice. *See Rucho*, 139 S. Ct. at 2494–96; *Harper I*, 380 N.C. at 417 (Newby, J., dissenting). Second, based on this historical practice, some amount of partisan gerrymandering must be constitutionally permissible, meaning that strict proportionality is not required by the state or federal constitution. *See Rucho*, 139 S. Ct. at 2499; *Harper I*, 380 N.C. at 417 (Newby, C.J., dissenting). Third, neither constitution prescribes the *exact* amount of partisan gerrymandering that is unconstitutional. *See Rucho*, 139 S. Ct. at 2501, 2506; *Harper I*, 380 N.C. at 421 (Newby, C.J., dissenting). This final point coupled with the notion that the "political science tests" that have been developed to expose partisan gerrymandering are insufficient yield the conclusion that there is no standard a trial court can reliably apply to determine whether a partisan gerrymander is unconstitutional. This line of reasoning can be reduced to a common refrain: "At what point does permissible partisanship become unconstitutional," or more simply, "[h]ow much is too much?" *Rucho*, 139 S. Ct. at 2501. This question, the majority thinks, is simply too hard to answer.

Even if the question is too challenging for this Court's current majority to fully grapple with—this particular issue is addressed in more detail below—courts both in North Carolina and around the country that have successfully confronted this question as well similar questions in analogous contexts, demonstrating that the manufactured conundrum is not as mystifying as the majority would have us believe.

The majority attempts to obfuscate the standard laid out in *Harper I* by repeatedly asserting that *Harper I* simply requires a proportionality standard. *Harper I* was clear that "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." *Harper I*, 380 N.C. at 387 (majority opinion). To clarify any confusion amongst the members of the majority, this means that *Harper I* acknowledged that proportionality is not the constitutional baseline.

Instead, *Harper I* explained that the state constitution provides that

> 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.

Id. To crystalize the point, when the voting strength of a particular group of voters is artificially diluted based purely on their political preferences, they are deprived of their "fundamental right to vote on equal terms," *Stephenson I*, 355 N.C. at 378, among other constitutional rights. When such constitutional violations are alleged, the state constitution requires an inquiry into whether maps enacted by the General Assembly systematically prevent a political party whose candidates receive a majority of the statewide votes from having a realistic opportunity to win at least half of the representative seats that are up for election. That does not mean that the party *must* win half of the seats. It simply means the party must not be deprived of the opportunity to do so though maps that are intended to suppress a particular kind of voter's voting power.

There are various empirical and statistical analyses that demonstrate whether unconstitutional partisan vote dilution has occurred. Relevant here, *Harper I* clearly outlined "multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander," including the mean-median difference analysis; the efficiency gap analysis; the close-votes, close seats analysis; and the partisan symmetry analysis. *Harper I*, 380 N.C. at 384. Through these analyses, "the same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them, by exposing just how much they dilute votes." *Rucho*, 139 S. Ct. at 2517 (Kagan, J., dissenting).[7]

"Once a plaintiff shows that a map infringes on their [constitutional rights]" through impermissible vote dilution, the legislature may still be able to justify the apparent anomalies by reference to constitutionally acceptable redistricting criteria, which amount to compelling governmental interests. *See Harper I*, 380 N.C. at 387. "[C]ompelling 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." *Id.* at 388. Additionally, incumbency, so long as "it is applied evenhandedly, is not perpetuating a prior unconstitutional

---

7. *Harper I* was careful in declining to "identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Harper I*, 380 N.C. at 384. As explained later, this approach exemplifies the understanding that a single case presenting an issue of first impression for the Court would be insufficient to establish all of the circumstances in which unconstitutional partisan gerrymandering might occur.

redistricting plan, and is consistent with the equal voting power requirements of the state constitution," as well as other "widely recognized traditional neutral redistricting criteria, such as compactness of districts and respect for other political subdivisions, may also be compelling governmental interests."[8] *Id.*

The majority seems to have two primary objections to the standard laid out in *Harper I*. First, the majority is unsatisfied because, while outlining a number of "political science tests" whose results can evidence an unconstitutional partisan gerrymander, *Harper I* and *Harper II* did not define a single numeric threshold at which point a metaphoric line can be drawn and a court can conclude that a map enacted by the General Assembly is unconstitutional because it denies certain voters of "substantially equal voting power." This position ignores that "the law is 'full of instances' where a judge's decision rests on 'estimating rightly . . . some matter of degree.' " *Rucho*, 139 S. Ct. at 2522 (Kagan, J., dissenting) (alteration in original) (quoting *Johnson v. United States*, 576 U.S. 591, 604 (2015). And in these contexts, "[t]o the extent additional guidance has developed over the years . . . , courts themselves have been its author." *Id.*

Reviewing redistricting plans to determine whether certain voters have been deprived of "substantially equal voting power" is no different. Indeed, "courts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish, well, substantial portions of their docket." *Id.* Countless claims require a court to determine when a harm is sufficiently substantial to constitute a constitutional violation. We need look no further than the Sixth Amendment of the U.S. Constitution for an example of this point.

The Sixth Amendment instructs that an "accused shall enjoy the right to a speedy and public trial," but what does that mean exactly? U.S. Const. amend. VI. The U.S. Constitution certainly does not elaborate, presenting problems that resemble the majority's concern about partisan gerrymandering claims. Indeed, as this Court has explained, "it is impossible to determine precisely when the right [to a speedy trial]

---

8. "[W]hile 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." *Harper I*, 380 N.C. 384 n.15.

has been denied; it cannot be said precisely how long a delay is too long; [and] there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial." *State v. McKoy*, 294 N.C. 134, 140 (1978). But the constitutional text's omission of these details was not cause for the courts to eventually determine that they were helpless when faced with a claim that an individual had been denied the right to a speedy trial. I hope the majority would agree that such a decision would have been a baseless abdication of the judicial function that would itself defy the judiciary's role as contemplated by the Constitution.

Instead of abandoning this duty, a "difficult and sensitive balancing" of four factors has emerged to determine whether a violation has occurred. *State v. Farmer*, 376 N.C. 407, 414 (2020) (quoting *Barker v. Wingo*, 407 U.S. 514, 533 (1972)). This balancing test has developed over time and still provides no precise point at which the right has been violated. Even so, engaging in this "difficult and highly fact-specific evaluation" is a mandatory judicial function. *Id.* at 411. Just as neither the Sixth Amendment nor its corresponding four-part test define exactly "how long [of] a delay is too long" for purposes of the right to a speedy trial, *McKoy*, 294 N.C. at 140, the North Carolina constitution and the standard that was illuminated by *Harper I* do not answer precisely "how much partisan gerrymandering is too much." This was never thought to be a justiciability issue in the Sixth Amendment context, and it is not a justiciability issue here.

The majority's only attempt to distinguish this example is based on the notion that, unlike the Sixth Amendment, "the constitution assigns the responsibility of redistricting to the General Assembly, not to the courts." This argument bears on the separate issue of whether the courts have a constitutionally contemplated role in presiding over partisan gerrymandering claims. In other words, it is a textual commitment argument, which is a distinct issue with respect to justiciability. This argument is not responsive to the point the Sixth Amendment example proves: judicially manageable standards have been adopted in the face of other constitutional questions that raise the same "how much is too much" question. The concern that the majority raises is discussed in full in Section II.C.3. For now, it is enough to respond that, contrary to the majority's assertion that "*Harper I* and the dissent . . . seem to imagine a future where redistricting is a court-managed process[,]" rather than exclusively in the hands of the General Assembly, "*Harper I* and the dissent" imagine only a future in which the constitutional guarantees of free elections and equal protection of the laws are enforced—a future in which this Court does not abdicate the judicial role for its own partisan ends.

With the majority's irrelevant argument aside, I turn to the capacity of the courts to interpret the constitutional mandate that voters be afforded "substantially equal voting power." Though this mandate is not defined purely in mathematical terms, the requirement is grounded in language that courts are accustomed to interpreting. Most importantly, this Court gave the phrase meaning in the one-person, one-vote context in *Stephenson I*. 355 N.C. at 380, 383 (holding that, the right to "substantially equal voting power" as guaranteed by the state constitution's equal protection clause requires that, with respect to legislative apportionment, "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.")

The majority attempts to distinguish this example from partisan gerrymandering claims on the basis that the one-person, one-vote principle is "relatively easy to administer as a matter of math." Though lawyers and judges may not be widely renowned for their mathematical prowess, courts cannot abdicate the judicial function simply because a legal issue involves a detailed analysis. Both the state and federal constitutions "forbid[ ] 'sophisticated as well as simple-minded modes of discrimination.' " *Reynolds*, 377 U.S. at 563 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). When faced with the one-person, one-vote issue in *Reynolds*, the U.S. Supreme Court opined:

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

Id. at 566. As Justices on this state's highest court, our oath, our office, and the North Carolina electorate demanded the same. Today, a majority of this Court turns its back on those duties.

Similar language as that found in *Harper I*'s standard has been given meaning in other contexts as well. For example, when a criminal defendant seeks to have charges against him dismissed for insufficient evidence, a trial court ruling on the motion "need determine only

whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Call*, 349 N.C. 382, 417 (1998).

In defining this standard, this Court has explained that "[s]ubstantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301 (2002). And how much evidence is that exactly? Over time, the Court has come to recognize that it is something more than "suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator." *State v. Malloy*, 309 N.C. 176, 179 (1983). The standard is imprecise—reasonable minds regularly disagree about what constitutes substantial evidence. But one would be hard-pressed to find any member of the legal community who would insist that the judiciary identify a quantifiable amount of evidence that meets the standard in all future cases. Such an undertaking would likely be impossible—criminal evidence comes in countless forms that serve different purposes and indicate guilt to varying degrees—and profoundly unwise. Instead of creating a definition with mathematical precision, over time, both this Court and lower courts have clarified what constitutes "substantial evidence" in a way that allows a court to consider the quantity and quality of evidence that might come before it in a particular case.

That is all that was required here. Unconstitutional partisan gerrymandering can be demonstrated or disproved through various forms of evidence, including the tests identified in *Harper I*, and each allegation involves unique facts that bear on whether a voter has been deprived of "substantially equal voting power." That *Harper I* allowed future cases to mete out the boundaries of unconstitutional partisan gerrymandering was not an infirmity indicating that this state's courts are incapable of determining what constitutes unconstitutional partisan gerrymandering. Rather, *Harper I* described a standard using terminology to which this Court has given meaning before—even if not with mathematical or scientific exactitude—and demonstrated the foresight that a single decision could not anticipate every future scenario in which a constitutional violation has occurred.

The majority takes great issue with *Harper I*'s promise that "[l]ower courts can and assuredly will work out more concrete and specific standards in the future." *Harper I*, 380 N.C. at 384 (alteration in original). Despite the majority's complaints, this forward-looking approach is not unique to *Harper I*. Though courts around the country regularly decide cases based on standards that lack precise numerical thresholds, these thresholds may also develop over time. If such flexibility were not permitted and courts were forced to announce precise

constitutional thresholds in the first instance, many important constitutional claims would have never been resolved. The one-person, one-vote principle provides an important example.

In *Baker v. Carr*, 369 U.S. 186, 209 (1962), the U.S. Supreme Court held that legislative apportionment claims under the Fourteenth Amendment of the U.S. Constitution were justiciable but did not provide any standard for resolving them. This decision paved the way for the one-person, one-vote principle itself, which was developed in broad terms two years later in *Reynolds v. Sims*. 377 U.S. 533, 578 (1964). *Reynolds* held that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.* at 577. But recognizing that "[m]athematical exactness or precision is hardly a workable constitutional requirement," *id.*, the Court "deem[ed] it expedient not to attempt to spell out any precise constitutional tests[,]" *id.* at 578.

Instead, *Reynolds* allowed lower courts leeway to determine those tests, explaining that "[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.* As the U.S. Supreme Court predicted, the one-person, one-vote principle took additional form in the years following *Reynolds*. *See*, *e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (holding that "an apportionment plan with a maximum population deviation under 10% falls within th[e] category" of "minor deviations . . . from mathematical equality among state legislative districts [that] are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment"); *see also Karcher v. Daggett*, 462 U.S. 725 (1983); *White v. Weiser*, 412 U.S. 783 (1973); *Mahan v. Howell*, 410 U.S. 315 (1973); *Avery v. Midland Cnty.*, 390 U.S. 474 (1968). As the majority recognizes, in *Stephenson I*, this Court eventually adopted the same threshold that the U.S. Supreme Court developed over time in its one-person, one-vote cases to analyze whether multi-member districts are constitutionally compliant. 355 N.C. at 383.

The second issue the majority appears to raise with the standard laid out in *Harper I* is that it permits reliance on "political science tests" that are not found within the text of the constitution itself. But the majority seems to misunderstand the difference between a constitutional right and the tests that determine whether such a right has been breached. The former is a cognizable guarantee that must be contained in the constitution itself whereas the latter is a means by which the courts assess whether a constitutional violation has occurred. Such tests are almost always

created and adopted by the courts and are rarely found within the constitutional text.

Among the constitutional rights and principles that *Harper I* determined had been violated by the 2021 Plans were the free elections clause's promise that "[a]ll elections shall be free," N.C. Const. art I, § 10; *see Clark v. Meyland*, 261 N.C. 140, 143 (1964); and the guarantee that North Carolina citizens have "substantially equal voting power," "legislative representation," and "representational influence," *Stephenson I*, 355 N.C. at 377, 379; *see also* N.C. Const. art. I, § 19. Those principles are satisfied and the rights of North Carolinians are protected when a plan gives the party that wins a majority of the statewide vote a substantially equal opportunity as the opposing party to secure a majority of the open representative seats. The tests *Harper I* identified as "reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander," namely the mean-median difference analysis; the efficiency gap analysis; the close-votes, close seats analysis; and the partisan symmetry analysis, provide credible *evidence* as to whether legislative apportionment plans violate those identified constitutional rights. 380 N.C. at 384.

Examples of courts relying on empirical, statistical, and social science analyses to resolve constitutional issues, despite the absence of these analyses from the text of the state and federal constitutions, are too numerous to count.[9] The majority criticizes the analyses adopted in *Harper I*, however, because they "are not grounded in any constitutional guidance." But if this state's courts were only permitted to act when the state (or federal) constitution provided a specific and explicit test for determining when a constitutional violation has occurred, courts would

---

9. *See*, *e.g.*, *Cooper v. Harris*, 581 U.S. 285 (2017) (relying on expert statistical analysis finding that the General Assembly predominately relied on race in drawing 2011 redistricting plan because the plan disproportionately moved black voters into racially gerrymandered districts even when controlling for party registration to conclude that the plan constituted an unconstitutional racial gerrymander); *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983) (holding that "an apportionment plan with a maximum population deviation under 10% falls within th[e] category" of "minor deviations . . . from mathematical equality among state legislative districts [that] are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment," even though the Constitution does not reference any such threshold); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (relying on statistical and social science evidence to conclude that, if the allegations at issue were uncontradicted at trial, "the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the [challenged] legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote"); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (relying on academic studies of the psychological impact of segregation on youth *as evidence* that racially segregated educational facilities violate the Equal Protection Clause).

lack the authority to hear cases involving countless constitutional claims, meaning the courts would be prohibited from engaging in one of their core constitutional duties.

Finally, the majority attempts to seal the point that *Harper I* failed to provide a judicially manageable standard by pointing out that the Court in *Harper II* was forced to strike down one of the 2022 Plans that the trial court approved during the remedial phase because the trial court failed to properly apply *Harper I*'s standard. In relying on *Harper II* as evidence that *Harper I* failed to define a judicially manageable standard, the majority does not make the point it believes it does. In fact, just the opposite.

First, the majority claims that, after *Harper I* and during the remedial phase,

> the General Assembly attempted to apply the *Harper I* standard in drawing the Remedial House Plan (RHP), Remedial Senate Plan (RSP), and Remedial Congressional Plan (RCP). The General Assembly followed the same process in enacting each plan, yet the Special Masters recommended, and the three-judge panel concluded, that only the RHP and RSP met the *Harper I* standard.

The majority goes on to complain that, not only did the three-judge panel strike down the RCP, the Court in *Harper II* struck down the RSP as well. What the majority declines to mention, however, is the blatantly partisan result of the maps that the General Assembly produced during the remedial phase. Since the majority has neglected to take on that task, distorting the evidence of partisan gerrymandering that was before both this Court and the trial court, I do so here.

First, take the RCP. One of the advisors to the Special Masters who were appointed to assess the constitutional compliance of the remedial 2022 Plans, Dr. Bernard Grofman, concluded in his report that the Plan "creates a distribution of voting strength across districts that is very lopsidedly Republican." *Harper II*, 383 N.C. at 101. He determined that "[b]ecause they all point in the same direction, the political effects statistical indicators of partisan gerrymandering strongly suggest the conclusion that this congressional map should be viewed as a pro-Republican gerrymander." *Id.* (alteration in original). Despite recognizing that "the RCP yielded an efficiency gap of 6.37%," he noted that that this was "not . . . proof that there is no vote dilution" because, applying the other measures identified in *Harper I*, "legislative map drawers have apparently

sought to draw a congressional map that just narrowly pass[es] a supposed threshold test for partisan gerrymandering." *Id.* (alterations in original).

Another advisor, Dr. Eric McGhee:

> determined that the RCP yielded an efficiency gap of 6.4%, a mean-median difference of 1.1%, a partisan asymmetry of 4.9%, and a declination metric of 0.14, all favoring Republicans. He noted that "[t]he values with incumbency factored in all lean more Republican . . . , and this incumbency effect is greater than it was in the [2021] enacted plan." Relatively, he noted that while the RCP shows improvement from the 2021 enacted plan on several measures of partisan symmetry, it is "clearly worse" than the remedial congressional plans proposed by Plaintiffs.

Id. (alterations in original).

Likewise, a third advisor, Dr. Samuel Wang, concluded that the RCP has "an average efficiency gap of 6.8% and an average mean-median difference of 1.2%, both favoring Republicans." *Id.* In nine out of ten sample elections, he found that the RCP would allow Republicans to win more seats than Democrats with the same vote share. *Id.* "Averaging across all 10 elections, the advantage was 1.7 more seats for Republicans, or 12% of the 14-seat Congressional delegation." *Id.*

Finally, a fourth advisor, Dr. Tyler Jarvis, "determined that the RCP 'consistently favors Republicans' across all applicable measures. He determined that the RCP yields an efficiency gap of 8.8%, a mean-median difference of 0.9%, a partisan bias of 5.2%, and a declination metric of 11.6%, all favoring Republicans." *Id.*

Though a less severe partisan gerrymander than the RCP, the RSP was also largely inconsistent with *Harper I*'s mandate. *Harper II* described these findings in depth:

> Dr. Grofman determined that the RSP "creates a distribution of voting strength across districts that is very lopsidedly Republican." He determined the RSP's vote bias indicates "a substantial pro-Republican bias" in which a statewide majority of Republican voters would be able to win a majority of the seats while "only a win by considerably more than 50% of the statewide vote can yield the Democrats a majority

of the seats." He determined that "[b]ecause they all point in the same direction, the political effects statistical indicators of partisan gerrymandering argue for the conclusion that th[e] [RSP] should be viewed as a pro-Republican gerrymander." He concluded that "the dilutive effects of th[e] RSP] . . . are still . . . quite substantial."

Dr. McGhee determined that the RSP "still favors Republicans when all seats are open." He concluded that the RSP yields an efficiency gap of 4.8%, a mean-median difference of 2.2%, a partisan asymmetry of 4.8%, and a declination metric of 0.20, all favoring Republicans. He observed that "[t]he [efficiency gap] value now clearly falls below the commonly identified threshold of 7%, though the [mean-median difference] value falls well above the 1% number cited by Legislative Defendants." He determined that "[a]ll the metric values for both the open seat and incumbency scenarios are more than 50% likely to favor Republicans throughout the decade." He concluded that the [mean-median difference] and [partisan symmetry] metrics, which are more relevant for a state legislative plan because they connect directly to control of the chamber, suggest that in a tied election Republicans would still hold 27 or 28 [of 50 total] seats, and that Democrats would need to win as much as 53 percent of the vote to claim 25 seats. The odds are about three to one that Republicans would maintain this advantage throughout the decade.

Relatively, Dr. McGhee observed that the Republican advantage within Plaintiffs' proposed RSP "is often less than half the size of the same advantage in the Legislative Defendants' [RSP]." "This suggests that there is nothing foreordained about the advantages in the Legislative Defendants' plan."

Dr. Wang determined that the RSP favors Republicans in all six metrics evaluated: seat partisan asymmetry, mean-median difference, partisan bias, lopsided wins, declination angle, and efficiency gap. Specifically, he determined that the RSP yields an efficiency gap of 2.2%, a mean-median difference of 0.8%,

> and an average partisan asymmetry of 2.1 seats, all favoring Republicans.
>
> Finally, Dr. Jarvis determined that analysis of the RSP reveals that it "is often a significant outlier in favor of the Republicans." He determined that the RSP yields an efficiency gap of 4.0%, a mean-median difference of 1.4%, an average partisan bias of 4.0%, and a declination metric of 7.0%.

Id. at 103–04 (alterations in original).

By contrast, the advisors to the Special Masters made the following conclusions about the RHP:

> Dr. Grofman determined that although the RHP "creates a distribution of voting strength across districts that is very lopsidedly Republican," it "is genuinely far more competitive than either of the other two legislatively proposed maps." He observed that under the RHP, "unlike the other maps, the Democrats do not have to win all of the competitive seats to win a majority in the House. Moreover, unlike the [RCP and RSP], . . . the competitive seats [in the RHP] are substantially Democrat in directionality." He further noted that: "quit[e] important in judging the constitutionality of this map in the full context are the facts that: (a) the Harper plaintiffs have not chosen to offer an alternative [RHP] but are apparently content to see the legislative map implemented by the Court, (b) the map was passed by a clear bipartisan consensus in the legislature, including members of the legislature who belong to particular minority communities, and (c) that while it still is further from being non-dilutive than the NCLCV [RHP] alternative, it is far closer to Plaintiffs' map than it is to the rejected [2021] enacted NC House map."
>
> He determined that while the RHP's efficiency gap "remains in a pro-Republican direction," it is "at the low level of 2.72[%]." In considering "the totality of the circumstances . . . and recognizing that this map is still not ideal (nor need it be)," he concluded that the RHP "simply lacks the same clear indicia of egregious

> bias found in the previously rejected maps and still found . . . in the [RCP] and [RSP]."
>
> Dr. McGhee likewise determined that the RHP "still favors Republicans when all seats are open, but substantially less [than the 2021 congressional map]." He determined that the RHP yields an efficiency gap of 3.0%, a mean-median difference of 1.4%, a partisan asymmetry of 2.9%, and a declination metric of 0.16, all favoring Republicans. Dr. McGhee concluded that the RHP "still favors Republicans: the party would likely hold about 64 of 120 seats with half the vote, and it would take the Democrats somewhere close to 52% of the vote to bring that number down to 60." Relatively, he determined that the RHP "is very similar to" NCLCV Plaintiffs' proposed remedial house map on metrics of partisan symmetry, that it "do[es] a reasonably good job of respecting traditional geographic principles," and that it reflects "very similar compactness" as Plaintiffs' proposed remedial House map. He concluded that the RHP's partisan symmetry is "closer [to NCLCV's proposed remedial plan] than was the case for either the [RSP] or the [RCP]," noting that the NCLCV Plaintiffs' plan is only "a little better." He concluded that this "relatively marginal improvement hints that it may be difficult to do better while still abiding by other constraints."
>
> Dr. Wang determined that the RHP favors Republicans in all six metrics evaluated: seat partisan asymmetry, mean-median difference, partisan bias, lopsided wins, declination angle, and efficiency gap. Specifically, he determined that the RHP yielded an efficiency gap of 3.1%, a mean-median difference of 0.9%, a partisan asymmetry of 7.2 seats, and a declination angle of 4.5 degrees.
>
> Finally, Dr. Jarvis determined that the RHP "appear[s] to be mostly typical in terms of the number of seats won." He determined that the RHP yields an efficiency gap of 2.7%, a mean-median difference of 1.5%, an average partisan bias of 2.7%, and a declination metric of 5.7%.

Id. at 102–03 (alterations in original).

Two observations follow from this evidence. First, contrary to the majority's suggestion that *Harper I* simply required a proportionality standard, the Court in *Harper II* approved the RHP, even though three of the four advisors to the Special Masters determined that the RHP maintained a pro-Republican bias. Though the majority appears to believe that there is no basis for *Harper II*'s decision to accept the RHP but reject the RSP, this conclusion rests solely on the majority's failure to consider the totality of the evidence presented for both plans, as discussed below.

Second, as to the RCP, the General Assembly's refusal to make a legitimate effort in applying *Harper I*'s mandate is not evidence that *Harper I* failed to delineate a manageable standard. The RCP was rejected by both the three-judge panel and this Court due to the General Assembly's own plain and intentional manipulation of the statistical data. As the Special Masters concluded, "there is substantial evidence from the findings of the advisors that the proposed congressional plan has an efficiency gap above 7% and a mean-median difference of greater than 1%." *Id.* at 105–106. More specifically, "none of the Special Masters' Advisors determined that the RCP yielded both an efficiency gap below 7% and a mean-median difference below 1%." *Id.* at 117. But this was not all. The evidence demonstrated that the RCP " 'consistently favor[ed] Republicans' across all applicable measures." *Id.* at 117.

Despite the strong evidence across metrics that the RCP represented an unconstitutional partisan gerrymander, the majority chastises the three-judge panel for applying this Court's precedent and concluding that the RCP was "not satisfactorily within the statistical ranges set forth in [*Harper I*]." According to the majority "[a] majority of advisors and experts found that all three plans fell within the thresholds set by the *Harper I* majority, yet for some reason . . . only the RCP was unconstitutional." As an initial matter, this statement plainly misstates the advisors' findings, which are summarized above. Further, it commits the same error that *Harper I* and *Harper II* prohibited by relying exclusively on two of the empirical tests in isolation, rather than analyzing the evidence in its entirety. *See Harper II*, 383 N.C. at 93 (explaining that in *Harper I*, the Court expressly declined to "identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander.") (quoting *Harper I*, 380 N.C. at 384).

Harper II was clear that "[c]onstitutional compliance has no magic number." 383 N.C. at 114. Nor should it for the reasons already explained. Moreover, "[a]n individual statistical measure standing alone,

though helpful, is not dispositive of constitutional compliance," *id.* at 93, because "individual datapoints are vulnerable to manipulation[,]" *id.* at 115. The majority proves this point. The majority concludes that *Harper I*'s standard must have been applied inconsistently because the Defendants' RCP was rejected, even though some of the advisors' results yielded *either* an efficiency gap value *or* a mean-median difference value within an acceptable—yet still pro-Republican—range, similarly to the RSP and RHP. In so concluding, the majority conveniently forgets to acknowledge the substantial amount of evidence showing "a very lopsidedly Republican" gerrymander. *See id.* at 117. The majority's analysis shows exactly why *Harper II* explained that cherry picking individual tests as proof of constitutional compliance is not sufficient.[10]

That the trial court was required to evaluate a variety of evidence to determine whether the RCP as well as the other two maps violated the state constitution does not demonstrate that *Harper I*'s standard is judicially unmanageable. The obligation to weigh the totality of the evidence is a basic evidentiary issue. When overwhelming and varying evidence in the record points to the same conclusion, a court simply has a stronger foundation from which to render the correct decision. In fact, that there is a range of evidence that must be evaluated to reach the correct result does not bear on the constitutional standard delineated by *Harper I* in any respect. In the criminal context, for example, judges and juries must evaluate many different kinds of evidence, and in assessing guilt or innocence, *all* of the relevant evidence before the finder of fact should be considered and afforded the appropriate weight. So too here. The majority's refusal to engage in this analysis is not a shortcoming of *Harper I*—the failure belongs to the majority alone.[11]

---

10. The majority similarly ignores the totality of the evidence demonstrating that the RSP was an extreme partisan gerrymander. For example, the majority takes umbrage with the fact that "[t]he *Harper II* majority did not say why an average Mean-Median Difference of 1.27% weighed in favor of the RHP's constitutionality but an average Mean-Median Difference of 1.29% weighed against the RSP's constitutionality." Actually, the majority did address this issue—several times. To repeat, a single data point such as the average mean-median calculation among the Advisors to the Special Masters is not dispositive of a plan's constitutionality. *Harper II*, 383 N.C. 89, 123 (2022) (explaining that, with respect to the RSP, "none of these datapoints are individually dispositive."). As a result, *Harper II*'s rejection of the RSP did not turn on the average of the mean-median values alone.

11. This Court's decision in *Stephenson v. Bartlett*, 357 N.C. 301 (2003) (*Stephenson II)* further illustrates the point. In *Stephenson II*, a majority of this Court affirmed a trial court ruling that districts 6, 10, 11, 14, 16, 21, 26 36 and 44 in the remedial Senate redistricting plan drawn after the Court invalidated the General Assembly's first plan in *Stephenson I* were unconstitutional under the state constitution as interpreted in *Stephenson I* because they were "not compact." *Id.* at 314. This Court did not specify what metric determined a district's compactness for constitutional purposes even though the software programs

As a final comment, a footnote buried in the majority's dissent demonstrates the majority's continued attempts to mischaracterize what is at stake in this case. In this footnote, the majority opines:

> Both the RHP and RSP were used during the 2022 election cycle. Significantly, under the RHP approved by the four-justice majority in *Harper II*, Republican candidates won 59% of the House races while receiving about 58% of the aggregate statewide vote. Under the RSP, which the *Harper II* majority found unconstitutional, Republican candidates won 60% of the Senate races while receiving about 59% of the aggregate statewide vote. It is unclear why this small difference of approximately one percentage point rendered the RHP constitutional and the RSP unconstitutional.

(Citations omitted). As an initial matter, this data appears nowhere in the record, and it is inappropriate for an appellate court to reach to outside sources for statistical data. More importantly, however, the majority's representation is highly misleading. In considering Republican House and Senate candidates' aggregate share of the statewide vote, the majority takes advantage of the fact that there are many districts in which there was no Democratic candidate. Specifically, using the data cited by the majority, 25% of House districts did not have a Democrat on the ballot, compared to the 7.5% of districts in which there was no Republican on the ballot. In the Senate, 28% of districts lacked a Democratic candidate, whereas only a single district, which represents 2% of Senate districts, lacked a Republican candidate. Considering only the aggregate statewide vote is therefore misleading because it suggests that Republicans beat more Democrats, entitling them to more seats, than is true in reality. That the majority has no reservations about engaging in this kind of statistical manipulation is telling.

---

used at the time calculated geographic compactness in nine different ways and did not delineate how non-compact is too non-compact. There was no objection that the compactness standard must not be administrable because the General Assembly didn't comply with it when drawing remedial districts; no holding that the State Constitution cannot be interpreted to require geographically compact districts because the word compactness does not appear in the Constitution; no objection that the court was taking over the function of the legislature by substituting its own notions of what might be sufficiently geographically compact. It is impossible to reconcile the *Stephenson II* opinion with the majority's decision in this case, and its failure to apply the same principles here illustrates the majority's intellectual dishonesty. The only consistency is that the result of both opinions is to impose on the voters of this state districting plans that benefit Republican legislators.

When considering races that included only Republican and Democratic candidates, the results paint a much different story. With respect to the State House race, though Republicans won 59% of the seats, they only won approximately 53% of the statewide vote, meaning Democrats won approximately 47% of the statewide vote. Without the RHP, Republicans likely would have won a supermajority in the House, despite that, in races in which members of both parties were actually competing, both parties won a very close share of the statewide vote. As to the State Senate race, Republicans won 60% of the seats—a supermajority in the Senate—by receiving only 51% of the statewide vote, compared to Democrats' 49%. Though the RSP was used in the 2022 election cycle, allowing Republicans to win a supermajority of seats when barely able to win a majority of the statewide votes, *Harper II* eventually struck it down while retaining the RHP. To clarify any confusion for the majority, the "small difference" between Republicans winning 59% of the seats with 53% of the vote in the House versus 60% of seats in the Senate with only 51% of the statewide vote is the Senate's veto-proof supermajority.

3. Textual Commitment

Almost sixteen years before the U.S. Supreme Court decided *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), this Court explained that:

> the obligation of [judges'] oaths and the duty of their office require[s] them . . . to give their opinion on that important and momentous subject; and . . . notwithstanding the great reluctance they might feel against involving themselves in a dispute with the Legislature of the State, yet no object of concern or respect could come in competition or authorize them to dispense with the duty they owe[ ] the public, in consequence of the trust they were invested with under the solemnity of their oaths.

Bayard v. Singleton, 1 N.C. (Mart.) 5–6 (1787). Since then, "[i]t has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution." *Leandro v. State*, 346 N.C. 336, 345 (1997).

Though the majority is correct that the state constitution assigns the redistricting authority to the legislature, it does not give the General Assembly license to "dictate electoral outcomes." *Cook v. Gralike*, 531 U.S. 510, 523 (2001). Recognizing this limitation on the General Assembly's redistricting authority, this Court long ago established that "within the context of state redistricting and reapportionment disputes, it

is well within the 'power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan.' " *Stephenson I*, 355 N.C. at 362 (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam)); *see also Blankenship*, 363 N.C. at 522–28; *State ex rel. Martin v. Preston*, 325 N.C. 438 (1989).

There is no exception to this principle for redistricting cases, and for good reason. "Indeed, the need for judicial review is at its most urgent in these cases. For here, politicians' incentives conflict with voters' interests, leaving citizens without any political remedy for their constitutional harms." *Gill v. Whitford*, 138 S. Ct. 1916, 1941 (2018) (Kagan, J., concurring). But the majority lets none of this stand in its way in carving out its own partisan gerrymandering exception. In so holding, the majority violates the established principle that "the 'judicial power' under the North Carolina Constitution is plenary, and '[e]xcept as expressly limited by the constitution, the inherent power of the judicial branch of government continues.' " *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 607 (2021) (quoting *Beard v. N.C. State Bar*, 320 N.C. 126, 129 (1987)). No express limitation on the judicial power exists with respect to the General Assembly's redistricting authority, and judicial oversight in such cases, including partisan gerrymandering cases, is mandatory.

The majority's conclusion that partisan gerrymandering claims are not reviewable by this state's courts largely turns on the existence of two specific provisions in the state constitution that restrict the legislature's redistricting authority. In particular, the majority points to article II, sections 3 and 5 of the North Carolina constitution. Article II, section 3 provides:

> The Senators shall be elected from districts. The 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 senate districts and the apportionment of Senators among those districts, subject to the following requirements:
>
> (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.

N.C. Const. art. II, § 3. Article 2, section 5 prescribes the same guidelines and restrictions for the North Carolina House of Representatives. N.C. Const. art. II, § 5. Together, the third limitations in both sections are known as the Whole County Provisions (WCP). In the majority's view, article II, sections 3 and 5 are effectively the only limitations in the state constitution that restrict the General Assembly's redistricting powers. Accordingly, the majority believes that "the role of our courts is limited to identifying a redistricting plan that violates those express limitations."

This reasoning, of course, ignores that *Harper I* identified multiple constitutional protections that prohibit partisan gerrymandering, rendering such an express provision redundant. That the rights and principles upon which *Harper I*'s holding is based are more encompassing than those found in article II, sections 3 and 5 is of no moment. As the majority itself explains, the North Carolina Declaration of Rights, which contains all of the rights protected by *Harper I*, speaks in "abstract" terms. The majority admits that this quality is what has allowed the Declaration of Rights to survive. To maintain this "abstractness," the Declaration of Rights necessarily does not explicitly define every type of conduct or act that constitutes a constitutional violation.

Whether through narrow and explicit provisions, like article II, sections 3 and 5, or those that are broad and less indefinite, like the free elections clause, the state constitution protects the rights that are fundamental to our state and upon which our democracy was founded. It is the duty of the courts to interpret precisely what conduct these provisions proscribe. This duty is not to be abandoned simply because a constitutional provision is not sufficiently "explicit."[12] All of this aside,

12. For this reason, the majority's reliance on *Stephenson I* as an appropriate example of judicial oversight with respect to a redistricting dispute as compared to *Harper I* is unavailing. Just as the Court in *Stephenson I* properly reviewed and ruled unconstitutional malapportioned maps that violated article II, sections 3 and 5, 355 N.C. at 371, *Harper I* properly reviewed and ruled unconstitutional maps that violated the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause.

the majority's reasoning also fails to acknowledge that the restrictions articulated in article II, sections 3 and 5 of the North Carolina constitution were first recognized in principle by this Court before they were ever added to the state constitution.

In *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198, 220 (1875), this Court struck down an act of the General Assembly that divided Wilmington, North Carolina into three wards from which nine members—three members from each ward—of the Board of Alderman would be elected. The first and second ward consisted of approximately 400 voters, whereas the third ward had approximately 2,800 voters. *Id.* at 225. The Court struck down the malapportioned map as a "plain violation of fundamental principles, the apportionment of representation." *Id.* The Court further explained that "[o]ur government is founded on the will of the people. Their will is expressed by the ballot." *Id.* at 220.

The principle *Van Bokkelen* recognized, however, was not expressly contained in the text of the North Carolina constitution—article II, sections 3 and 5 were not added until much later—and the U.S. Supreme Court's one-person, one-vote principle was not recognized for almost another ninety years. Thus, *Van Bokkelen* recognized that, with respect to city representatives, "representation shall be *apportioned* to the popular vote *as near as may be*" nearly one hundred years before express constitutional provisions requiring the same were adopted. 73 N.C. at 224. This point is absent from the majority's extensive musings about the requirement that there be an "express" limitation on the General Assembly's reapportionment power in order for courts to exercise judicial review.

Finally, the majority exalts this Court's decision in *Stephenson I* as an example of the proper exercise of judicial review over a dispute arising from legislative redistricting maps. But its reliance on *Stephenson I* is misplaced.

Stephenson I concerned state House of Representative and Senate maps that divided counties throughout the state into multiple districts in violation of the WCP, which "prohibit[ ] the General Assembly from dividing counties into separate Senate and House districts." 355 N.C. at 359. The defendants "contend[ed] 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. The Court rejected this argument, holding that "the WCP remain[ ] valid and binding upon the General Assembly during the redistricting and reapportionment process . . . except to the extent superseded by federal law." *Id.* at 372.

The majority recognizes that "[o]nce [the Court] found that the 2001 Plans violated the still-valid WCP, [it] then crafted detailed criteria harmonizing the WCP . . . with the [Voting Rights Act] and the federal one-person, one-vote principle." But the *Stephenson I* Court did not *only* "harmonize" the WCP with federal law. It also went on to ensure that the legislative maps complied with the state constitution's equal protection clause. The Court specifically explained, "the WCP cannot be applied in isolation or in a manner that fails to comport with other requirements of the State Constitution." *Id.* at 376. The particular issue the Court was tasked with resolving at this stage was "[p]laintiffs['] conten[tion] that remedial compliance with the WCP require[d] the formation of multi-member legislative districts" in addition to single-member districts within the same plan. *Id.* And so, the Court went on to evaluate whether such a plan would comply with the requirements of North Carolina's equal protection clause *in addition* to other constraints imposed by federal law.

As part of its state equal protection analysis, the Court explained that "[i]t is well settled in this State that 'the right to vote on equal terms is a fundamental right.' " *Id.* at 378 (quoting *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746 (1990)). With this in mind, "[t]he classification of voters into both single-member and multi-member district within plaintiffs' proposed remedial plans necessarily implicates the fundamental right to vote on equal terms," making strict scrutiny the appropriate standard of review. *Id.*

The Court was faced with a problem, however, in that article II, sections 3(1) and 5(1)

> arguably contemplate multi-member districts by stating that, for apportionment purposes, each member of the General Assembly from such a district represents a fraction of the voters in that district. The principle of 'one-person, one-vote' is preserved because the number of voters in each member's fraction of the multi-member district is the same as the number of voters in a single-member district.

Id. at 379. This point is worth emphasizing. Though the state constitution does not expressly permit partisan gerrymandering, there is an express provision that permits use of single-member and multi-member districts together.

Were we to accept the Court's rationale today, this fact would have been the end of the Court's inquiry in *Stephenson I*: enacting maps

that use single and multi-member districts in tandem is a power that is expressly granted to the General Assembly, and there is no express limitation on this power (as it involves a clause other than the WCP), so the courts are unable to oversee the General Assembly's exercise of this authority. This, of course, is not what *Stephenson I* did.

Instead, *Stephenson I* analyzed the practical effects of the combined use of single and multi-member districts in light "of the fundamental right of each North Carolinian to substantially equal voting power" under the state equal protection clause. *Id.* at 379. The Court concluded that such maps violate this fundamental right. *Id.* at 384. As such, based on the principle that "a constitution cannot be in violation of itself," the Court determined that article II, sections 3(1) and 5(1) cannot, as their text suggests, be construed as "affirmative constitutional mandates and do not authorize use of both single-member and multi-member districts in a manner" that violates the fundamental right to substantially equal voting power. *Id.* at 378–79.

This is all that *Harper I* did. Where *Stephenson I* analyzed the General Assembly's apportionment powers under article II, sections 3(1) and 5(1) in light of the equal protection clause, *Harper I* analyzed the General Assembly's redistricting powers under article II, sections 3 and 5 and the federal Constitution in light of the state equal protection clause, the free elections clause, the free speech clause, and the freedom of assembly clause. The majority might disagree about whether partisan gerrymandering actually violates any of these constitutional provisions. But as *Stephenson I* demonstrates, it is simply inaccurate to characterize this issue as committed solely to the province of the General Assembly.

In sum, the majority's textual commitment analysis does not establish that this state's courts lack a constitutionally contemplated role in ensuring that the General Assembly respects the will of the voters through constitutionally complaint maps.

4. Policy Decisions

The majority's final effort to establish that partisan gerrymandering claims are nonjusticiable is based on its conclusion that such claims involve "a host of 'policy determination[s] of a kind clearly for nonjudicial discretion[,]' " quoting *Baker*, 369 U.S. at 217 (alteration in original). I have already addressed many of the arguments the majority raises here, and I will not repeat why those arguments fail. A few additional points are warranted, however.

First, the majority argues that the "political science tests"—or the empirical analyses—that *Harper I* identified as means of determining

whether a legislative redistricting plan constitutes an unconstitutional partisan gerrymander are insufficient because they use data from past elections to predict how "voters will vote in the future." Such data will not provide accurate results, the majority posits, because "individual voters may vote inconsistently at different times in their life for a variety of reasons."

This argument is smoke in mirrors. These tests do not simply permit courts to "gaze into crystal balls, as the majority tries to suggest." *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting). Using these reliable analyses that courts around the country have successfully employed, courts can make "findings about . . . gerrymanders' effects on voters—both in the past and predictably in the future—[that are] evidence-based, data-based, statistics-based." *Id.* In other words, these tests use *the same data* and analyses that the General Assembly uses in attempting to create egregious partisan gerrymanders in the first place.[13] When the General Assembly uses advanced technological tools and similar analyses in drawing legislative plans, it does not simply cross its fingers and hope that it is making a close guess about election outcomes. It knows with near certainty what the outcomes are going to be. The same is true when trial courts use this data to determine whether the maps as drawn by the General Assembly have been gerrymandered on a partisan

---

13. The dissent in *Rucho* explained clearly why the argument raised by the majority is not a legitimate concern, particularly in light of the constitutional rights that are at stake:

> Mapmakers now have access to more granular data about party preference and voting behavior than ever before. County-level voting data has given way to precinct-level or city-block-level data; and increasingly, mapmakers avail themselves of data sets providing wide-ranging information about even individual voters. . . . Just as important, advancements in computing technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision. . . . While bygone mapmakers may have drafted three or four alternative districting plans, today's mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. These are not your grandfather's—let alone the Framers'—gerrymanders.

Rucho, 139 S. Ct. at 2513 (Kagan, J., dissenting).

basis. In acknowledging the purpose and capabilities of such analyses, the Court in *Harper I* "refused to content [itself] with unsupported and out-of-date musings about the unpredictability of the American voter. . . . They did not bet [North Carolina's] future—as today the majority does—on the idea that maps constructed with so much expertise and care to make electoral outcomes impervious to voting would somehow or other come apart." *Id.*

The majority goes on to criticize *Harper I* for making policy judgments about a number of issues that, as explained previously, are nothing more than evidentiary questions. Though I will not repeat this explanation in depth, it is necessary to clarify what the majority is doing here. As an initial matter, determining how to discriminate against a certain kind of voter most effectively "reflects *no* policy, but simply arbitrary and capricious action." *Baker*, 369 U.S. at 226. This issue aside, rather than pointing out genuine policy disputes, the majority uses the term as a misnomer for what are really just evidentiary judgments.A quick exercise illuminates the point. Every time the majority uses the term "policy question" or "policy determination," replace it with the term "evidentiary judgments."[14] The latter term is the accurate way to describe the different decisions that the majority explores and that come before a court analyzing partisan gerrymandering issues. Repeatedly declaring that these considerations are policy judgments does not make them so.

For example, contrary to the majority's conclusion "[s]electing between past elections, current voter registration information, or some other data as the 'best' source for garnering partisan election data" is not a "non-judicial policy determination," but an evidentiary judgment that a court must resolve in determining which data yields the most accurate results. This is the kind of judgment that courts must frequently make in other contexts, and the use of experts in the particular field can help provide guidance on making the right decision. How this is a policy question in any respect is unclear.

---

14. Note that there is one particular claim in the majority's analysis where this comparison will not work. Specifically, the majority states that using "these political science metrics at all requires policy determinations that are not grounded in any constitutional guidance." As explained in depth, this argument simply advances the incorrect notion that the tests for proving a constitutional violation must be found within the state constitution itself. Apparently, if a court itself prescribes a test that is sufficient to prove a constitutional violation, this is a "policy decision." Many members of the legal community will be surprised to learn this.

The majority also takes aim at the fact that a single test, such as the mean-median difference analysis or the efficiency gap analysis, can yield different results. This is simply another way of expressing the concern addressed above because it takes issue with the variety of data, as well as "software" and "calculation methods" that a single analysis can utilize. But when these analyses, despite their different methods and data, yield results that point in substantially the same direction as consistently happened in both *Harper I* and *Harper II*, there is only greater confidence that the results are accurate. For example, as the three-judge panel found in *Harper I* with respect to the Congressional Plan, "[e]ven though [Plaintiffs'] experts employed different methodologies, each expert found that the enacted plan is an outlier that could only have resulted from an intentional effort to secure Republican advantage." Further, the trial court explained that "Legislative Defendants offered no defense of the 2021 Congressional Plan. No expert witness opined that it was not the product of an intentional partisan redistricting." In this way, a variety of analyses that employ different methods only support that the trial court's conclusion was correct.

D. The Issues Presented Here Have Already Been Decided by this Court

Finally, the majority attempts to convince us that today's decision—a decision that used raw partisan power to overturn two of this Court's precedents—is nothing out of the ordinary. "We have never hesitated," the majority explains "to rehear a case when it is clear that the Court 'overlooked or misapprehended' the law." What the majority has done today is anything but ordinary. It is an extreme departure from 205 years of practice. "Indeed, data from the Supreme Court's electronic filing system indicate that, since January 1993, a total of 214 petitions for rehearing have been filed, but rehearing has been allowed in only two cases." *Harper Order* at 550 (Earls, J., dissenting).

Nothing has changed since *Harper I* and *Harper II* were decided. "The legal issues are the same; the evidence is the same; and the controlling law is the same. The only thing that has changed is the political composition of the Court." *Id.* at 550–51. Now emboldened by its sheer political might, it takes the extraordinary step of overturning not just the two cases at issue here, but also a *third* voting rights case that this Court decided just months ago. *See Holmes v. Moore*, 383 N.C. 171 (2022), *rev'd*, No. 342PA19-3 (N.C. Apr. 28, 2023).

Rehearing in this case never should have been granted. The cases that the majority cites to justify its conduct confirm this. For example,

the majority cites only two cases in which rehearing was granted in this millennium. The scarcity of such instances speaks for itself.[15]

The cases that the Court cites in which rehearing was granted over twenty years ago offer no more support for its mischaracterization of the remedy. For example, in *Whitford v. Gaskill*, 345 N.C. 762 (1997), rehearing was granted for the sole and limited purpose of modifying the final clause of the last paragraph on the last page of an opinion. Specifically, a party sought to have this clause changed from stating "for entry of judgment consistent with this opinion," to "for further proceedings not inconsistent with this opinion." *Id.* at 762. Thus, rehearing was not granted to overturn the result of a previous case, but rather to provide more accurate instructions to the trial court regarding the proper way to proceed in the litigation. In *Alford v. Shaw*, 320 N.C. 465 (1987), the Court granted rehearing because it originally misunderstood the pertinent legal issue. In other words, it did not originally address the question the case presented. In *Lowe v. Tarble*, rehearing was granted without explanation, but the Court did not overturn its previous decision on rehearing, explaining that "the question [at issue] is no longer debatable; it has been resolved against defendants." 313 N.C. 460, 462 (1985). And in *Housing, Inc. v. Weaver*, 304 N.C. 588 (1981), the Court granted rehearing for the limited purpose of rescinding a previous order that denied a party's petition for a writ of certiorari and allowed the petition instead. The case had not even been argued, let alone decided (and affirmed by a separate case). *Id.*

---

15. These cases need not be distinguished: That they were the only two cases that were granted rehearing in the last twenty-three years proves that rehearing is granted in exceedingly rare instances. Even so, as explained in my dissent to the Court's order granted rehearing:

> The Court most recently granted rehearing in *Jones v. City of Durham*, 361 N.C. 144 (2006). There, the Court granted rehearing for the limited purpose of reconsidering specific evidence in a negligence action that involved a single plaintiff, rather than to consider abolishing a constitutional right that belongs to millions of voters. There was no dissent to the per curiam final opinion of the Court, indicating the absence of any partisan divide over the issue. The other case in which the Court permitted rehearing was *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805 (1999). That case similarly did not involve a fundamental issue central to the structure of our democracy and had no impact whatsoever on elections.

Harper Order at 550 n.1 (Earls, J., dissenting).

These cases "demonstrate that rehearing in this Court is used cautiously; it is rarely permitted, and when allowed, it is limited in scope." *Harper Order* at 552 (Earls, J., dissenting). By contrast, the majority has used rehearing in this case to "upend the constitutional guarantee that voters in the State will enjoy 'substantially equal voting power,' regardless of their political affiliations." *Id.* "Such a change . . . fundamentally alter[s] the political rights of every voter in North Carolina." *Id.* (quoting *Harper I*, 380 N.C. at 376).

The Court cites only one case in which the outcome changed on rehearing after an adjustment in the Court's composition. *See Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805 (1999). This case did not involve voting rights or redistricting. Nevertheless, even if it were analogous, a politically motivated decision in a single case over twenty years ago does not excuse or justify such conduct going forward. Instead, it highlights the fact that, despite ideological differences, this Court has historically abided by its own precedent out of "[r]espect for the institution and the integrity of its processes." *Harper Order* at 550 (Earls, J., dissenting).

III. Conclusion

Following decisions such as this, we must remember that, though the path forward might seem long and unyielding, an injustice that is so glaring, so lawless, and such a betrayal to the democratic values upon which our constitution is based will not stand forever. As *Harper II* explained, the rights that prohibit partisan gerrymandering in this state "are . . . the enduring bedrock of our sacred system of democratic governance, and may be neither subordinated nor subverted for the sake of passing political expediency." *Harper II*, 383 N.C. at 95.

I dissent from this Court's majority opinion and its shameful manipulation of fundamental principles of our democracy and the rule of law. I look forward to the day when commitment to the constitutional principles of free elections and equal protection of the laws are upheld and the abuses committed by the majority are recognized for what they are, permanently relegating them to the annals of this Court's darkest moments. I have no doubt that day will come.

Justice MORGAN joins in this dissenting opinion.

JABARI HOLMES, FRED CULP, DANIEL E. SMITH, BRENDON JADEN PEAY, AND PAUL KEARNEY, SR.

v.

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; DAVID R. LEWIS, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE HOUSE SELECT COMMITTEE ON ELECTIONS FOR THE 2018 THIRD EXTRA SESSION; RALPH E. HISE, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE SENATE SELECT COMMITTEE ON ELECTIONS FOR THE 2018 THIRD EXTRA SESSION; THE STATE OF NORTH CAROLINA; AND THE NORTH CAROLINA STATE BOARD OF ELECTIONS

No. 342PA19-3

Filed 28 April 2023

1. Constitutional Law—North Carolina—equal protection—facial challenge to state law—analytical framework

A facial challenge to a state law under the Equal Protection Clause of the state constitution will overcome the presumptive validity of an act of the General Assembly only upon proof beyond a reasonable doubt that the legislature enacted the law with discriminatory intent and that the law actually produces a meaningful disparate impact along racial lines.

2. Constitutional Law—North Carolina—equal protection—voter ID law—presumption of legislative good faith

In a facial challenge to a voter ID law, the trial court erred by concluding that the law was unconstitutional on the basis that it was enacted with discriminatory intent and that it therefore violated the Equal Protection Clause of the state constitution, and by permanently enjoining implementation of the law. Although the trial court applied the federal framework set forth in *Village of Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977), which is not binding on state courts interpreting the constitutionality of a state law under a state constitution, plaintiffs' claim failed under even this analysis because the trial court relied too heavily on past discrimination in the historical record and its own speculation regarding additional measures the legislature could have taken during the legislative process rather than on the presumption of legislative good faith, and thus improperly shifted the burden of proving constitutional validity to the General Assembly.

3. Constitutional Law—North Carolina—equal protection—voter ID law—discriminatory intent—disparate impact

On rehearing of a facial challenge to a voter ID law, the trial court abused its discretion when it acted under a misapprehension of the law—by using an incorrect legal standard and improperly shifting the burden of proof of constitutional validity to the legislature—to conclude that the voter ID law was unconstitutional in that it violated the Equal Protection Clause of the state constitution. Under the proper framework for evaluating a facial challenge under the state constitution, plaintiffs did not provide sufficient evidence to meet their burden of proving beyond a reasonable doubt that the legislature enacted the law with discriminatory intent and that the law actually provides disparate impact along racial lines by disproportionately impeding black voters from voting; therefore, plaintiffs failed to overcome the presumption of validity that attaches to legislative acts. The prior opinion issued in this case was withdrawn, the trial court's order was reversed, and the matter was remanded for entry of an order dismissing plaintiffs' claim with prejudice.

Justice MORGAN dissenting.

Justice EARLS joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 from the judgment entered on 17 September 2021 by a divided three-judge panel of the Superior Court, Wake County, holding that S.B. 824 violates Article I, Section 19 of the North Carolina Constitution and permanently enjoining that law. On 16 December 2022, this Court affirmed the judgment, and that mandate was issued on 5 January 2023. On 3 February 2023, this Court allowed a petition for rehearing pursuant to N.C. R. App. P. 31. Heard in the Supreme Court on 15 March 2023.

Southern Coalition for Social Justice, *by Jeffrey Loperfido and Hillary Harris Klein; and Jane O'Brien*, *pro hac vice*, *Paul D. Brachman*, *pro hac vice*, *and Andrew J. Ehrlich*, *pro hac vice*, *for plaintiff-appellees.*

Nicole J. Moss, *David H. Thompson*, *pro hac vice*, *Peter A. Patterson*, *pro hac vice*, *Joseph O. Masterman*, *pro hac vice*, *John W. Tienken*, *pro hac vice*, *Nicholas A. Varone*, *pro hac vice*, *and Nathan A. Huff*, *for legislative defendant-appellants.*

Joshua H. Stein, *Attorney General*, *by Terence Steed*, *Special Deputy Attorney General*, *Laura McHenry*, *Special Deputy*

Attorney General, and Mary Carla Babb, Special Deputy Attorney General, for defendant-appellants State of North Carolina and North Carolina State Board of Elections.

BERGER, Justice.

There is no legal recourse available for vindication of political interests, but this Court is yet again confronted with "a partisan legislative disagreement that has spilled out . . . into the courts." *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*, 553 U.S. 181, 128 S. Ct. 1610 (2008). This Court once again stands as a bulwark against that spillover, so that even in the most divisive cases, we reassure the public that our state's courts follow the law, not the political winds of the day.

It is well settled that the proper exercise of judicial power requires great deference to acts of the General Assembly, as the legislature's enactment of the law is the sacrosanct fulfillment of the people's will. *See Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) ("[T]he General Assembly . . . functions as the arm of the electorate."). With that basic principle in mind, we are confronted here with a simple question: does S.B. 824 violate the meaningful protections set forth in Article I, Section 19 of the North Carolina Constitution? Because it does not, we reverse and remand to the trial court for dismissal of this action with prejudice.

I. Background

In November 2018, the people of North Carolina amended our Constitution to require that "[v]oters offering to vote in person shall present photographic identification before voting." N.C. Const. art. VI, § 2(4). The people commanded "[t]he General Assembly [to] enact general laws governing the requirements of such photographic identification, which may include exceptions." *Id.* The General Assembly thereafter complied by passing S.B. 824, now codified in Chapter 163 of our General Statutes. *See* An Act to Implement the Constitutional Amendment Requiring Photographic Identification to Vote, S.L. 2018-144, 2019 N.C. Sess. Laws 72.

Pursuant to S.B. 824, registered voters are required to present one of a multitude of acceptable forms of identification prior to casting a ballot. These include a valid, unexpired: (1) North Carolina driver's license; (2) North Carolina nonoperator's identification; (3) United

States passport; (4) North Carolina voter identification card; (5) student identification card issued by any statutorily-defined eligible institution; (6) employee identification card issued by a state or local government entity; or (7) out-of-state driver's license or nonoperator's identification, provided that the voter's registration was within ninety days of the election. N.C.G.S. § 163-166.16(a)(1) (2021). These forms of identification are acceptable even if expired, so long as they have been expired for one year or less. *Id.*

In addition, if voters lack one of the aforementioned identifications, they may also present any of the following identifications regardless of their expiry: (1) a military identification issued by the United States government; (2) a veterans identification card issued by the United States Department of Veterans Affairs; (3) a tribal enrollment card issued by a State or federally recognized tribe; or (4) an identification card issued by a department, agency, or entity of the United States or North Carolina for a government public assistance program. N.C.G.S. § 163-166.16(a)(2) (2021). Registered voters over the age of sixty-five may present *any* of the aforementioned identifications listed in sections (a)(1) and (2) regardless of expiry, so long as the identification was unexpired on the date of the registered voter's sixty-fifth birthday. N.C.G.S. § 163-166.16(a)(3) (2021).

If a registered voter lacks one of the various types of acceptable identifications, the law also requires that "[t]he county board of elections . . . issue without charge voter photo identification cards upon request to registered voters." N.C.G.S. § 163-82.8A(a) (2021). To receive a free photo identification card, a registered voter need only provide "the registered voter's name, the registered voter's date of birth, and the last four digits of the voter's social security number." N.C.G.S. § 163-82.8A(d)(1) (2021). These free identification cards are valid for ten years, which, when coupled with the one-year expiration exception provided by N.C.G.S. § 163-166.16(a)(1), means a voter can use a free photo identification card for a period of eleven years. N.C.G.S. § 163-82.8A(a).[1]

The law further provides a host of exceptions for any registered voter who, despite the wide range of acceptable identifications, and despite the availability of freely issued identification cards, nevertheless "does not produce an acceptable form of identification." N.C.G.S. § 163-166.16(d) (2021). First, if a registered voter cannot produce

1. The trial court entered an erroneous finding of fact that the free identification cards expire after one year. In its previous opinion in this case, the majority of this Court repeated this erroneous finding. *Holmes v. Moore*, 383 N.C. 171, 199, 881 S.E.2d 486, 507 (2022) ("[F]ree NC Voter IDs had a one-year expiration date.").

acceptable identification, he or she "may cast a provisional ballot" that will be counted "if the registered voter brings an acceptable form of photograph identification . . . to the county board of elections no later than the end of business on the business day prior to the canvass by the county board of elections as provided in G.S. 163-182.5." N.C.G.S. § 163-166.16(c) (2021). In addition, a registered voter is not required to present any acceptable form of photo identification if that failure is due to: (1) "a religious objection to being photographed;" (2) "a reasonable impediment that prevents the registered voter from presenting a photograph identification;" or (3) "being a victim of a natural disaster occurring within 100 days before election day that resulted in a disaster declaration by the President of the United States or the Governor of this State." N.C.G.S. § 163-166.16(d)(1)–(3).

The "reasonable impediment" exception allows the registered voter to cast a provisional ballot so long as they complete a reasonable impediment declaration affidavit. N.C.G.S. § 163-166.16(d)(2). The law mandates that the State Board of Elections implement a reasonable impediment declaration form that, at a *minimum*, allows voters to identify any of the following as their reasonable impediment to presenting an acceptable ID:

> (1) Inability to obtain photo identification due to:
>
> a. Lack of transportation.
>
> b. Disability or illness.
>
> c. Lack of birth certificate or other underlying documents required.
>
> d. Work schedule.
>
> e. Family responsibilities.
>
> (2) Lost or stolen photo identification.
>
> (3) Photo identification applied for but not yet received by the registered voter voting in person.
>
> (4) Other reasonable impediment. If the registered voter checks the "other reasonable impediment" box, a further brief written identification of the reasonable impediment shall be required, including the option to indicate that State or federal law prohibits listing the impediment.

N.C.G.S. § 163-166.16(e) (2021).

Any provisional ballot cast by a registered voter who fails to present an acceptable form of identification, but who nevertheless submits a reasonable impediment affidavit, must be counted as a valid ballot "unless the county board [of elections] has grounds to believe the affidavit is false." N.C.G.S. § 163-166.16(f) (2021).

This law is one of the least restrictive voter identification laws in the United States. *See N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 310 (4th Cir. 2020) ("Indeed, the 2018 [North Carolina] Voter-ID Law is more protective of the right to vote than other states' voter-ID laws that courts have approved."); *see also Greater Birmingham Ministries v. Sec'y of State for Alabama*, 992 F.3d 1299 (11th Cir. 2021) (upholding a more restrictive voter identification law); *Lee v. Va. State Bd. of Elections*, 843 F.3d 592 (4th Cir. 2016) (same); *South Carolina v. United States*, 898 F. Supp. 2d. 30 (D.D.C. 2012) (same).

In sum, S.B. 824 permits registered voters to present a multitude of acceptable identifications, including expired identifications, and requires the State to provide free voter identification cards to any registered voter. If a registered voter leaves their identification at home or otherwise fails to present it on voting day, he or she can cast a provisional ballot which will be counted if the identification is later presented to the county board of elections. Even if a registered voter still somehow fails to obtain or otherwise possess an acceptable form of identification, the law permits him or her to cast a provisional ballot that will be counted so long as they do not provide false information in the reasonable impediment affidavit. Essentially, North Carolina's photo identification statute does not require that an individual present a photo identification to vote.

Nevertheless, shortly after passage of S.B. 824, plaintiffs filed a facial challenge to the legislation in Wake County Superior Court, alleging that the law violates numerous provisions of the North Carolina Constitution. Specifically, plaintiffs alleged the law: (1) violates Article I, Section 19 because it was enacted with discriminatory intent; (2) violates Article I, Section 19 because it unjustifiably and significantly burdens the fundamental right to vote; (3) violates Article I, Section 19 because it creates different classes of voters who will be treated disparately in their access to their fundamental right to vote; (4) violates Article I, Section 10 because it infringes on the right to participate in free elections; (5) violates Article I, Section 10 because it conditions the fundamental right to vote on the possession of property; and (6) violates Article I, Sections 12 and 14 because it infringes upon the rights of assembly, petition, and freedom of speech.

Plaintiffs moved for a preliminary injunction to enjoin implementation and enforcement of S.B. 824. Defendants moved to dismiss plaintiffs' claims, and the three-judge panel assigned to the case entered an order denying plaintiffs' motion for a preliminary injunction and dismissing all but the first of plaintiffs' claims.[2] Plaintiffs appealed the trial court's denial of the preliminary injunction and the Court of Appeals reversed the panel's decision. *Holmes v. Moore*, 270 N.C. App. 7, 36, 840 S.E.2d 244, 266–67 (2020).

Thereafter, the panel issued the preliminary injunction and held a trial on the merits of plaintiffs' equal protection claim. A majority of the three-judge panel decided in plaintiffs' favor, holding that S.B. 824 violates Article I, Section 19 of the North Carolina Constitution because it was enacted with discriminatory intent. The panel then issued an injunction permanently enjoining implementation of the law.

One judge on the panel dissented, concluding that plaintiffs had failed to meet their burden of proving the law was enacted with discriminatory intent. Defendants timely appealed to the Court of Appeals—however, after briefing began, but before the Court of Appeals could consider the case, this Court granted plaintiffs' petition for expedited review prior to a determination by the Court of Appeals.

As is relevant to our consideration of this case, a separate group of plaintiffs challenged S.B. 824 in federal court prior to the present matter reaching this Court. Plaintiffs there made nearly identical arguments, asserting that the voter identification law violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it was enacted with discriminatory intent. On the plaintiffs' motion, the district court granted a preliminary injunction because it found that the plaintiffs were likely to succeed on the merits of their constitutional claim. *N.C. State Conf. of the NAACP v. Cooper*, 430 F. Supp. 3d. 15, 54 (M.D.N.C. 2019).

The defendants appealed in that federal case, and the Fourth Circuit, in a lengthy and detailed opinion, held that *this very law* was not enacted with discriminatory intent and reversed the district court's decision to invalidate S.B. 824 because of "fundamental legal errors that permeate[d]" the district court's order. *Raymond*, 981 F.3d at 310–11. Most remarkably, the Fourth Circuit concluded that "the district court improperly reversed the burden of proof and disregarded the

2. As plaintiffs did not appeal the dismissal of these claims, plaintiffs' only remaining argument is their discriminatory intent claim under Article I, Section 19.

presumption of legislative good faith," and that when the correct legal principles were applied to the plaintiffs' arguments, "the remaining evidence in the record fails to meet the Challengers' burden." *Id.* at 311.

On appeal to this Court in the present matter, defendants argued that the panel erred in finding the law was enacted with discriminatory intent because the panel improperly reversed the burden of proof and disregarded the presumption of legislative good faith. Defendants further contended that, as indicated by the Fourth Circuit in *Raymond*, plaintiffs' challenge could not be sustained under the correct application of the relevant legal principles. In December 2022, after an election that would change the composition of this Court, but prior to the expiration of the terms of two outgoing justices, the majority—half of which was composed of those two justices—issued an opinion affirming the lower court's issuance of the injunction. *Holmes v. Moore*, 383 N.C. 171, 881 S.E.2d 486 (2022). In so doing, the majority claimed to apply federal precedent but declined to follow the Fourth Circuit's guidance from *Raymond*, the federal case which found that S.B. 824 did not violate the federal Equal Protection Clause. *Id.* at 189, 881 S.E.2d at 500.

Following this Court's decision, defendants timely filed a petition for rehearing, arguing that the majority of this Court overlooked or misapprehended relevant points of fact and law. This Court determined that petitioners had satisfied the requirements of Rule 31 of the Rules of Appellate Procedure and ordered rehearing in an order entered 3 February 2023. After supplemental briefing and oral argument, and upon rehearing pursuant to Rule 31, we withdraw the prior decision reported at 383 N.C. 171, 881 S.E.2d 386 "and treat the case before us as a hearing de novo on the issue raised." *Alford v. Shaw*, 320 N.C. 465, 467, 358 S.E.2d 323, 324 (1987) (citing *Trust Co. v. Gill, State Treasurer*, 392 N.C. 164, 237 S.E.2d 21 (1977); *Clary v. Bd. of Educ.*, 286 N.C. 525, 212 S.E.2d 160 (1975)).

II. Standard of Review

"Whether a statute is constitutional is a question of law that this Court reviews de novo." *State v. Grady*, 372 N.C. 509, 521–22, 831 S.E.2d 542, 553 (2019) (quoting *State v. Romano*, 369 N.C. 678, 685, 800 S.E.2d 644, 649 (2017)). "Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Bartley v. City of High Point*, 381 N.C. 287, 293, 873 S.E.2d 525, 532 (2022) (quoting *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009)). "In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional,

and we will not declare a law invalid unless we determine that it is unconstitutional beyond reasonable doubt." *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 111 (2018) (quoting *State v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016)).

"[T]he trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Parisi*, 372 N.C. 639, 649, 831 S.E.2d 236, 243 (2019) (cleaned up). While "a [trial] court's finding[s] of fact on the question of discriminatory intent [are] reviewed for clear error," when "a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand." *Abbott v. Perez*, 138 S. Ct. 2305, 2326 (2018). "[W]hether the court applied the correct burden of proof is a question of law subject to plenary review." *Id.*

III. Analysis

A. Introduction

"Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.' " *Burdick v. Takushi*, 504 U.S. 428, 433, 112 S. Ct. 2059, 2063 (1992) (quoting *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 1279 (1974)). "[I]t should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021). Indeed, "the integrity of the election process empowers the state to enact laws to prevent voter fraud before it occurs, rather than only allowing the state to remedy fraud after it becomes a problem." *Fisher v. Hargett*, 604 S.W.3d 381, 404 (Tenn. 2020) (cleaned up).

The Supreme Court of the United States has recognized that "every voting rule imposes a burden of some sort." *Brnovich*, 141 S. Ct. at 2338. "The burden of acquiring, possessing, and showing a free photo identification is simply not severe." *Crawford*, 553 U.S. at 209, 128 S. Ct. at 1627 (Scalia, J., concurring). "[T]he inconvenience of making a trip to [a government office], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting." *Id.* at 198, 128 S. Ct. at 1621. *See also Milwaukee Branch of NAACP v. Walker*, 2014 WI 98, ¶ 4, 357 Wis. 2d 469, 475–76, 851 N.W.2d 262, 265 ("[P]hoto identification is a condition of our times where more

and more personal interactions are being modernized to require proof of identity with a specified type of photo identification. With respect to these familiar burdens, which accompany many of our everyday tasks, [a photo identification requirement] does not constitute an undue burden on the right to vote.").

B. Judicial Review

Plaintiffs here have asserted that in enacting S.B. 824, the legislature acted "at least in part to entrench itself by burdening the voting rights of reliably Democrat[ ] African-American voters." Although the Supreme Court of the United States has recognized that "partisan motives are not the same as racial motives," *Brnovich*, 141 S. Ct. at 2349, plaintiffs contend that the mere allegation that race played some part in enactment of the law compels us to consider the effects S.B. 824 has on "reliably Democrat" voters when evaluating intent of the legislature, and in doing so, to depart from our well-settled approach to reviewing the constitutionality of legislative acts. However, "[a] facial challenge must fail where the statute has a plainly legitimate sweep." *Crawford*, 553 U.S. at 202, 128 S. Ct. at 1623 (cleaned up).

Under our Constitution, "power remains with the people and is exercised through the General Assembly, which functions as the arm of the electorate. An act of the people's elected representatives is thus an act of the people and is presumed valid *unless it conflicts with the Constitution*." *Pope*, 354 N.C. at 546, 556 S.E.2d at 267; *see also State v. Strudwick*, 379 N.C. 94, 105, 864 S.E.2d 231, 240 (2021) ("[W]e presume that laws enacted by the General Assembly are constitutional." (quoting *Grady*, 372 N.C. at 521–22, 831 S.E.2d at 553)). "The Legislature alone may determine the policy of the State, and its will is supreme, except where limited by constitutional inhibition, which exception or limitation, when invoked, presents a question of power for the courts to decide. But even then the courts do not undertake to say what the law ought to be; they only declare what it is." *State v. Revis*, 193 N.C. 192, 195 136 S.E. 346, 347 (1927) (citation omitted).

The presumption of constitutionality is a critical safeguard that preserves the delicate balance between this Court's role as the interpreter of our Constitution and the legislature's role as the voice through which the people exercise their ultimate power. *Id.* ("To interpret, expound, or declare what the law is, or has been, and to adjudicate the rights of litigants, are judicial powers; to say what the law shall be is legislative.").

To that end, "we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *Strudwick*, 379 N.C. at 105, 864 S.E.2d at 240 (quoting *Grady*, 372 N.C. at 522, 831 S.E.2d

at 553). "In addressing the facial validity of [a statute], our inquiry is guided by the rule that a facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 485 (2005) (cleaned up) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100 (1987)). To succeed in this endeavor, one who facially challenges an act of the General Assembly may not rely on mere speculation. Rather, "[a]n individual challenging the facial constitutionality of a legislative act must establish that no set of circumstances exists under which the act would be valid." *Id.* at 564, 614 S.E.2d at 486 (cleaned up).[3]

> [W]e emphasize that "the role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests. The role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials." Rather, this Court must "measure the balance struck by the legislature against the required minimum standards of the constitution."

Id. at 565, 614 S.E.2d at 486 (quoting *Harvey v. Edmisten*, 315 N.C. 474, 491, 340 S.E.2d 720, 731 (1986)).

C. Equal Protection

[1] The North Carolina Constitution, under which plaintiffs' claim is brought, provides in pertinent part that "[n]o person shall be denied the

---

3. Our dissenting colleague expresses skepticism of this Court's continued adherence to *Salerno*'s standard. However, the requirement that plaintiffs facially challenging a presumptively valid law carry this burden is far from "novel." Only eighteen months ago, our dissenting friend wrote, with added emphasis: "After all, it has been long established by this Court that an individual challenging the facial constitutionality of a legislative act must establish that *no* set of circumstances exists under which the act would be valid." *State v. Strudwick*, 379 N.C. 94, 108, 864 S.E.2d 231, 242 (2021) (quoting *Salerno*, 481 U.S. at 739, 107 S. Ct. at 2100).

Contrary to our friend's contention, our application of this standard to claims that a law was enacted with discriminatory intent is only "novel" in the sense that this Court has never before had the opportunity to address such a claim—the prior, withdrawn, and erroneous opinion in this matter notwithstanding. But, this Court's application of *Salerno*'s standard to facial challenges has not been questioned, until now. *See id.*; *State v. Grady*, 372 N.C. 509, 547, 831 S.E.2d 542, 570 (2019) (quoting and applying *Salerno*'s standard); *Kimberley Rice Kaestner 1992 Fam. Tr. v. N.C. Dep't of Revenue*, 371 N.C. 133, 138, 814 S.E.2d 43, 47 (2018), *aff'd sub nom. N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Fam. Tr.*, 139 S. Ct. 2213 (2019) (same); *Hart v. State*, 368 N.C. 122, 131, 774 S.E.2d 281, 288 (2015) (same); *Bryant*, 359 N.C. at 564, 614 S.E.2d at 485 (same); *State v. Thompson*, 349 N.C. 482, 491, 508 S.E.2d 277, 281–82 (1998) (same).

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. In essence, "[e]qual protection requires that all persons similarly situated be treated alike." *Blankenship v. Bartlett*, 363 N.C. 518, 521, 681 S.E.2d 759, 762 (2009) (quoting *Richardson v. N.C. Dep't of Corr.*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996)).

This Court's analysis of our Constitution's Equal Protection Clause has "generally follow[ed] the analysis of the Supreme Court of the United States in interpreting the corresponding federal clause."[4] *Id.* at 522, 681 S.E.2d at 762. Both provisions guarantee equal treatment for individuals, not equality of outcome. *See Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014). However, "in the construction of [a] provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court." *Blankenship*, 363 N.C. at 522, 681 S.E.2d at 762 (quoting *Bulova*, 285 N.C. at 474, 206 S.E.2d at 146).

State supreme courts are not bound by federal courts when interpreting their state constitutions, and the parties here correctly concede that principles of federalism do not require lock-stepping. *See* Jeffrey S. Sutton, *51 Imperfect Solutions, States and the Making of American Constitutional Law*, 16 (2018) ("Nothing compels the state courts to imitate federal interpretations of the liberty and property guarantees in the U.S. Constitution when it comes to the rights guarantees found in their own constitutions . . . . Our federal system gives state courts the final say over the meaning of their own constitutions.").

Thus, it is the duty of the Supreme Court of North Carolina alone to declare what the law is under our Constitution. *See Bayard v. Singleton*, 1 N.C. 5 (1787). It follows that when a party challenges a presumptively valid act of the General Assembly under our Constitution's Equal Protection Clause, as in this case, we are in no sense bound to follow the analytical or evidentiary framework established by the Supreme Court of the United States or any other federal court for resolving equal protection challenges under the federal Constitution.

---

4. The Fourteenth Amendment to the United States Constitution provides in pertinent part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "The decisions of the Supreme Court of the United States as to the construction and effect of . . . the Fourteenth Amendment to the Constitution of the United States are, of course, binding upon this Court." *Bulova Watch Co., Inc. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974).

Accordingly, pursuant to both the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution, we reaffirm that "[a] statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race." *Washington v. Davis*, 426 U.S. 229, 241, 96 S. Ct. 2040, 2048 (1976). In addition, when a facially neutral statute is challenged, both proof of "a racially discriminatory purpose," *id.* at 239, 96 S. Ct. at 2047, and proof that the law actually "produces disproportionate effects," *Hunter v. Underwood*, 471 U.S. 222, 227, 105 S. Ct. 1916, 1920 (1985), are required to demonstrate the law's unconstitutionality. But a provision will not be declared unconstitutional "*solely* because it has a racially disproportionate impact." *Davis*, 426 U.S. at 239, 96 S. Ct. at 2047.

"Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State." *Abbott*, 138 S. Ct. at 2324 (citing *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481, 117 S. Ct. 1491, 1499 (1997)). Where a law is facially neutral, as here, the challenger faces an especially heavy burden of proving enactment of the law was motivated by discriminatory intent.

To meet this burden under the federal analytical framework, plaintiffs "must prove by a preponderance of the evidence that racial discrimination was a substantial or motivating factor" in the enactment of the challenged legislation. *Hunter*, 471 U.S. at 225, 105 S. Ct. at 1918 (quoting *Underwood v. Hunter*, 730 F.2d 614, 617 (11th Cir. 1984)). In *Arlington Heights*, the Supreme Court of the United States established a non-exhaustive list of evidentiary sources plaintiffs may use to establish discriminatory intent under the federal Constitution. *Vill. of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555 (1977). Whether the government action " 'bears more heavily on one race than another' may provide an important starting point," *Id.* at 266, 97 S. Ct. at 564 (quoting *Davis*, 426 U.S. at 242, 96 S. Ct. at 2049), however, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id.* at 264–65, 97 S. Ct. at 563. Thus, *Arlington Heights* commands federal courts to also consider "[t]he historical background of the decision," the "specific sequence of events leading up to the challenged decision," and the challenged action's "legislative or administrative history." *Id.* at 267–68, 97 S. Ct. at 564–65.

However, plaintiffs' claim in the instant suit is brought pursuant to Article I, Section 19 of the North Carolina Constitution, not the Fourteenth Amendment of the United States Constitution. Specifically, plaintiffs argue that application of the *Arlington Heights* test produces an inference of discriminatory intent in the passage of S.B. 824 such

that, even though the law is facially neutral, the law violates the Equal Protection Clause found in our state Constitution. But, plaintiffs' challenge, whether analyzed under *Arlington Heights* or under our traditional standard, must fail.

The result below, which endorsed plaintiffs' argument, is not only contrary to the result reached by the Fourth Circuit in *Raymond*, the federal corollary to this suit which held S.B. 824 does not contravene the Fourteenth Amendment, but also "would have the potential to invalidate just about any voting rule a State adopts." *Brnovich*, 141 S. Ct. at 2343. To utilize such a subjective test "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433, 112 S. Ct. at 2063.

Constitutional deference and the presumption of legislative good faith caution against casting aside legislative policy objectives on the basis of evidence that could be fairly interpreted to demonstrate that a law was enacted in spite of, rather than because of, any alleged racially disproportionate impact. To that end, a challenge to a presumptively valid and facially neutral act of the legislature under Article I, Section 19 of the North Carolina Constitution cannot succeed if it is supported by speculation and innuendo alone.

It is well settled that this Court has required plaintiffs to produce proof beyond a reasonable doubt to invalidate a legislative action as violative of our state's Constitution. *See Strudwick*, 379 N.C. at 105, 864 S.E.2d at 240 ("[W]e will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." (quoting *Grady*, 372 N.C. at 522, 831 S.E.2d at 553)); *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015) ("Stated differently, a law will be declared invalid only if its unconstitutionality is demonstrated beyond a reasonable doubt."); *Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 888 (1991) ("[E]very presumption favors the validity of a statute. It will not be declared invalid unless its unconstitutionality be determined beyond reasonable doubt." (quoting *Gardner v. Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967))).

With the ability to declare a legislative act unconstitutional, courts wield a "delicate, not to say dangerous" power which is "antagonistic to the fundamental principles of our government." *State v. White*, 125 N.C. 674, 688, 34 S.E. 532, 536 (1899) (Clark, J., dissenting). The power to invalidate legislative acts is one that must be exercised by this Court with the utmost restraint, and the proof beyond a reasonable doubt standard is a necessary protection against abuse of such power by unprincipled or undisciplined judges.

This is not a novel or unique approach, as federal courts have acknowledged that overturning state legislative acts requires a challenger to meet a heightened burden. *See Plain Loc. Sch. Dist. Bd. of Educ. v. DeWine*, 486 F. Supp. 3d 1173, 1198 (S.D. Ohio 2020) ("[T]he 'party challenging the constitutionality of a statute bears the burden of proving that it is unconstitutional beyond a reasonable doubt.' " (quoting *Cleveland v. State*, 989 N.E.2d 1072, 1078 (Ohio Ct. App. 2013))); *Huffman v. Brunsman*, 650 F. Supp. 2d 725, 742 (S.D. Ohio 2008) ("[A] person challenging a statute must prove that the statute is unconstitutional beyond a reasonable doubt." (citing *State v. Anderson*, 57 Ohio St. 3d 168, 171, 566 N.E.2d 1224, 1226 (1991))); *Coal. for Equal Rights, Inc. v. Owens*, 458 F. Supp. 2d 1251, 1258 (D. Colo. 2006) ("Challengers to a state law 'bear the burden of proving it unconstitutional beyond a reasonable doubt.' " (quoting *Mosgrove v. Town of Federal Heights*, 191 Colo. 1, 4, 543 P.2d 715, 717 (1975))).

Even in the context of "determining the federal constitutionality" of a state law challenged under *Arlington Heights*, federal courts should "begin[ ] with the presumption of constitutionality," should require the challengers to "demonstrate that the Act is unconstitutional beyond a reasonable doubt," and "must accept" the state's "plausible construction of the Act [if] that would result in a finding of constitutionality." *Villanueva v. Carere*, 873 F. Supp. 434, 447 (D. Colo. 1994), *aff'd*, 85 F.3d 481 (10th Cir. 1996).

Therefore, we hold that to prevail on such a facial challenge to a state statute under this state's traditional analytical framework, the challenger must prove beyond a reasonable doubt that: (1) the law was enacted with discriminatory intent on the part of the legislature, and (2) the law actually produces a meaningful disparate impact along racial lines.

We reach this determination not out of disagreement with the federal courts' analysis of these issues under the federal Equal Protection Clause. Rather, we reach this decision because *Arlington Heights*' analytical framework is incompatible with our state Constitution and this Court's precedent as it allows challengers to succeed on such claims by proffering evidence that is by its very nature speculative, subjective, and thus, insufficient to meet the well-established burden of proof. The differing outcomes reached by the Fourth Circuit in *Raymond* and the trial court below highlight the subjective nature of the *Arlington Heights* test. The fact that different results can be reached using the *Arlington Heights* test suggests that personal biases and subjective interpretations concerning presumptively valid legislative acts can greatly influence

outcomes in these types of cases. It is the objective application of legal principles that leads to consistent and fair judicial decisions. There, the *Arlington Heights* framework falls short.[5]

D. Federal Precedent

With this in mind, we now turn our attention to the trial court's order permanently enjoining S.B. 824. Because the trial court below relied heavily on *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016), it is appropriate to provide a brief review of that case. In addition, a proper review of the trial court's order requires a thorough analysis of *Abbott v. Perez*, 138 S. Ct. 2305 (2018) and *Raymond*, 981 F.3d 295.

1. North Carolina State Conference of the NAACP v. McCrory

In *McCrory*, the plaintiffs challenged various voting provisions contained in H.B. 589, a 2013 omnibus bill enacted by the North Carolina General Assembly that included voter identification provisions, arguing the law had been enacted with discriminatory intent. *McCrory*, 831 F.3d at 218.

The 2013 provision was enacted shortly after the Supreme Court of the United States "invalidated the preclearance coverage formula," a federal statutory mechanism that required North Carolina, and other states with histories of racially motivated voter suppression laws, to seek preclearance with the United States Department of Justice before enacting new voting laws. *Id.* at 216 (citing *Shelby County v. Holder*, 570 U.S. 529, 557, 133 S. Ct. 2612, 2631 (2013)). At the conclusion of trial, the district court found that the 2013 law was not enacted with discriminatory intent and entered judgment against the plaintiffs on all of their claims. *Id.* at 219.

On appeal, the Fourth Circuit noted that the "ultimate question" was whether "the legislature enact[ed] a law 'because of,' and not 'in spite of,' its discriminatory effect." *Id.* at 220. In concluding that the 2013 law was enacted because of its discriminatory effect, i.e., with discriminatory

---

5. Our holding does not mean that the *Arlington Heights* test will not be appropriate in other circumstances in which the beyond a reasonable doubt standard does not apply. For example, it may remain a sound analytical framework for challenges to zoning or executive agency regulatory actions, which are the types of official action the test was designed to address. *See Arlington Heights*, 429 U.S. at 254, 97 S. Ct. at 558 ("[Plaintiffs] alleged that the denial [of a rezoning request] was racially discriminatory . . . ."). However, in the context of invalidating presumptively constitutional legislative action, our precedent is clear, and *Arlington Heights* is contrary to the overwhelming weight of authority in North Carolina.

intent, the Fourth Circuit determined that the "undisputed" facts regarding the "sequence of events leading up to the challenged decision" were "devastating." *Id.* at 227 (quoting *Arlington Heights*, 429 U.S. at 267, 97 S. Ct. at 564).

The Fourth Circuit noted that the legislature utilized various racial data in enacting portions of the law, including the photo identification provisions. *Id.* at 216–18. According to the Fourth Circuit, "relying on this racial data, the General Assembly enacted legislation restricting all—and only—practices disproportionately used by African Americans." *Id.* at 230. The Fourth Circuit determined that "[t]he district court erred in refusing to draw the obvious inference that this sequence of events signals discriminatory intent." *Id.* at 227. The Fourth Circuit concluded that, "at least in part, discriminatory racial intent motivated the enactment of" the 2013 law. *Id.* at 233. Because the plaintiffs carried their burden of establishing discriminatory intent, and because the State had failed to show that the challenged provisions would have been enacted without discriminatory intent, the Fourth Circuit reversed the district court's judgment and remanded the case "for entry of an order enjoining the implementation" of the challenged voting provisions of the 2013 omnibus law. *Id.* at 242.

2. Abbott v. Perez

Thereafter, the Supreme Court of the United States provided clarification to discriminatory intent analysis that is especially relevant here. In *Abbott*, the Court emphasized that "the 'good faith of [the] legislature must be presumed' " regardless of a prior finding of discriminatory intent. 138 S. Ct. at 2324 (alteration in original) (quoting *Miller v. Johnson*, 515 U.S. 900, 915, 115 S. Ct. 2475, 2488 (1995)). There, the Court reversed the decision of a three-judge panel of the Western District of Texas because that panel imputed past discriminatory intent to the then-sitting legislature and thereby failed to presume good faith. *Id.* at 2335. The Court stated that:

> The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. Past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. The historical background of a legislative enactment is one evidentiary source relevant to the question of intent. But we

> have never suggested that past discrimination flips the evidentiary burden on its head.

Id. at 2324–25 (cleaned up).

The Court in *Abbott* noted that the lower court "referred repeatedly to the 2013 Legislature's duty to expiate its predecessor's bad intent" and concluded that the "Texas court's references to the need to 'cure' the earlier Legislature's 'taint' cannot be dismissed as stray comments." *Id.* at 2325. Importantly, although the Court stated that "a [trial] court's finding of fact on the question of discriminatory intent is reviewed for clear error," it nonetheless reversed the panel because "when a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand." *Id.* at 2326.

Thus, the presumption of legislative good faith is only overcome when a plaintiff meets his or her burden of proving that the legislature responsible for enacting the challenged law acted with discriminatory intent in the present case. Past discrimination may be a relevant factor under an *Arlington Heights* analysis, but it is error to treat subsequent legislative acts as fruit of the poisonous tree such that subsequent similar legislation is per se verboten.[6]

In addition, *Abbott* clearly emphasized that a trial court errs when it makes findings of fact utilizing the incorrect burden of proof, and any findings which result therefrom are not binding on a reviewing court. *See id.* at 2326 (holding that "when a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand"); *see also State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (holding

---

6. "The world moves, and we must move with it." *State v. Williams*, 146 N.C. 618, 639, 61 S.E. 61, 68 (1908) (Clark, C.J., dissenting). Indeed, many of the historical facts referenced by the trial court and in plaintiffs' brief "hav[e] no logical relation to the present day." *Shelby Cnty. v. Holder*, 570 U.S. 529, 554, 133 S. Ct. 2612, 2629 (2013). The Lieutenant Governor, two members of this Court, and the minority leaders in the North Carolina Senate and the North Carolina House of Representatives are the most recent examples of the significant social progress made in North Carolina.

North Carolina's population has changed dramatically. North Carolina ranked 9th in population growth by percentage between 2021 and 2022; representing the third largest addition to population out of all 50 states. Michael Cline, *North Carolina Population Growth Bouncing Back*, Off. of State Budget & Man., (Dec. 22, 2022), https://www.osbm.nc.gov/blog/2022/12/22/north-carolina-population-growth-bouncing-back. While discrimination based on race is a historical reality, to imply that S.B. 824 is a product or derivative of that history is to imply that the people of North Carolina have failed to change. Such an implication is fundamentally at odds with the modern reality of our State. The imputation of wrongs committed in the distant past to current realities is not only unjust and disingenuous, but it also presents an insurmountable hurdle to future progress.

that when "evidence does not support the trial court's finding . . . [that] finding of fact is not binding on this Court").

3. Federal Review of S.B. 824

The federal corollary to the present appeal is found in *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295 (4th Cir. 2020). There, the plaintiffs challenged S.B. 824 under the federal Equal Protection Clause, alleging that the law had been enacted with discriminatory intent. *Id.* at 301. The plaintiffs moved to enjoin enforcement of the law, and the district court granted the injunction after concluding that the plaintiffs were likely to succeed on their constitutional claims. *Id.*

On appeal, the Fourth Circuit sharply criticized the district court and reversed "because of the fundamental legal errors that permeate the [district court's] opinion." *Id.* at 310–11. Principal among these fundamental errors was that the district court, contrary to the Supreme Court's explicit holding in *Abbott*, focused on the past finding of discriminatory intent in *McCrory* as evidence of discriminatory intent in the passage of S.B. 824. *Id.* Thus, the district court improperly "considered the General Assembly's discriminatory intent in passing the 2013 Omnibus Law to be effectively dispositive of its intent in passing the 2018 Voter-ID Law." *Id.* at 303. The Fourth Circuit stated:

> [t]he district court here made the same mistake as the panel in *Abbott* without even trying to distinguish the Supreme Court's holding. . . . [T]he district court noted that the General Assembly did not try to cleanse the discriminatory taint, or tak[e] steps to purge the taint of discriminatory intent. . . .
>
> The district court penalized the General Assembly because of who they were, instead of what they did. When discussing the sequence of events leading to the 2018 Voter-ID Law's enactment, the district court discounted the normalcy of the legislative process to focus on *who* drafted and passed the law.

Id. at 304 (cleaned up).

The Fourth Circuit explicitly disavowed the district court's inappropriate focus on *who* passed S.B. 824:

> The question of *who* reared its head again in the court's discussion of the 2018 Voter-ID Law's legislative history. In that section, the district court

> emphasized that the General Assembly's positions had "remained virtually unchanged" between *McCrory* and the enactment of the 2018 Voter-ID law. And the court assumed that the racial data remained in the minds of the legislators: "[T]hey need not have had racial data in hand to still have it in mind." By focusing on *who* passed the 2018 Voter-ID Law and requiring the General Assembly to purge the taint of the prior law, the district court flipped the burden and disregarded *Abbott*'s presumption.

Id. at 304–05 (alteration in original) (quoting *NAACP v. Cooper*, 430 F. Supp. 3d at 33–35).

The district court's analytical reliance on *who* passed S.B. 824 "also overlooked the state constitutional amendment" by which "[f]ifty-five percent of North Carolinian voters constitutionally required the enactment of a voter-ID law and designated to the General Assembly the task of enacting the law." *Id.* at 305 (citing N.C. Const. art. VI, § 2(4)). Because the amendment "served as an independent intervening event between the General Assembly's passage of the 2013 Omnibus Law and its enactment of the 2018 Voter-ID Law," Article VI, Section 2(4) of the North Carolina Constitution "undercut[ ] the district court's tenuous 'who' argument." *Id.*

The Fourth Circuit determined that "[o]nce the proper burden and the presumption of good faith are applied, the Challengers fail to meet their burden of showing that the General Assembly acted with discriminatory intent in passing the 2018 Voter-ID Law." *Id.* In reaching this conclusion, the Fourth Circuit clarified that although "North Carolina's historical background," including the 2013 omnibus law, "favors finding discriminatory intent, the facts considered under the remaining *Arlington Heights* factors—the sequence of events leading to enactment, legislative history, and disparate impact—cannot support finding discriminatory intent." *Id.* (cleaned up).

First, the Fourth Circuit analyzed "the sequence of events leading to the enactment of the 2018 Voter-ID Law." *Id.* Noting that S.B. 824 "underwent five days of legislative debate," "was permitted time for public comment," and "enjoyed bipartisan support," the Fourth Circuit determined that "the enactment was not the 'abrupt' or 'hurried' process that characterized the passage of the 2013 Omnibus Law." *Id.* at 305–06 (citing *McCrory*, 831 F.3d at 228–29).

Next, the Fourth Circuit analyzed "the 2018 Voter-ID Law's legislative history," which the district court found "supported finding discriminatory intent" because "Republican legislative leaders strongly opposed *McCrory*, remained committed to passing a voter-ID law that would withstand future court challenges, and did not change their positions, goals, or motivations between the passage of the 2013 Omnibus Law and the 2018 Voter-ID Law." *Id.* at 307. The Fourth Circuit specifically denounced the district court's reasoning because its findings "impermissibly stemmed from the comments of a few individual legislators and relied too heavily on comments made by the bill's opponents." *Id.* (cleaned up).

The Fourth Circuit also stated that the district court's reasoning "go[es] against inferring 'good faith' on the part of the legislature, which we are required to do: decrying a court opinion holding that you acted improperly in the past is not evidence that you have acted improperly again." *Id.* Noting that "[n]othing here suggests that the General Assembly used racial voting data to disproportionately target minority voters 'with surgical precision,' " the Fourth Circuit concluded that S.B. 824's legislative history did not evidence discriminatory intent. *Id.* at 308–09 (quoting *McCrory*, 831 F.3d at 214).

Finally, the Fourth Circuit analyzed "the racial impact of the 2018 Voter-ID Law." *Id.* at 309. While the Fourth Circuit "accept[ed] the district court's finding that minority voters disproportionately lack the types of ID required" by S.B. 824, it found significant that the law "contains three provisions that go 'out of [their] way to make its impact as burden-free as possible.' " *Id.* (second alteration in original) (quoting *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 603 (4th Cir. 2016)).

> First, the law provides for registered voters to receive free voter-ID cards without the need for corroborating documentation. Second, registered voters who arrive to the polls without a qualifying ID may fill out a provisional ballot and their votes will be counted if they later produce a qualifying ID at the county elections board. Third, people with religious objections, survivors of recent natural disasters, and those with reasonable impediments may cast a provisional ballot after completing an affidavit that affirms their identity and their reason for not producing an ID. Their votes must be counted unless the county board of elections has grounds to believe the affidavit is false.

Id. (cleaned up).

The Fourth Circuit noted that, because of these various mitigating provisions, "the 2018 Voter-ID law is more protective of the right to vote than other states' voter-ID laws that courts have approved." *Id.* at 310.

> In *Lee v. Virginia State Board of Elections*, we upheld Virginia's voter-ID law that only included two of these mitigating features—free voter IDs available without corroborating documentation and provisional voting subjected to 'cure.' Likewise, in *South Carolina v. United States*, the District Court of the District of Columbia precleared South Carolina's voter-ID law that included a different combination of two mitigating features—free voter IDs available without corroborating documentation and a reasonable impediment procedure. And recently, the Eleventh Circuit, in *Greater Birmingham Ministries v. Secretary of State for the State of Alabama*, upheld Alabama's Voter-ID law that included . . . mitigating features—free voter IDs that require corroborating documentation and provisional voting subject to 'cure.' Given these cases, it is hard to say that the 2018 Voter-ID Law does not sufficiently go out of its way to make its impact as burden-free as possible.

Id. (cleaned up).

Because of these mitigating provisions, the Fourth Circuit determined that any potential disparate impact of S.B. 824 did not evidence any discriminatory intent by the General Assembly. *Id.* The Fourth Circuit reversed the district court, but not because "[the district court] weighed the evidence before it differently than [the Fourth Circuit] would." *Id.* Rather, the Fourth Circuit reversed the district court's grant of a preliminary injunction "because of the fundamental legal errors that permeate the opinion—the flipping of the burden of proof and the failure to provide the presumption of legislative good faith—that irrevocably affected its outcome." *Id.* at 310–11. The district court "abused its discretion" because "it considered the North Carolina General Assembly's past conduct to bear so heavily on its later acts that it was virtually impossible for it to pass a voter-ID law that meets constitutional muster." *Id.* at 311.

E. Review of the Panel Below

1. Under the Federal Framework

[2] Although *Raymond* was decided under the federal Equal Protection Clause, we are confronted in the present appeal with a similar question

under the North Carolina Constitution. When properly analyzed under *Arlington Heights*, plaintiffs' claim here, as in *Raymond*, must fail because the same fundamental legal errors that permeated the district court's decision in *Raymond* pervade the trial court's order below.

A majority of the three-judge panel below made findings of fact based upon historical evidence that, while perhaps useful in a policy setting, has little bearing upon the constitutionality of S.B. 824 in light of *Abbott*. As the dissent below noted, to "place outsized weight on the increasingly distant past would constitute a failure by the judiciary to allow our [s]tate to fully progress from that shameful past. Any overreliance on our [s]tate's history is therefore misplaced." The trial court's findings demonstrate exactly this sort of overreliance on historical evidence, and these findings "were not merely 'stray comments. On the contrary, they were central to the court's analysis,' for they made explicit the burden-shifting that the court engaged in while assessing the *Arlington Heights* factors." *Raymond*, 981 F.3d at 304 (quoting *Abbott*, 138 S. Ct. at 2325).

The trial court's finding that "recent cases," including *McCrory*, "show that race is still a dominant consideration for the North Carolina General Assembly" is illustrative. As the Supreme Court of the United States has made abundantly clear, "[t]he allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination." *Abbott*, 138 S. Ct. at 2324. "Past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Id.* (cleaned up). The trial court's attribution of past sins to the passage of S.B. 824 is plainly contrary to *Abbott*.

In addition, the trial court's finding that "[j]ust as with other states in the South, North Carolina has a long history of race discrimination generally and race-based voter suppression in particular," was a quotation of a Court of Appeals' quotation from *McCrory*, not a finding premised upon any evidence in this particular case. *See Holmes v. Moore*, 270 N.C. App. 7, 20–21, 840 S.E.2d 242, 257 (2020); *McCrory*, 831 F.3d at 223. Again, the trial court's use of historical information to strike down an otherwise lawful act is exactly what *Abbott* cautioned against.

Further, the trial court made specific findings of fact regarding statements made in the wake of *McCrory*, evidently considering that statements criticizing that decision and vowing to "continue the fight" for a voter identification law supported a finding that S.B. 824 was enacted with discriminatory intent. Once again, this finding is contrary to directly on-point federal precedent. In *Raymond*, "the district court

noted that Republican legislative leaders strongly opposed *McCrory*, [and] remained committed to passing a voter-ID law that would withstand future court challenges." *Raymond*, 981 F.3d at 307. The Fourth Circuit refused to sanction these findings because they "[went] against inferring 'good faith' on the part of the legislature, which we are required to do: decrying a court opinion holding that you acted improperly in the past is not evidence that you have acted improperly again." *Id.* (citing *Abbott*, 138 S. Ct. at 2324, 2327).

Also, the trial court found that both the passage of the constitutional amendment which required enactment of S.B. 824 and the enactment of S.B. 824 itself departed from normal legislative procedures, and the trial court evidently relied on this finding when determining that "[t]he [l]egislative [h]istory of S.B. 824 [r]aises [a]dditional [r]ed [f]lags." The trial court "found" that "[t]here is no reason why the General Assembly could not have followed normal procedures, passed implementing legislation to accompany the proposed constitutional amendment, and submitted that proposed legislation to the People of North Carolina for their approval." The trial court's findings on this issue, however, are contrary to both federal precedent, North Carolina precedent, and the historical role of the judiciary in not second-guessing the contours of the legislative process.

The Supreme Court of the United States has stated "we do not see how the brevity of the legislative process can give rise to an inference of bad faith—and certainly not an inference that is strong enough to overcome the presumption of legislative good faith." *Abbott*, 128 S. Ct. at 2328–29. This Court has stated "the role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials." *Bryant*, 359 N.C. at 565, 614 S.E.2d at 485 (quoting *Harvey*, 315 N.C. at 491, 340 S.E.2d at 731). Moreover, and perhaps most importantly, the North Carolina Constitution contains an explicit separation of powers provision, *see* N.C. Const. art. I, § 6, which is violated "when one branch exercises power that the constitution vests exclusively in another branch" or "when the actions of one branch prevent another branch from performing its constitutional duties." *State v. Berger*, 368 N.C. 633, 645, 781 S.E.2d 248, 256 (2016).

There is no law in this state that implies the General Assembly possesses anything less than its full constitutional authority when conducting legislative business in a special session. Despite this, the trial court's order indicates that the panel below sees itself as possessing the power to second-guess the legislature's authority over its own procedures, thereby "prevent[ing] another branch from performing its constitutional

dut[y]." *Id*. It bears repeating that "[t]o interpret, expound, or declare what the law is, or has been, and to adjudicate the rights of litigants, are judicial powers; to say what the law shall be is legislative." *Revis*, 193 N.C. 192, 136 S.E. at 347.

One of the many governmental functions the constitution vests exclusively in the legislature is the balancing of policy interests involved when drafting, amending, and enacting laws. During this process for S.B. 824, the General Assembly accepted amendments proposed by Democrat members, and multiple Democrat members thanked and praised their Republican colleagues for the bipartisan and collaborative manner in which the law was passed. Democrats thanked the Republican members "for being open and inclu[sive] in listening to us on the other side of the aisle in trying to come up with something that is reasonable," "for the hard work that you have done in negotiating and accepting many of the amendments that have been placed before you," and for doing "a really terrific job working with us to help improve the bill, [which] is a much better bill than the bill that left this chamber in 2013."[7]

Despite this, the trial court went on to enter speculative findings of fact regarding additional measures the legislature could have taken, such as adopting more of the amendments proposed by Democrat members of both chambers. According to the trial court, the legislature's failure to take these additional steps, despite the obviously bipartisan nature of the law's enactment, led to the trial court's finding of fact heading that "The Design of S.B. 824 Does Not Evince an Intent by the General Assembly to Cure Racial Disparities Observed Under H.B. 589."

Under this heading, the trial court found "that [d]efendants have not rebutted [p]laintiffs' assertion that the General Assembly did not consider any updated racial demographic data prior to the enactment

---

7. "One might question the relevance of bipartisanship in a discriminatory-intent analysis," *Raymond*, 981 F.3d at 306, n.3, because "partisan motives are not the same as racial motives." *Brnovich*, 141 S. Ct. at 2349. This is why, even under *Arlington Heights*, a court is required to "assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove" a law's enactment. *Cooper v. Harris*, 581 U.S. 285, 308, 137 S. Ct. 1455, 1473 (2017) (citation omitted). Under our standard, this means that plaintiffs must prove beyond a reasonable doubt that racial, rather than political, considerations motivated the passage of a law they claim was enacted with discriminatory intent. For plaintiffs here, that requirement is at odds with their theory of the case, which inextricably "[ ]entangle[s] race [and] politics[.]" *Id*. Article I, Section 19 prohibits discrimination based on race; political parties are not protected classes, and barring proof that racial animus, rather than political considerations, led to the passage of a particular measure, we find it difficult to imagine a scenario in which partisan interests would constitute sufficient evidence that a law was enacted with discriminatory intent.

of S.B. 824." Moreover, the trial court found that "[t]he categories of ID added to the list of acceptable ID were arbitrary, and [l]egislative [d]efendants have offered no evidence to show that inclusion of these ID[s] would make a difference to overcome the already existing deficiency." Presumably, this "already existing deficiency" was the prior outcome in *McCrory*, which clearly demonstrates that the General Assembly was not afforded the presumption of legislative good faith, rather, its decisions were criticized by the lower court for "demonstrating . . . lack of reasoning or logic."

Putting aside for a moment the glaringly obvious conflict with *Raymond* and *Abbott*, this heading itself indicates that the trial court fundamentally misunderstood the applicable legal framework, plaintiffs' burden, and its own task. Even presuming the findings underpinning this heading are supported by competent evidence, they at most support a conclusion that the legislature failed to do everything possible to ameliorate any alleged disparate impact. They do not support a conclusion that the legislature acted with discriminatory intent and actively designed a bill to cause the alleged disparate impact.

That reasonable minds may differ as to whether the legislature endeavored to pass the least restrictive voter identification law possible does not equate to a showing that the legislature endeavored to pass a voter identification law designed to disparately impact black North Carolinians. Plaintiffs' burden is not to demonstrate beyond a reasonable doubt that a hypothetical alternative law may have been less restrictive; it is to demonstrate beyond a reasonable doubt that *this* law was designed to discriminate on the basis of race. The evidence in the record cannot support such a contention because the hypothetical existence of a less restrictive alternative does not satisfy plaintiffs' burden. If that were so, no law could ever stand.

Hereto, the trial court's findings directly conflict with precedent of the Supreme Court of the United States which could not be clearer:

> The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. *Past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.* The ultimate question remains whether a discriminatory intent has been proved in a given case. The historical background of a legislative enactment is one evidentiary source relevant to the question of intent. *But we*

> *have never suggested that past discrimination flips the evidentiary burden on its head.*

Abbott, 138 S. Ct. at 2324–25 (cleaned up) (emphases added).

The panel below "made the same mistake as the panel in *Abbott* without even trying to distinguish the Supreme Court's holding." *Raymond*, 981 F.3d at 304. The trial court inexplicably ignored *Abbott* and *Raymond*, and this serious and egregious error undermines the integrity of the trial court's decision and its decision-making process. The improper reliance on speculative historical evidence and failure to analyze *Abbott* made it "virtually impossible for [the legislature] to pass a voter-ID law that meets constitutional muster." *Id.* at 311.

"When evaluating a neutral, nondiscriminatory regulation of voting procedure, we must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203, 128 S. Ct. 1610, 1623 (2008) (cleaned up). It is not the role of this Court to endorse an analytical approach that would effectively enjoin all future legislatures from effectuating the will of the people. This is why *Abbott* and *Raymond* are so critical to a proper analysis.

As the Supreme Court of the United States has noted, "a finding of fact . . . based on the application of an incorrect burden of proof . . . cannot stand." *Abbott*, 138 S. Ct. at 2326. Here, the trial court's findings of fact flow from impermissibly assigning the burden to the General Assembly and failing to presume legislative good faith.

The trial court's order is riddled with both explicit and implicit instances demonstrating that, as here, it erroneously placed the burden on the General Assembly to overcome a presumption of legislative bad faith. As in *Abbott*, these findings cannot stand, and the trial court's legal conclusions are left unsupported. Thus, the "fundamental legal errors that permeate the [lower panel's opinion]—the flipping of the burden of proof and the failure to provide the presumption of legislative good faith" have "irrevocably affected [the] outcome [of this case]," *Raymond*, 981 F.3d at 310–11, and we hold that even under *Arlington Heights*, the trial court's finding of discriminatory intent was erroneous.

2. Under North Carolina Law

[3] However, as previously noted, *Arlington Heights* is not the standard plaintiffs challenging a presumptively valid legislative act are required to meet in this state. *See Strudwick*, 379 N.C. at 105, 864 S.E.2d at 240 ("[W]e will not declare a law invalid unless we determine that

it is unconstitutional beyond a reasonable doubt." (quoting *Grady*, 372 N.C. at 522, 831 S.E.2d at 553)). Where a trial court applies the incorrect legal standard, regardless of whether the parties consent to that incorrect standard, the trial court per se abuses its discretion. *See Da Silva v. WakeMed*, 375 N.C. 1, 5 n.2, 846 S.E.2d 634, 638 n.2 (2020) ("[A]n error of law is an abuse of discretion.").

In addition, just as the Supreme Court of the United States has held that "a finding of fact . . . based on the application of an incorrect burden of proof . . . cannot stand," *Abbott*, 138 S. Ct. at 2326, this Court has held that "facts found under misapprehension of the law are not binding on this Court and will be set aside." *Van Hanford v. McSwain*, 230 N.C. 229, 233, 53 S.E.2d 84, 87 (1949). Because the trial court's findings of fact below were found under a misapprehension of law, i.e., under the incorrect legal standard, without requiring plaintiffs to carry their burden of demonstrating the unconstitutionality of S.B. 824 beyond a reasonable doubt, these findings cannot stand. Without them, the trial court's conclusions of law are wholly unsupported and the order below must be reversed.

The general procedure for disposing of a matter where the trial court's "facts found under misapprehension of the law are . . . set aside," would be to remand the case "to the end that the evidence should be considered in its true legal light." *Id.* However, such a procedure is inappropriate in matters such as this, where the evidence in the record is wholly insufficient to prove beyond a reasonable doubt that S.B. 824: (1) was enacted with discriminatory intent, and (2) produces a meaningful disparate impact. *See Snuggs v. Stanly Cnty. Dep't of Pub. Health*, 310 N.C. 739, 741, 314 S.E.2d 528, 529 (1984) (remanding to the trial court for entry of an order of dismissal); *Hunt ex rel. Hasty v. N.C. Dep't of Lab.*, 348 N.C. 192, 199, 499 S.E.2d 747, 751 (1998) (same). Here, plaintiffs have produced insufficient evidence to meet their burden.

To succeed in their claim, plaintiffs must demonstrate not only discriminatory intent, but must also demonstrate that the challenged law actually "produces disproportionate effects along racial lines." *Hunter*, 471 U.S. at 227, 105 S. Ct. at 1920; *see also Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989) ("To establish an equal protection violation, a plaintiff must show discriminatory intent *as well as* disparate effect." (emphasis added)). On this point, plaintiffs' evidence consists of incompetent expert testimony and unfounded speculation upon which the trial court found that "S.B. 824 would bear more heavily on African American voters, if permitted to go into effect" because: (1) black voters are more likely to lack qualifying ID; (2) the burdens of obtaining qualifying IDs, including free IDs, fall more heavily on black

voters; and (3) black voters may be more likely to encounter problems navigating the reasonable impediment process.

Regarding the disparate lack of qualifying identifications, plaintiffs' expert failed to consider multiple types of qualifying identifications, the reasonable impediment provision, and the availability of free identifications under S.B. 824. Plaintiffs' expert simply produced a mathematical analysis based on DMV records that showed 7.61% of black voters and 5.47% of white voters lacked *some* of the qualifying IDs under S.B. 824. Such an incomplete consideration of the various forms of qualifying identification under S.B. 824 renders this expert's evidence fatally deficient and incapable of supporting a finding that black voters are more likely to lack the qualifying identifications permitted under S.B. 824.

Furthermore, the trial court's finding that black voters are "39% more likely to lack a form of qualifying ID" than white voters is exactly the kind of "highly misleading" statistical transformation the Supreme Court of the United States has expressly disavowed. *Brnovich*, 141 S. Ct. at 2345. This kind of manipulation of mathematical concepts is used to turn a difference "small in absolute terms," here, 2.14%, into "a distorted picture . . . by dividing one percentage by another," *id.* at 2344–45, and such evidence is insufficient to support a finding that black voters are more likely to lack qualifying identification under S.B. 824.

Similarly, plaintiffs' evidence that the burdens of obtaining qualifying identification, including free identification, fall more heavily on black voters is entirely speculative. Plaintiffs' expert essentially suggests that because "a [b]lack person is 2.5 times more likely to live in poverty as compared to a white person," it must logically follow that black voters would disproportionately suffer a legally significant burden in obtaining a qualifying identification, even if that identification is free. This is merely speculative forecasting and simply ignores the reality that compliance with *any* government licensing or registration requirement requires effort on the part of citizens. "[M]inor inconvenience[s] . . . do[ ] not impose a substantial burden." *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 600 (4th Cir. 2016). Plaintiffs cannot prove such a crucial aspect of their claim by relying on speculation; they must provide sufficient evidence demonstrating that S.B. 824 actually produces disparate impact in reality, not hypothetical circumstances.[8]

8. Further, the panel's assumption that black voters may have difficulty acquiring free identification due to lack of transportation or disabilities is legally suspect because the reasonable impediment provision in S.B. 824 allows individuals to vote without an identification if their inability to obtain an identification is due to, among other things, a "[l]ack of transportation" or "[d]isability or illness." N.C.G.S. § 163-166.16(e)(1)(a)–(b).

The trial court's finding that black voters may be more likely to encounter problems navigating the reasonable impediment process suffers from the same fatal flaw that plagues the previous examples. The trial court merely relied on plaintiffs' evidence of past voters' issues navigating a more restrictive reasonable impediment process in 2016 under H.B. 589 and testimony that "[a] hesitant or infrequent voter *may be* deterred from voting with a reasonable impediment declaration because the process is unfamiliar or because it appears the voter is being treated differently from everyone else at the polls." (Emphasis added). This again is speculation that falls short of the evidence required to support this factual finding.

Thus, because plaintiffs have failed to provide evidence that S.B. 824 would result in disparate impact along racial lines, remand of this case for further consideration in light of the applicable legal standard, presumption, and burden, would be futile. S.B. 824 allows *all* would-be voters in North Carolina to vote either with or without an approved form of identification. Plaintiffs failed to produce sufficient evidence that either they, or any other citizen of this state, would be precluded from voting due to the terms and conditions of S.B. 824. Every prospective voter can vote without an identification if they submit a reasonable impediment affidavit, which can only be rejected if the county board of elections unanimously determines that the declaration is false.[9]

As stated by the Supreme Court of the United States when reviewing Indiana's voter identification law,

> A photo identification requirement imposes some burdens on voters that other methods of identification do not share. For example, a voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard. Burdens of that sort arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality of [Indiana's voter identification law]; the availability of the right

9. The dissent below correctly stated that "[a]s the federal court three-judge panel said of South Carolina's voter-ID law, on which S.B. 824 was modeled, 'the sweeping reasonable impediment provision in [that law]'—which, as noted, is in fact less sweeping tha[n] S.B. 824's—'eliminates any disproportionate effect or material burden that South Carolina's voter ID law otherwise might have caused.' " (quoting *South Carolina v. United States*, 898 F. Supp. 2d 30, 40 (D.D.C. 2012)).

> to cast a provisional ballot provides an adequate remedy for problems of that character.
>
> The burdens that are relevant to the issue before us are those imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of [Indiana's voter identification law]. . . . But just as other States provide free voter registration cards, the photo identification cards issued by Indiana[ ]are also free. For most voters who need them, the inconvenience of making a trip to [a government office], gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.

Crawford, 553 U.S. at 197–98, 128 S. Ct. at 1620–21.[10]

"[M]inor inconvenience[s] . . . do[ ] not impose a substantial burden" on the right to vote, *Lee*, 843 F.3d at 600, and the inconveniences theoretically imposed, not proven, on plaintiffs by S.B. 824 "arise[ ] from life's vagaries" and "are neither so serious nor so frequent as to raise any question about the constitutionality" of the voter identification law here. *Crawford*, 553 U.S. at 197, 128 S. Ct. at 1620. In no way do the hypothetical "disparate inconveniences" claimed by plaintiffs amount to a "denial or abridgement of the right to vote," let alone a denial or abridgment based on race. *Lee*, 843 F.3d at 600–01 (emphasis in original). Arguably, plaintiffs' speculations do not qualify as a legitimate attempt to carry their burden of "establish[ing] that no set

---

10. It is undisputed that every legal vote should be counted. In oral argument, however, plaintiffs implied that every provisional ballot should be counted as legal even if not lawfully cast. Oral Argument at 55:01, Holmes v. Moore (No. 342PA19-3) (Mar. 15, 2023), https://www.youtube.com/watch?v=RSJu29af7_4 (last visited Mar. 24, 2023). The trial court's order contains a similar proposition under the guise of a factual finding regarding noncompliant votes in 2016. This is plainly wrong. *See* N.C.G.S. §§ 163-1 to 163-306 (2021); *see also Burdick*, 504 U.S. at 441, 112 S. Ct. at 2067 (citation omitted) ("[T]he right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system."); *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 1279 (1974) ("Moreover, as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."). The right to vote and have a vote counted is dependent upon compliance with established rules and procedures, and to suggest this Court sanction noncompliance is to imply that the law has no meaning.

of circumstances exists under which the [a]ct would be valid." *Salerno*, 481 U.S. at 745, 107 S. Ct. at 2100.

The panel below relied heavily on the fact that plaintiff Mr. Holmes, who has cerebral palsy, has severe scoliosis, and is paraplegic, may encounter difficulties in obtaining a free identification under S.B. 824. Even if we ignore the fact that Mr. Holmes can still vote without an identification under S.B. 824, as discussed above, any difficulties he may face in acquiring an identification have nothing to do with race.

Such is the case with the other plaintiffs and their challenges. There is no evidence that Mr. Kearney's failure to present an identification in 2016 because he left it at home was related to race. Similarly, Mr. Smith's misplacement of his identification in 2016 was not related to race, nor was Mr. Culp's failure to present an acceptable identification in 2016. Setting aside the fact that any difficulties they are assumed to have encountered are wholly irrelevant because they occurred under a prior, much more restrictive law, these difficulties were not attributable to race, and all of these plaintiffs can vote under S.B. 824 without identification.

Moreover, the named plaintiffs can all obtain free identification cards that can be used for eleven years and, even if they fail to do so, can cast provisional ballots that will be counted if they comply with the forgiving requirements of S.B. 824. As the dissenting judge noted below, "[t]here is no credible evidence that obtaining" a form of qualifying identification under S.B. 824 "entails significant financial cost." The record also contains "no evidence that any voter, in particular any African American voter, would be dissuaded from using" the reasonable impediment declaration process if they failed to obtain a qualifying identification.

In sum, for all the aforementioned reasons, plaintiffs have failed to provide evidence sufficient to prove beyond a reasonable doubt that S.B. 824 will result in disparate impact. Because "plaintiff[s] must show discriminatory intent as well as disparate effect," *Irby*, 899 F.2d at 1355, to prevail, plaintiffs' failure to provide sufficient evidence of disparate impact ends the matter. Nevertheless, we note that plaintiffs also fail to provide sufficient evidence of discriminatory intent.

First, plaintiffs failed to produce any witness who could testify to the General Assembly's alleged discriminatory intent or otherwise rebut the presumption of good faith. Representative Harrison, plaintiffs' own witness, testified that she "cannot say that racial bias entered into [passage of S.B. 824] and [she] would not say that racial bias entered into [passage of S.B. 824]." As aptly put by the dissenting judge below, "[i]f

[p]laintiffs' own witness, who was in the General Assembly and actively participated in the passage of this legislation, did not then and does not now attribute the passage of S.B. 824 [to] any discriminatory intent, then this [c]ourt certainly [should] not either."

Further, the evidence that S.B. 824 was passed in a special legislative session, did not receive overwhelming support from Democratic legislators, and was enacted without the consideration of racial data, is wholly insufficient to demonstrate discriminatory intent beyond a reasonable doubt. Because our constitution commands that "[t]he role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests," it is not the role of this Court "to sit as a super legislature and second-guess the balance struck by the elected officials." *Bryant*, 359 N.C. at 565, 614 S.E.2d at 486 (alteration in original) (quoting *Harvey*, 315 N.C. at 491, 340 S.E.2d at 731). As the dissent below correctly noted, the General Assembly's decision to comply with the people's command to pass a voter identification law by enacting such a law in a special session in order to override the veto of Governor Cooper, a vocal opponent of *any* such law, "was completely lawful and within [its] authority."

Finally, there are two further fundamental errors below worthy of brief discussion. First, the panel's factual findings regarding both the sequence of events leading to the enactment of S.B. 824 and the legislative history of S.B. 824 misapprehend the relevant presumptions in favor of the law's validity because they fail to properly consider and credit the crucial importance of the voter identification amendment. Because the constitutional amendment created a positive duty for the General Assembly to pass a voter identification law, adoption of S.B. 824 or some similar measure was mandatory, not optional. The evidence, viewed with the proper presumptions of both legislative good faith and constitutional compliance, plainly demonstrates an intent to comply with the peoples' will and the North Carolina Constitution, not an intent to discriminate on the basis of race.

Second, the panel appears to have given considerable weight to the fact that the General Assembly requested racial data when enacting H.B. 589 but did not request racial data when enacting S.B. 824. It bears repeating that the request of racial data, and the use of that data, was one of the primary reasons the Fourth Circuit held that H.B. 589 was enacted with discriminatory intent. *See McCrory*, 831 F.3d at 230; *see also Raymond*, 981 F.3d at 308–09 ("The 2018 Voter-ID Law's legislative history is otherwise unremarkable. Nothing here suggests that the General Assembly used racial voting data to disproportionately

target minority voters 'with surgical precision.' " (quoting *McCrory*, 831 F.3d at 214)).

According to the trial court, because the General Assembly did not request this data, "the legislature did not know whether these changes between S.B. 824 and H.B. 589 would have any impact on the racial disparities in ID possession rates that had been documented during the H.B. 589 litigation." Paradoxically, the trial court nevertheless implied, in the absence of any evidence, that the "62 members of the legislature who voted for H.B. 589 [and] also voted for S.B. 824" relied on the H.B. 589 data when enacting S.B. 824, stating that it was "implausible that these legislators did not understand the potential that S.B. 824 would disproportionately impact [black] voters, just as H.B. 589 had done."

Thus, in the absence of any evidence that any legislator utilized racial data from *McCrory*, and in direct contradiction of the testimony from Representative Harrison, the trial court imputed knowledge to 62 members of the General Assembly and presumed bad faith of an entire branch of our government. The General Assembly was placed in a "damned if you do, damned if you don't" conundrum in which, had it used racial data, it would run afoul of the prior admonition in *McCrory*, and by not using such data, it could never satisfy the trial court's application of the *Arlington Heights* test. There was, thus, no option available to the legislature that could lead to implementation of a voter identification measure. This is exactly the kind of reasoning explicitly disavowed by the Supreme Court of the United States and the Fourth Circuit. As stated by the Fourth Circuit:

> [T]he [trial] court emphasized that the General Assembly's positions had "remained virtually unchanged" between *McCrory* and the enactment of the 2018 Voter-ID Law. And the court assumed that the racial data remained in the minds of the legislators: "[T]hey need not have had the racial data in hand to still have it in mind." By focusing on *who* passed the 2018 Voter-ID Law and requiring the General Assembly to purge the taint of the prior law, the district court flipped the burden and disregarded *Abbott*'s presumption.

Raymond, 981 F.3d at 304–05 (third alteration in original); *see also Abbott*, 138 S. Ct. at 2324 ("[T]he good faith of the state legislature must be presumed. The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination." (cleaned up)).

When this matter is considered under the applicable legal standards, plaintiffs can neither carry their burden of demonstrating discriminatory intent beyond a reasonable doubt nor their burden of demonstrating meaningful disparate impact beyond a reasonable doubt. Therefore, the order below is reversed and we remand to the trial court for entry of a dismissal in this matter.

IV. Conclusion

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." N.C. Const. art. I, § 35. This humble reminder applies not just to individual rights preserved by our Constitution, but to the fundamental structure of our government, without which rights cannot properly be protected.

In North Carolina "[t]he legislature is the great and chief department of government. It alone is created to express the will of the people." *Wilson v. Jordan*, 124 N.C. 683, 701, 33 S.E. 139, 150 (1899) (Clark, J., dissenting). Indeed, "for the courts to strike down valid acts of the [l]egislature would be wholly repugnant to, and at variance with, the genius of our institutions." *Revis*, 193 N.C. at 196, 136 S.E. at 348.

The people of North Carolina overwhelmingly support voter identification and other efforts to promote greater integrity and confidence in our elections. Subjective tests and judicial sleight of hand have systematically thwarted the will of the people and the intent of the legislature. But no court exists for the vindication of political interests, and judges exceed constitutional boundaries when they act as a super-legislature. This Court has traditionally stood against the waves of partisan rulings in favor of the fundamental principle of equality under the law. We recommit to that fundamental principle and begin the process of returning the judiciary to its rightful place as "the least dangerous" branch. The Federalist No. 78 at 402 (Alexander Hamilton) (Gideon ed. 2001).

Plaintiffs here have failed to prove beyond a reasonable doubt that S.B. 824 was enacted with discriminatory intent or that the law actually produces a meaningful disparate impact along racial lines. The prior opinion is withdrawn, and we reverse and remand to the trial court for entry of an order dismissing plaintiffs' claim with prejudice.

REVERSED AND REMANDED.

Justice MORGAN dissenting.

Not long ago, the current Chief Justice of this Court, who is the most senior member of the majority in the present case, observed in a dissenting opinion:

> Judicial activism is a philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find constitutional violations and are willing to ignore governing texts and precedents. It is difficult to imagine a more appropriate description of the action that the majority takes today.

State v. Kelliher, 381 N.C. 558, 597 (2022) (Newby, C.J., dissenting) (extraneity omitted). Consistent with this swashbuckling view, the Chief Justice also wrote this richly ironic nugget a few years back as a dissenter in one of this Court's opinions:

> As a monarch, King Louis XVI once famously said, "*C'est légal, parce que je le veux*" ("It is legal because it is my will."). Today, four justices of this Court adopt the same approach to the law, violating the norms of appellate review and disregarding or distorting precedent as necessary to reach their desired result. Apparently, in their view, the law is whatever they say it is. . . .
>
> . . . .
>
> . . . Instead of doing the legally correct thing, the majority opinion picks its preferred destination and reshapes the law to get there.

State v. Robinson, 375 N.C. 173, 193, 195 (2020) (Newby, J., dissenting) (footnote omitted).

In uniform fashion, the author of the majority opinion in this case[1] recently offered this dissenting view in one of this Court's decisions:

---

1. For clarity, the authoring justice of the majority opinion and the identity of one of the named defendants are not one and the same. Although the two individuals have identical first and last names, the named defendant is the father of the authoring justice.

> The majority's dismissal of our precedent here is deeply troublesome, yet increasingly unsurprising. . . .
>
> . . . .
>
> That the majority has injected chaos and confusion into our political structure is self-evident.

N.C. State Conf. of the NAACP v. Moore, 382 N.C. 129, 182, 197 (2022) (Berger, J., dissenting).

Similarly, yet a third member of the majority in the instant case freshly penned this dissenting observation in response to an order of this Court a short time back:

> [T]he majority's decision today appears to reflect deeper partisan biases that have no place in a judiciary dedicated to the impartial administration of justice and the rule of law.

Harper v. Hall, 382 N.C. 314, 317 (2022) (order allowing expedited hearing and consideration) (Barringer, J., dissenting).

It is apparent from the artfully chosen words of my three distinguished colleagues that they have not been reticent about the notion of introducing partisan politics into this Court's opinions when they disagreed with various case outcomes. Indeed, these three justices of the majority have clearly been enamored with this strategic approach which has been conveniently conceived in order to cast aspersions in certain categories of cases which this Court decided in a manner which differed from their three united orientations. Yet now, joined by two more justices who subscribe to the trio's identical politically saturated legal philosophies and who were elected to serve on the Court since the dissenting opinions cited above were written, the five justices which constitute the majority here have emboldened themselves to infuse partisan politics brazenly into the outcome of the present case. This majority's extraordinarily rare allowance of a petition for rehearing in this case, mere weeks after this newly minted majority was positioned on this Court and mere months after this case was already decided by a previous composition of members of this Court, spoke volumes. My consternation with the majority's abrupt departure from this Court's institutionalized stature—historically grounded in this forum's own reverence for its caselaw precedent, its deference to the rule of law, and its severance from partisan politics—is colossal. When convenient at the time, Chief Justice Newby wrote in his dissenting opinion in *Harper v. Hall*:

> [T]he 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. . . . Undeterred, it untethers itself from history and caselaw.

380 N.C. 317, 434 (2022) (Newby, C.J., dissenting). As a member of the majority in the instant case, the Chief Justice's own words unwittingly and succinctly happen to apply to him and his counterparts of the majority in this case. I must dissent.

"All . . . will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression." President Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), available at https://avalon.law.yale.edu/19th_century/jefinau1.asp. Although the sentiment that all persons be afforded equal protection of the law was expressed early and often in the founding of our great republic, any substantive guarantee embedded in this provision did not come into fruition until much later in the respective histories of the nation and of this state. In particular, suffrage, a fundamental right that "is preservative of other basic civil and political rights," *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), was explicitly restricted to white male property owners in North Carolina following the Constitutional Convention of 1835 and was not re-extended to Black people until 1868 following the conclusion of the Civil War and the beginning of Reconstruction.

Even then, Democrats, realizing that the interests of Blacks were better aligned with the Republican and Populist Parties at the time, began a campaign of racist rhetoric, violence, and outright fraud in order to regain a majority. J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* 188 (1974). Once in office, the legislators passed a law in 1899 that relocated the power to appoint election officers from local officials to a state election board selected by the General Assembly which eventually became controlled by the Democrats. *Id.* at 190. The legislative body required voters to re-register and allowed registrars to disfranchise anyone as they saw fit. *Id.* In 1900, the Democratic General Assembly passed a constitutional amendment that required the completion of a literacy examination and payment of a poll tax in order to establish one's eligibility to vote. *Id.* at 190–95. As a result of this and

other facially neutral measures,[2] which exempted men who were eligible to vote in 1867 or whose fathers or grandfathers were eligible to vote in 1867 (i.e., white men) and empowered county officials to act as gatekeepers by administering the highly subjective literacy tests, Black voter turnout plummeted, and the state remained under conservative control until the mid-twentieth century. *Id.*

After the Voting Rights Act of 1965 was passed as part of the American civil rights movement, North Carolina was forced to remove many barriers to voting that had been previously implemented throughout the state, including the aforementioned literacy examination.[3] The Act also required that certain counties across the United States, including forty counties within North Carolina, obtain preclearance from the federal government before implementing any new election laws in order to ensure that any such laws would not be discriminatory in nature. A year later, registration of Black voters in North Carolina exceeded fifty percent for the first time since 1900. J. Morgan Kousser, *When African-Americans Were Republicans in North Carolina, The Target of Suppressive Laws Was Black Republicans. Now That They Are Democrats, The Target Is Black Democrats. The Constant Is Race* 14 (Apr. 17, 2014), https://www.aclu.org/sites/default/files/assets/lwv_expert_report_-_m__kousser.pdf. During this time, the General Assembly also passed a number of laws that had the effect of increasing access to voting, including laws that authorized early voting, out-of-precinct voting, same-day registration, and preregistration for teenagers. These efforts collectively boosted the registration of Black voters in the state by fifty percent and dramatically increased voter turnout, especially of Black voters. *Id.* at 17.

---

2. As the United States Supreme Court held in 1959, the state's literacy requirement did not, on its face, violate the Fifteenth Amendment by denying the right to vote on the basis of race. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 53 (1959). Noteworthily, Henry Frye, who was the first Black person to serve on this Court and who eventually became this Court's first Black Chief Justice, was denied the right to register to vote on the grounds that he was deemed to have failed this literacy test, even after graduating with highest honors from the collegiate institution now known as North Carolina Agricultural and Technical State University and after attaining the rank of Captain upon serving four years in the United States Air Force. Although he was declared unable to vote, he was accepted into the University of North Carolina School of Law and graduated with its law degree in 1959. *See* Adrienne Dunn, "Henry Frye," North Carolina History Project, https://northcarolinahistory.org/encyclopedia/henry-e-frye-1932/.

3. Although the Voting Rights Act banned states from requiring the completion of literacy tests as a prerequisite to voting, the literacy requirement remains part of the state Constitution as a "not . . . particularly pleasing relic" of North Carolina's racial past. Michael Hyland, *Bipartisan measure aims to remove literacy requirement from North Carolina Constitution*, FOX 8 (Mar. 2, 2023), https://myfox8.com/news/politics/your-local-election-hq/bipartisan-measure-aims-to-remove-literacy-test-from-north-carolina-constitution/.

Nevertheless, state politics have remained racially polarized going into the twenty-first century, "offer[ing] a political payoff" for legislators to "dilute or limit the minority vote," *Holmes v. Moore*, 270 N.C. App. 7, 22 (2020) (extraneity omitted), since the disenfranchisement of Black voters "predictably redound[ed] to the benefit of one political party and to the disadvantage of the other." *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016), *cert denied sub nom. North Carolina v. N.C. State Conf. of the NAACP*, 581 U.S. 985 (2017). For instance, after the United States Supreme Court invalidated the Voting Rights Act's preclearance requirements in 2013 through its decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), the North Carolina General Assembly rapidly put together an omnibus bill altering state election law that the Fourth Circuit determined was motivated, at least in part, by discriminatory racial intent. *McCrory*, 831 F.3d at 233. This law eliminated or curtailed many voter-friendly initiatives that had been introduced in the 1960s—including early voting, same-day registration, and preregistration—and included a provision that required voters to present photographic identification in order to vote in person. *Id.* at 214–17. The Fourth Circuit found that the state legislature had crafted this law with the knowledge and intent that it would disproportionately impact Black voters who disproportionately made use of those initiatives that the bill worked to curtail or eliminate, tended to lack the forms of identification deemed acceptable by the Republican General Assembly, and voted overwhelmingly for the Democratic Party. *Id.*

"Unquestionably, North Carolina has a long history of race discrimination generally and race-based vote suppression in particular." *Id.* at 223. This historical reality is not one that anyone can legitimately deny, although the majority appears to represent in a footnote in its written opinion that the mere current presence of one Black man and one Black woman who were both elected to this Court, coupled with other individuals expressly identified by the majority who are members of the Black race who have also been elected to office in North Carolina in modern times, proves that this state has progressed so much that this state's contemptible racial history regarding electoral politics bears no logical relation to its present-day political climate.[4] This naïveté, if such, would be appalling; this callousness, if such, would be galling.

---

4. It is both noteworthy and instructive that legislation intended to limit suffrage along racial lines was specifically introduced as backlash to the election of Black legislators during the Reconstruction Era, indicating both that racial progress is not always linear and that political gains for minorities often precede conservative pushback to universal suffrage. Olivia B. Waxman, *The Legacy of the Reconstruction Era's Black Political Leaders*, Time (Feb. 7, 2022), https://time.com/6145193/black-politicians-reconstruction/.

Courts are not obliged to turn a blind eye to the historical circumstances that might inform present-day efforts to encumber, restrict, or otherwise discourage the exercise of the precious right to vote. An equilibrium between presuming legislative good faith, while remaining cognizant of the insidious nature of discriminatory intent as a potential motivation for facially neutral legislative acts, is precisely what was captured by the United States Supreme Court when it decided *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). In issuing its decision in *Arlington Heights*, the nation's highest court recognized that "[t]he historical background of [a legislative act] is one evidentiary source" relevant to discriminatory intent, "particularly if it reveals a series of official actions taken for invidious purposes." *Id.* at 267. While the Supreme Court has subsequently cautioned that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful," *Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion), it remains the case that historical discrimination is a relevant factor in ascertaining the existence of present discriminatory intent. *Abbott v. Perez*, 138 S. Ct. 2305, 2351–52 (2018) (Sotomayor, J., dissenting).

My esteemed colleagues who constitute the majority granted petitioners' request for rehearing of this case on the grounds that a previous majority of this Court was deemed to have committed legal error by failing to afford the General Assembly its presumption of good faith in accordance with federal precedent. However, in an egregious twist and twirl, this Court obliterates its recognition of federal precedent altogether in order to introduce its own new standard of review for equal protection claims arising under the state Constitution. In doing so, this majority conveniently and haughtily spurns federal caselaw precedent fostered by the decision of the United States Supreme Court in *Arlington Heights*, while simultaneously upending decades of state constitutional principles, in its quest to shield acts of the state legislature from scrutiny for invidious discriminatory intent.

I. Background and Standard of Review

"Using race as a proxy for party may [still] be an effective way to win an election." *McCrory*, 831 F.3d at 222. Even in the absence of explicit "race-based hatred" or animus, "intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose." *Id.* Furthermore, racially neutral laws motivated by discriminatory intent are "just as abhorrent, and just as unconstitutional, as laws that expressly discriminate on the basis of race." *Id.* at 220. Because

"[o]utright admissions of impermissible racial motivation are infrequent" in the contemporary context, *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999), courts must often make a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available" when determining whether a legislative body has acted with discriminatory intent in violation of the state or federal constitution. *Arlington Heights*, 429 U.S. at 266.

In deciding *Arlington Heights*, the United States Supreme Court established a nonexhaustive list of factors that courts may consider probative on this question, including: (1) the historical background of the action; (2) the sequence of events leading up to its enactment, including any departures from the normal procedural or substantive operations of that legislative body; (3) the law's legislative and administrative history; and (4) whether the law's effect "bears more heavily on one race than another." *Id.* at 266–68. Discriminatory purpose "may often be inferred from the totality of the relevant facts," *Washington v. Davis*, 426 U.S. 229, 242 (1976), and courts do not consider "each piece of evidence in a vacuum," but the "totality of the circumstances" when ascertaining the presence of discriminatory intent. *McCrory*, 831 F.3d at 233. The Supreme Court has further provided that, because legislative bodies are "[r]arely . . . motivated solely by a single concern," a plaintiff need only demonstrate that "invidious discriminatory purpose was a motivating factor" in the enactment of a piece of legislation, *Arlington Heights*, 429 U.S. at 265–66, before the burden shifts onto the legislature to demonstrate that "the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).[5] "[T]he ultimate question" then becomes whether a law was enacted "because of," rather than "in spite of," the discriminatory effect it would produce. *McCrory*, 831 F.3d at 220 (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

As a preliminary matter, the case before us was brought under Article I, Section 19 of the Constitution of North Carolina, which provides that "No 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. This provision "expressly incorporated" the Equal Protection Clause that had been "made explicit in the Fourteenth Amendment to the Constitution of the United States." *S. S. Kresge Co. v. Davis*, 277 N.C. 654, 660 (1971). As such, "[t]his Court's analysis of the State Constitution's Equal Protection

5. The initial burden of proof by which plaintiffs must demonstrate that racial discrimination was a motivating factor in the adoption of a facially neutral act under *Arlington Heights* is by a preponderance of the evidence. *Hunter*, 471 U.S. at 225.

Clause generally follows the analysis of the Supreme Court of the United States in interpreting the corresponding federal clause." *Blankenship v. Bartlett*, 363 N.C. 518, 522 (2009). "However, in the construction of the provision of the State Constitution, the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court." *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 474 (1974). We maintain our authority to construe our state Constitution and its provisions separately from their federal analogues, so long as "our citizens are thereby accorded no lesser rights than they are guaranteed by the parallel federal provision[s]." *Stephenson v. Bartlett*, 355 N.C. 354, 380–81 n.6 (2002) (quoting *State v. Carter*, 322 N.C. 709, 713 (1988)). The federal Constitution is a floor, below which we cannot sink. The majority ignores this fundamental principle.

In determining whether Senate Bill 824 violates Article I, Section 19 of the Constitution of North Carolina, this Court must accept any findings of fact made by the trial court as conclusive when supported by any competent evidence. When the trial court acts as factfinder, "the trial court's findings of fact . . . are conclusive on appeal if there is competent evidence to support them, even [if] the evidence could be viewed as supporting a different finding." *In re Estate of Skinner*, 370 N.C. 126, 139 (2017) (quoting *Bailey v. State*, 348 N.C. 130, 146 (1998)). Findings of fact that are "supported by competent, material and substantial evidence in view of the entire record[ ], are conclusive upon a reviewing court and not within the scope [of its] reviewing powers." *Id.* at 139 (alteration in original) (quoting *In re Revocation of Berman*, 245 N.C. 612, 616–17 (1957)). However, a trial court's conclusion as to whether a statute is constitutional, made in light of its findings of fact, is a question of law that this Court reviews de novo. *State v. Romano*, 369 N.C. 678, 685 (2017).

II. Discussion

"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. UNC*, 330 N.C. 761, 783 (1992) (emphasis added). Rather than choosing to honor that duty, the majority instead strives to protect the state legislature *from* the citizens—first, by adopting a standard of proof for equal protection claims brought under Article I, Section 19 of the Constitution of North Carolina that unduly diminishes a claimant's ability to prevail and, second, by misconstruing federal precedent to neuter the sensitive inquiries specifically authorized under *Arlington Heights*.

A. The New Majority's Novel Standard of Proof

Throughout its opinion, the majority adopts an unprecedented burden of proof for claimants bringing equal protection claims arising under our state Constitution. Although the majority repeatedly characterizes its framework as traditional and consistent with the bulk of state authority, the depiction is, mildly put, a freewheeling exaggeration. In fact, the majority's new standard departs sharply from both federal *and* state precedent by abandoning the traditional equal protection framework and construing a provision of our state Constitution as providing lesser protection to citizens of our state than its federal analogue.

The majority cites numerous opinions of this Court for its assertion that facial constitutional challenges to an act of the legislature must be proven beyond a reasonable doubt. *See State v. Strudwick*, 379 N.C. 94 (2021); *Cooper v. Berger*, 370 N.C. 392 (2018); *Hart v. State*, 368 N.C. 122 (2015); *Pope v. Easley*, 354 N.C. 544 (2001); *Baker v. Martin*, 330 N.C. 331 (1991). The majority implies that these cases establish some state-specific analytical jurisprudence that departs from the federal framework and supersedes *Arlington Heights*; however, none of these cases concern equal protection claims arising under Article 1, Section 19 of the Constitution of North Carolina. This is a crucial misfire because precedent specific to Article 1, Section 19 tends to favor identical construction to the Fourteenth Amendment. *See S. S. Kresge Co.*, 277 N.C. at 660 ("[T]he principle of the equal protection of the law, made explicit in the Fourteenth Amendment to the Constitution of the United States . . . has now been expressly incorporated in Art. I, § 19, of the Constitution of North Carolina . . . ."); *Blankenship*, 363 N.C. at 522 ("This Court's analysis of the State Constitution's Equal Protection Clause generally follows the analysis of the Supreme Court of the United States in interpreting the corresponding federal clause.").

Furthermore, state jurisprudence favors a more liberal construction of state constitutional provisions as compared to their federal analogues and disavows any construction that would afford citizens fewer protections than are afforded federally. *See Carter*, 322 N.C. at 713 ("[W]e have the authority to construe our own 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*." (emphasis added)); *see also Stephenson*, 355 N.C. at 380–81 (applying this principle to the Equal Protection Clause); *Corum*, 330 N.C. at 783 ("Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of its citizens."). The majority's decision flies in the face

of this precedent by rejecting *Arlington Heights* on the grounds that it makes it too easy for citizens of this state to succeed on claims that legislative acts were enacted with discriminatory intent and thereby to assert their right to equal protection of the law.

The majority contends that its adoption of the "beyond a reasonable doubt" standard is justified by the pursuit of objectivity and consistency. Specifically, the majority appears to be gravely concerned that courts applying *Arlington Heights* might come to different conclusions concerning the constitutionality of the same legislative act. However, inconsistent outcomes are a regular byproduct of complicated, fact-intensive legal inquiries which appellate courts are presumably equipped to review. Furthermore, the entire purpose of *Arlington Heights* and its progeny is to empower plaintiffs alleging equal protection claims against legislation which appears neutral on its face to put forward "such circumstantial and direct evidence . . . as may be available" across a range of factors that the Supreme Court of the United States has deemed probative on the question of discriminatory intent. 429 U.S. at 266.[6] By the very nature of such claims, the evidence presented by plaintiffs in these types of cases will necessarily appear from sources other than the face of the challenged piece of legislation; consequently, different groups of plaintiffs challenging the same law may build entirely different records from which factfinders may derive entirely different factual findings upon which to base their legal conclusions. These circumstances are routine and do not justify the extreme departure from proven precedent which the majority cavalierly creates.

As if this new standard of proof were not enough to ensure its desired outcome, the majority imposes additional hurdles onto plaintiffs in the form of legal tests that are not ordinarily applied to equal protection claims. Specifically, the majority discusses the so-called *Salerno* test, which establishes that an individual challenging the facial constitutionality of a legislative act "must establish that no set of circumstances exist under which the [a]ct could be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also State v. Bryant*, 359 N.C. 554, 564 (2005). However, this test is rarely applied as strictly as it was conceived, *see Washington v. Glucksberg*, 521 U.S. 702, 740 (1997) (Stevens, J., concurring), and is barely applied at all in several areas of constitutional

6. Although the majority does not specifically state that its new legal framework disfavors the *Arlington Heights* factors as legitimate sources of evidence bearing on the issue of discriminatory intent, it does opine that evidence declared to be sufficient under the *Arlington Heights* framework is "by its very nature speculative" and open to subjective interpretation.

law, including Equal Protection Clause jurisprudence. *See* Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 Wm. & Mary Bill Rts. J. 657, 659–65 (2010); Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 238–39 (1994). To the extent that this Court has previously cited *Salerno*, it has never been within the context of an equal protection claim. Finally, the United States Supreme Court itself has questioned the ongoing viability of this aspect of *Salerno* altogether. *See City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself . . . .").

B. The Majority's Abuse of *Abbott* and *Raymond*

Unsatisfied with its ability to eschew the federal framework for one which all but guarantees the state legislature's indemnity from plaintiffs' pesky claims of racial discrimination, the majority attempts to extract overly broad legal principles from two federal decisions that, as it acknowledges, are not binding on this Court and were cabined by their own records on appeal in order to claim that the trial court's analysis not only faltered under this Court's entirely new state standard, but also under a traditional application of *Arlington Heights*. However, neither case stands for such a sweeping proposition as the majority would assign to it and, in fact, both cases happen to expressly acknowledge historical context as a permissible source of insight into present legislative intent. Furthermore, both the United States Supreme Court in *Abbott*, as well as the Fourth Circuit in *Raymond*, were confronted with trial court findings that were distinctly and thoroughly flawed by the misapplication of the proper burden of proof. In the absence of such error by the trial court in the present case, the majority's effort to analogize the trial court's decision in this case with those presented in *Abbott* and *Raymond* falls flat.

i. *The United States Supreme Court's Decision in* Abbott v. Perez

In *Abbott*, the United States Supreme Court reversed in part the decision of a three-judge panel sitting in the Western District of Texas, finding that the redistricting plans adopted by the 2013 Texas Legislature had not been "cured" of the unlawful discriminatory intent that had been previously found in the plans adopted by the Texas Legislature in 2011. 138 S. Ct. at 2313. The *Abbott* Court held that the district court had "committed a fundamental legal error" by requiring "the State to show that the 2013 Legislature somehow purged the 'taint' that the court

attributed to the defunct and never-used plans enacted by a prior legislature in 2011." *Id.* at 2313, 2324. The Supreme Court acknowledged that *Arlington Heights* applied, and that the historical background of the 2013 redistricting plans was relevant to the question of whether they were enacted with discriminatory intent; however, it also emphasized that a finding of past discrimination alone did not justify shifting the burden of proof from plaintiffs to the State. *Id.* at 2324. The high Court therefore concluded that "the essential pillar of the three-judge court's reasoning was critically flawed" and that, reviewed under the "proper legal standards," all but one of the legislative districts were lawful. *Id.* at 2313–14.

The *Abbott* Court determined that, aside from the legislative body's prior bad acts, both the direct and circumstantial evidence did not support the district court panel's conclusion that the 2013 Texas Legislature had acted with discriminatory intent. *Id.* at 2327. The Supreme Court credited the fact that the 2013 redistricting plans had been approved and adopted by the three-judge court itself, and that the state attorney general had advised the 2013 Legislature that adopting these plans was the easiest way to bring legal challenges to a close as "expeditiously as possible," thus indicating the legislature's legitimate intent to adopt court-approved plans as a means of ending litigation. *Id.* at 2313, 2327. Meanwhile, it discredited the federal district court's inferences of unlawful intent as unsound and without supporting evidence. *Id.* at 2327–29. As such, the *Abbott* Court opined that the federal district court's inappropriate reallocation of the burden of proof onto the State was "central" to its analysis, noting that the lower court had

> referred repeatedly to the 2013 Legislature's duty to expiate its predecessor's bad intent, and when the court summarized its analysis, it drove the point home. It stated: "The discriminatory taint [from the 2011 plans] was not removed by the Legislature's enactment of the Court's interim plans, because the Legislature engaged in no deliberative process to remove any such taint, and in fact intended any such taint to be maintained but be safe from remedy."

Id. at 2325–26 (alteration in original) (quoting *Perez v. Abbott*, 274 F. Supp. 3d 624, 649 (W.D. Tex. 2017)). Having concluded that the plaintiffs had not met their burden of proof to demonstrate discriminatory intent under the correct legal standard except in the case of one district which had a design explicitly predicated on race, the Court reversed in part, affirmed in part, and remanded to the trial court. *Id.* at 2335.

The majority strains to construe *Abbott* as impacting the present case in at least two ways. First, the majority misconstrues the directive in *Abbott* that a finding of past discrimination cannot *alone* justify reallocating the burden of proof from plaintiffs onto the State as indicating that the trial court's findings in the present case, considering the historical background of Senate Bill 824, had *no* bearing on the intent of the legislature which had passed it. Second, the majority regards *Abbott* as permission for this Court to entirely disregard the second prong of *Arlington Heights* absent a finding that the General Assembly here not only deviated from its normal operating procedures but deviated so grossly as to have acted outside of its legitimate constitutional power. However, the United States Supreme Court's holding in *Abbott* cannot legitimately be stretched by the majority to substantiate the liberties which it takes with the high court's instructive reasoning in *Abbott*.

First, the *Abbott* Court's holding that the federal district court had improperly flipped the burden of proof was neither based on the lower court's mere consideration of the law's historical background, nor stray references to a prior legislature's discriminatory intent or knowledge of the plans' potential discriminatory impact. Indeed, the Supreme Court in *Abbott* fully recognized the relevancy of the 2013 redistricting plans' historical background, including the prior finding of discrimination on the part of the 2011 Legislature:

> In holding that the District Court disregarded the presumption of legislative good faith and improperly reversed the burden of proof, *we do not suggest either that the intent of the 2011 Legislature is irrelevant* or that the plans enacted in 2013 are unassailable because they were previously adopted on an interim basis by the Texas court. *Rather, both the intent of the 2011 Legislature and the court's adoption of the interim plans are relevant to the extent that they naturally give rise to—or tend to refute—inferences regarding the intent of the 2013 Legislature.* They must be weighed together with any other direct and circumstantial evidence of that Legislature's intent. But when all the relevant evidence in the record is taken into account, it is plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination.

Id. at 2326–27 (emphases added). Justice Sotomayor's dissent in *Abbott* credits the majority for exactly this distinction, noting that the majority

opinion "does not question the relevance of historical discrimination in assessing present discriminatory intent. Indeed, [it] leaves undisturbed the longstanding principle recognized in *Arlington Heights* that the historical background of a legislative enactment is one evidentiary source relevant to the question of intent." *Id.* at 2351–52 (Sotomayor, J., dissenting) (extraneity omitted).

Instead, the holding in *Abbott* reflects the fact that the federal district court in that case had allowed the previous legislature's intent not only to invade its considerations of the other *Arlington Heights* factors, but also to dictate the lower court's findings at each stage by requiring the legislature to affirmatively prove that it had cured the discriminatory taint of the prior legislative body. *See Perez*, 274 F. Supp. 3d at 648. It would be nearly impossible to disentangle the *Perez* court's factual findings from its improper legal framework because, as the federal district court itself explicitly stated, it conducted its analysis believing that the "most important consideration [was] whether the 2011 plans continue[d] to have discriminatory or illegal effect, and whether the [2013] reenactment further[ed] that existing discrimination." *Id.* The Supreme Court addressed this misconception in deciding that the lower court had committed legal error, unequivocally declaring that: "[u]nder these circumstances, there can be no doubt about what matters: It is the intent of the 2013 Legislature. And it was the plaintiffs' burden to overcome the presumption of legislative good faith and show that the 2013 Legislature acted with invidious intent." *Abbott*, 138 S. Ct. at 2325.

Conversely, the trial court made no such legal error in the present case. The tribunal correctly identified the applicable legal framework as supplied by *Arlington Heights* and accurately acknowledged throughout that plaintiffs bore the initial burden of proving that Senate Bill 824 was enacted with discriminatory intent before defendants would ever be required to demonstrate that the law would have been enacted absent discrimination as a motivating factor. Unlike the federal district court in *Perez*, the trial court in this case never contemplated that the primary consideration might be the intent of the prior legislature that had passed the previous voter identification provision; indeed, it never strayed from its objective to determine the intent of the legislature which passed Senate Bill 824 using the factors provided by *Arlington Heights*. While, in its thorough analysis, the trial court referenced both the previous voter identification law, House Bill 589—and the Fourth Circuit's decision in *McCrory* that had determined that House Bill 589 was itself passed with discriminatory intent—the trial court appropriately did so by properly considering House Bill 589 as part of the overall historical

background leading up to Senate Bill 824 and by using *McCrory*'s analysis of House Bill 589 in order to guide its own analysis of Senate Bill 824 rather than to dictate its outcome.

The majority ascribes much significance to one of the trial court's numerous subheadings in the lower forum's issued order: "The Design of S.B. 824 Does Not Evince an Intent by the General Assembly to Cure Racial Disparities Observed Under H.B. 589." This organizational entry, and the trial court's subsequent analysis appearing under the section, do not constitute an improper reallocation of the burden of proof onto defendants. In this portion of its order, the trial court rejects some of defendants' counterarguments as to why and how the legislative history of Senate Bill 824 did not raise "additional red flags." Before reaching this section, as well as the one immediately following it which concluded that the "Limited Democratic Involvement in Enacting S.B. 824 [Did] Not Normalize the Legislative Process," however, the trial court specifically found that Senate Bill 824 had been enacted in an unusually expeditious process, leaving little time for concerns to be addressed about the law's impact on minority voters. The trial court further specifically found that amendments to the legislative bill that were proposed which might have benefitted Black voters were rejected and not incorporated into the final law. In the aforementioned category of the trial court's order, the tribunal acknowledged that Senate Bill 824 included forms of qualifying identification which were not included in House Bill 589 before concluding that the General Assembly did not "consider any updated racial demographic data prior to the enactment of S.B. 824" and, therefore, could not be credited with actively persevering to reduce the known racial impact of requiring voters to present photographic identification. This segment of the trial court's order did not directly ascribe the *discriminatory intent* of the legislature that had passed House Bill 589 to the legislature that had passed Senate Bill 824; instead, it recognized the known disparate impact of a photographic identification requirement to vote, evidenced in part by data from the implementation of House Bill 589; the fact that those amendments that would specifically assist Black voters in accessing the franchise despite such a requirement were rejected by the General Assembly; and that those additional forms of identification that were integrated into the final law were not fashioned to alleviate the law's disparate racial impact. All of these findings by the trial court were supported by competent evidence and should have been taken as conclusive on appeal.

The majority also cites *Abbott* for the majority's proposition that a speedy legislative process cannot give rise to an inference of bad faith.

In *Perez*, the federal district court found that the 2013 Texas Legislature "pushed the redistricting bills through quickly in a special session." 274 F. Supp. 3d at 649. The federal district court noted that the Texas Attorney General had urged the legislature to adopt the redistricting plans during the regular session, but that the regular session ended in May 2013 with no redistricting action, whereupon the Governor of Texas called a special session to consider legislation ratifying and adopting the court-approved redistricting plans. *Id.* at 634. On this point, the United States Supreme Court provided that:

> we do not see how the brevity of the legislative process can give rise to an inference of bad faith—and certainly not an inference that is strong enough to overcome the presumption of legislative good faith . . . . The "special session" was necessary because the regular session had ended. As explained, the Legislature had good reason to believe that the interim plans were sound, and the adoption of those already-completed plans did not require a prolonged process. After all, part of the reason for adopting those plans was to avoid the time and expense of starting from scratch and leaving the electoral process in limbo while that occurred.

Abbott, 138 S. Ct. at 2328–29. The majority clings to this snippet from *Abbott* in an effort to discredit the trial court's findings that the sequence of events leading to the enactment of Senate Bill 824 was unusual and "[m]arked by [d]epartures from [n]ormal [l]egislative [p]rocedure."

However, the relevant inquiry under *Arlington Heights* is not whether a challenged action was adopted after a brief legislative process as opposed to a lengthy one; rather, *Arlington Heights* directs courts to consider "[d]epartures from the normal procedural sequence." 429 U.S. at 267. Cases applying the *Arlington Heights* factors suggest that an actor's "normal procedural sequence" should be defined by the procedural norms of that particular entity. *See*, *e.g.*, *Familias Unidas Por La Educación v. El Paso Indep. Sch. Dist.*, 2022 U.S. Dist. LEXIS 180846 at *23–25 (W.D. Tex. 2022) (finding that the public school district had deviated from *its* typical procedures by failing to involve community members in its decision to close three elementary schools); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563, 573–74 (E.D. La.) (finding that the St. Bernard Parish and Parish Counsel deviated from the normal process for enacting a moratorium in relation to a proposed construction project by not involving a

variance and not being limited in scope); *see also Normal*, *Black's Law Dictionary* (6th ed. 1990) (defining "normal" as "[a]ccording to, constituting, or not deviating from an established norm"). Furthermore, a deviation from a legislature's normal operating procedure does not automatically constitute a violation of the legislature's defined procedural rules, and therefore certainly not constitutional constraints. *McCrory*, 832 F.3d at 228 ("But, of course, a legislature need not break its own rules to engage in unusual procedures.").

In *Perez*, the federal district court made no findings from which it or an appellate court could determine whether a convention of a legislative special session for the purpose of considering and adopting court-approved redistricting plans was outside of the Texas Legislature's normal operating procedures. 274 F. Supp. 3d 624. As the United States Supreme Court held, the "brevity" of the legislative process in that case was not enough to give rise to an inference of bad faith alone, especially considering the legislature's reason to believe that the court-issued redistricting plans were sound and the law-making body's motivation to avoid an indefinite disruption of the electoral process. *Abbott*, 138 S. Ct. at 2328–29. The circumstances in *Abbott* are readily distinguishable from the situation in the present matter, where the trial court made multiple findings that directly addressed the North Carolina General Assembly's normal operating procedures and the legislative body's deviation therefrom during both the enactments of House Bill 1092—the constitutional amendment requiring voters to produce photographic identification in order to vote—and Senate Bill 824 as its implementing legislation. Instead of accepting these findings as binding and relevant to its *Arlington Heights* analysis, the majority proposes in its opinion here that *any* consideration of procedural abnormalities, short of the legislature plainly acting outside of its constitutional authority, amount to judicial overreach into the legislative process and consequently squelch the viability of this *Arlington Heights* factor in North Carolina.

ii. *The Fourth Circuit's Decision in* NAACP v. Raymond

As with *Abbott*, the majority here also labors to contort the Fourth Circuit's decision in *Raymond*. In *Raymond*, the Fourth Circuit reviewed a decision of the United States District Court for the Middle District of North Carolina which granted the plaintiffs' motion for a preliminary injunction enjoining the enforcement of Senate Bill 824 under the federal Equal Protection Clause. *N.C. State Conf. of the NAACP v. Raymond*, 981 F.3d 295, 298 (4th Cir. 2020), *rev'g N.C. State Conf. of the NAACP v. Cooper*, 430 F. Supp. 3d 15 (M.D.N.C. 2019). The Fourth Circuit reversed the federal district court, finding that the lower court

had "improperly disregarded" the principle that a legislature's "discriminatory past" cannot be used to condemn its later acts, by "reversing the burden of proof and failing to apply the presumption of legislative good faith." *Id.* Specifically, the Fourth Circuit determined that the federal district court had "considered the General Assembly's discriminatory intent in passing the 2013 Omnibus Law to be effectively dispositive of its intent in passing the 2018 Voter-ID Law." *Id.* at 302. The Fourth Circuit analogized to *Abbott*, finding that:

> The district court here made the same mistake as the panel in *Abbott* without even trying to distinguish the Supreme Court's holding. Explaining that it is " 'eminently reasonable to make the State bear the risk of non-persuasion with respect to intent' when the very same people who passed the old, unconstitutional law passed the new," *Cooper*, 430 F. Supp. 3d at 32, the district court noted that the General Assembly did not "try[] to cleanse the discriminatory taint," *id.* at 43, or "tak[e] steps to purge the taint of discriminatory intent," *id.* at 35. . . . These were not merely "stray comments." *Abbott*, 138 S. Ct. at 2325. "On the contrary, they were central to the court's analysis," *id.*, for they made explicit the burden-shifting that the court engaged in while assessing the *Arlington Heights* factors.

Id. at 303 (first and second alterations in original). The Fourth Circuit also observed that the federal district court repeatedly referenced the fact, throughout its *Arlington Heights* analysis, that the legislature that enacted Senate Bill 824 was largely composed of the same legislators who had passed House Bill 589. *Id.* at 304–05; *see Cooper*, 430 F. Supp. 3d at 31 ("Plaintiffs' more potent sequence-related argument is less about 'how' than 'who.' "); *Cooper*, 430 F. Supp. 3d at 35 ("[T]he legislative history reveals that the General Assembly's goals and motivations went virtually unchanged in the time between H.B. 589 and S.B. 824. Rather than taking steps to purge the taint of discriminatory intent, the bill's supporters expressed their resolve to circumvent *McCrory* and stave off future legal challenges.").

Just as the United States Supreme Court did in *Abbott*, the Fourth Circuit in *Raymond* comprehensively explained that the historical discrimination exhibited by the General Assembly that had enacted House Bill 589 *was* a relevant factor in discerning the existence of present discriminatory intent on the part of the General Assembly that had

passed Senate Bill 824. *Raymond*, 981 F.3d at 305. The federal appellate court cautioned:

> None of this suggests that the 2013 General Assembly's discriminatory intent in enacting the 2013 Omnibus Law is irrelevant. *See Abbott*, 138 S. Ct. at 2327. But the appropriate place to consider the 2013 Omnibus Law is under the "historical background" factor. *See Arlington Heights*, 429 U.S. at 267; *see also Abbott*, 138 S. Ct. at 2325 (finding that the historical background leading to the law's enactment is but " 'one evidentiary source' relevant to the question of intent" (quoting *Arlington Heights*, 429 U.S. at 267)). And yet the "historical background" section is the one part of the district court's discriminatory-intent analysis where the court did not discuss the 2013 Omnibus Law.

Id. at 305. Finding that the federal district court's legal errors had "fatally infected" its findings, the Fourth Circuit reviewed the remaining evidence and determined that, aside from historical background, the remaining factors of *Arlington Heights* did not support a finding of discriminatory intent. *Id.* at 303. Specifically, the Fourth Circuit acknowledged the federal district court's finding that there were no procedural irregularities leading up to the enactment of Senate Bill 824 and that minority voters disproportionately lacked the forms of identification required by the law before the federal appellate court determined that the federal district court had erred in discrediting the bill's bipartisan support, the impact of the intervening constitutional amendment, and the effect of the law's mitigating features. *Id.* at 305–10. The Fourth Circuit therefore reversed, explaining that it did not do so because the federal district court weighed the available evidence differently than the federal appellate court would have, but instead because "of the fundamental legal errors that permeate[d] the [lower court's] opinion." *Id.* at 310–11.

As a previous composition of this Court noted, *Raymond* was decided in an entirely different procedural posture and on an entirely different factual record. As the trial court in the instant case acknowledged, quoting *Holdstock v. Duke University Health System*, 270 N.C. App. 267, 280 (2020), "the [C]ourt of [A]ppeals cannot ask questions that might help resolve issues or prompt responses necessary to create a complete record." For this reason, appellate courts rely upon the trial courts to develop sufficient factual records from which the higher tribunals can make their own determinations upon appellate review;

furthermore, an appellate court's determinations will necessarily be premised upon the presence or absence of sufficient record evidence, as opposed to some abstract absolute truth. Whereas the trial court's decision here was based on a full and final record developed after the completion of a three-week bench trial, the federal district court in *Cooper* issued its opinion based upon a preliminary pretrial record and without the benefit of much of the evidence that was provided to the trial court in this case.

As a result, the federal district court's findings of fact, upon which the Fourth Circuit based its own review, differed significantly from those made by the trial court in the present case. For example, while the federal district court in *Cooper* found that the events leading up to the passage of Senate Bill 824 lacked any "procedural irregularity," 430 F. Supp. 3d at 32, the trial court in *Holmes* made numerous findings on the irregularities leading up to the enactments of both House Bill 1092 and Senate Bill 824 based upon expert testimony that the federal district court in *Cooper* did not receive. Likewise, the trial court here received and credited expert testimony discussing the disproportionate impact that Senate Bill 824's reasonable impediment provisions would have on Black voters that was unavailable to the federal district court in *Cooper*, and therefore to the Fourth Circuit in *Raymond*.

The trial court's findings in this case flowed directly from the evidentiary record before it, rather than from an improperly inverted assignment of the burden of proof. Whereas the federal district court's analysis in *Cooper* repeatedly paralleled the *Perez* court's improper legal standard nearly verbatim, the trial court in this case never ascribed the "discriminatory taint" of House Bill 589 to the legislature that had passed Senate Bill 824. *Compare Cooper*, 430 F. Supp. 3d at 43 ("[R]ather than trying to cleanse the discriminatory taint which had imbued H.B. 589, the legislature sought ways to circumvent state and federal courts and further entrench itself."), and *Cooper*, 430 F. Supp. 3d at 35 ("Rather than taking steps to purge the taint of discriminatory intent, the bill's supporters expressed their resolve to circumvent *McCrory* and stave off future legal challenges."), *with Perez*, 274 F. Supp. 3d at 649 ("Further, the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans."). By contrast, the majority decision here largely relies upon one instance in which the trial court supposedly inverted the evidentiary burden; namely, where the trial court had found that Senate Bill 824's substantive departures from House Bill 589 were not made for the purpose of alleviating the racially disparate *impact* that had been previously observed under House Bill

589. In doing so, the trial court did not, however, ascribe the previous legislature's *intent* to that legislative body which had passed Senate Bill 824, nor did it purport by its order that defendants were required to cleanse, purge, or cure any discriminatory intent which had traversed from House Bill 589 to Senate Bill 824.

For these reasons, inasmuch as the Fourth Circuit's decision in *Raymond* was explicitly based on the federal district court's "fundamental legal errors that permeate[d] the opinion," 981 F.3d at 311, and a full consideration of the particular evidentiary record before the Fourth Circuit, *Raymond* provides no meaningful grist for the majority's mill: the trial court's findings were derived from an entirely different and more extensive evidentiary record, and the trial court never required defendants to prove that they had purged Senate Bill 824 of the discriminatory taint of House Bill 589.

C. The Majority's Reconsideration of the Evidence

The remainder of the majority's opinion engages in an improper and self-serving reweighing evaluation of the evidence presented to the trial court which bears on disparate impact. While it is elementary that reweighing evidence upon appellate review is fundamentally wrongful, the egregiousness of the majority's act is particularly pronounced since the case is back on *rehearing*. The correct standard of review for a trial court's findings of fact is highly deferential. "[T]he trial court's findings of fact . . . are conclusive on appeal if there is competent evidence to support them, even [if] the evidence could be viewed as supporting a different finding." *In re Estate of Skinner*, 370 N.C. at 139 (quoting *Bailey*, 348 N.C. at 146). Findings of fact "supported by competent, material and substantial evidence in view of the entire record[ ], are conclusive upon a reviewing court and not within the scope [of its] reviewing powers." *Id.* at 139 (alteration in original) (quoting *In re Revocation of Berman*, 245 N.C. at 616–17). Furthermore, a finding of "overwhelming" disparate impact is not required under *Arlington Heights*. *McCrory*, 831 F.3d at 231. Instead, the pertinent inquiry is merely whether Senate Bill 824 "bears more heavily" on Black voters. *Arlington Heights*, 429 U.S. at 266 (quoting *Washington*, 426 U.S. at 242).[7] In other words, whether the law

7. The majority repeatedly cites cases which consider whether state legislative acts imposed a "substantial burden" upon the right to vote through requirements related to voter identification. Notably, these analyses occurred not under *Arlington Heights* but under separate constitutional principles which limit legislatures' ability to encumber exercise of the constitutionally protected right to vote even when acting without racially discriminatory purpose. *See, e.g.*, *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 605–06 (4th Cir.

actually "produces disproportionate effects." *Hunter*, 471 U.S. at 227;[8] *see also McCrory*, 831 F.3d at 231 ("[T]he district court's findings that African Americans . . . disproportionately lacked the photo ID required by SL 2013-381, if supported by the evidence, establishes sufficient disproportionate impact for an *Arlington Heights* analysis.").

Here, the trial court received evidence over the course of a three-week trial which included extensive expert testimony before determining that (1) Black voters were more likely to lack qualifying forms of identification than white voters and (2) the burdens of obtaining qualifying forms of identification and navigating the reasonable impediment process fell more heavily upon Black voters than white voters. Plaintiffs' expert Professor Kevin Quinn showed that, similar to House Bill 589, Senate Bill 824 was very likely to have a disproportionate impact on Black voters, who were approximately 39% more likely than white voters to lack qualifying forms of identification; when the professor's data analysis was restricted to active voters, Black voters were more than twice as likely to lack qualifying identification as white voters. A majority of this Court concludes that Professor Quinn's evidence was "fatally deficient" because he was unable to access data concerning *all* forms of qualifying identification[9] even though he testified that, while accounting for these forms of identification would likely decrease the absolute number of individuals lacking any form of qualifying identification as defined by Senate Bill 824, the ultimate racial disparity was likely to be even greater than originally estimated.[10] The trial court also heard

---

2016); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 190–91 (2008). Although these cases have some bearing on what types of voter-related requirements and restrictions have been determined to be facially unconstitutional, they do not stand for the proposition that claimants under *Arlington Heights* must demonstrate the imposition of a substantial burden along racial lines.

8. In its newly proposed standard, the majority contends that the relevant inquiry is whether a law produces a *meaningful* disparate impact along racial lines, separate and apart from the court's determination of whether the legislature acted with discriminatory intent. It is unclear what, if any, additional burden this standard imposes upon plaintiffs, but this too is a departure from *Arlington Heights*, which provided discriminatory effect as one relevant but not all-consuming factor in its constitutional analysis. 429 U.S. at 265 (holding that, although not "irrelevant," disproportionate impact is "not the sole touchstone of an invidious racial discrimination" (quoting *Washington*, 426 U.S. at 242)).

9. Specifically, Professor Quinn was unable to acquire identification databases for passports, military IDs, and veterans' IDs. He noted that these databases, by their very nature, contain highly confidential information and are not typically available for access.

10. This is due to the fact that these forms of identification are more likely to be held by whites than Blacks; for example, the trial court found that white voters are 2.4 times as likely to possess unexpired passports as Black voters.

testimony indicating that Senate Bill 824's ameliorative provisions failed to sufficiently mitigate the law's disparate impact on Black people. The trial court considered and credited evidence from the implementation of House Bill 589 which indicated that the bill's similar reasonable impediment provision had not been "uniformly provided to voters" and that the reasonable impediment process was "susceptible to error and implicit bias." To this end, the trial court found that those voters whose ballots were not counted were "much more likely" to be Black than the electorate's ballots as a whole. Finally, the trial court specifically discounted the testimony of defendants' experts as unpersuasive and incapable of rebutting the abovementioned findings.

In order to posit that these findings were not supported by competent evidence, the majority usurps the trial court's fact-finding function through its own credibility determinations and assigning its own weights to the plethora of evidence presented to the trial court. Where the majority cannot legitimately deny the trial court's statistical findings, the majority simply determines them to be overstated. In doing so, the majority both abandons the applicable standard of review and inflates plaintiffs' burden under *Arlington Heights*. *See In re I.K.*, 377 N.C. 417, 426 (2021) ("[T]his Court reviews the trial court's order to determine whether competent evidence supports the finding of fact and cannot reweigh the evidence when making this determination."); *In re J.A.M.*, 372 N.C. 1, 11 (2019) (holding that because "the trial court is uniquely situated to make . . . credibility determination[s] . . . appellate courts may not reweigh the underlying evidence presented at trial").

III. Conclusion

Our precedent, stretching back nearly 150 years into this Court's history, makes it exceedingly clear that those few and distinguished cases brought back before the Court for rehearing ought to be reconsidered only with tremendous caution.[11] Indeed, every presumption is construed in favor of the Court's previous holding, and we allow ourselves

11. *See Watson v. Dodd*, 72 N.C. 240, 240 (1875) ("The weightiest considerations make it the duty of the Courts to adhere to their decisions. No case ought to be reversed upon petition to rehear, unless it was decided hastily, or some material point was overlooked, or some direct authority was not called to the attention of the Court."); *Weisel v. Cobb*, 122 N.C. 67, 69 (1898) ("As the highest principles of public policy favor a finality of litigation, rehearings are granted by us only in exceptional cases, and then every presumption is in favor of the judgment already rendered."); *Hicks v. Skinner*, 72 N.C. 1, 2 (1875) ("[U]nless we have clearly mistaken some important fact, or overlooked some express and weighty authority, we must adhere to our decisions. We consider every case with care, and decide nothing with a venture.").

to upset our previous judgment if, and only if, we are able to determine that the previous majority either clearly mistook some important fact or overlooked an express and weighty authority in contradiction to its prior ruling. This principle exists precisely to ensure that the Court's judgments are not subject to immediate reversal upon a change in the direction of political winds. *See Weisel*, 122 N.C. at 70; *Devereux v. Devereux*, 81 N.C. 12, 16–17 (1879). Rather than abide by that lofty philosophy which has always permeated the fabric of this Court, the majority instead prefers to dismember both state and federal jurisprudence in order to demonstrate its alacrity to brandish its audacity to achieve its purposes, all while claiming to act in the name of judicial restraint. Perhaps the Chief Justice said it best when he once chose to dissent from a majority opinion of this Court when decrying judicial activism: "The ultimate damage to our jurisprudence and public trust and confidence in our judicial system is yet to be determined." *Robinson*, 375 N.C. at 214 (Newby, J., dissenting).

For these reasons, I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

IN THE MATTER OF H.B.

No. 292A22

Filed 28 April 2023

1. Termination of Parental Rights—findings of fact—reference to timeline report—independent determination of credibility and reliability

The trial court's order terminating respondent mother's rights to her daughter based on willful failure to make reasonable progress was supported by sufficient findings of fact, including the court's finding that it relied on and accepted into evidence a timeline that was introduced by the department of social services without objection, which was signed and notarized by a social worker and which summarized the department's interactions with respondent. The finding was more than a mere recitation of the evidence and constituted a proper evidentiary finding reflecting the court's independent evaluation of the evidence where the court stated specifically that it determined the timeline to be "both credible and reliable."

2. Termination of Parental Rights—best interests of the child—statutory factors—bond between mother and child

The trial court did not abuse its discretion in the disposition phase of a termination of parental rights proceeding by concluding that termination of a mother's parental rights to her daughter was in the daughter's best interests. The court's findings reflected its consideration of the relevant statutory factors contained in N.C.G.S. § 7B-1110(a), including its finding that there was no bond between the mother and her daughter, and the findings were supported by competent evidence. Any discrepancies in the evidence were within the trial court's province to resolve based on its assessment of the credibility and weight to be given to the evidence.

3. Termination of Parental Rights—amendment of juvenile petition—additional allegations—harmless error

In a termination of parental rights proceeding, where the trial court properly terminated a mother's rights to her daughter on the ground of willful failure to make reasonable progress, any error by the trial court in allowing the department of social services to amend the juvenile petition during the termination hearing in order to add allegations in support of a different ground (that the parent's rights to another child had been involuntarily terminated and the parent lacked the ability or willingness to establish a safe home) was harmless.

Justice MORGAN dissenting.

Justice EARLS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 285 N.C. App. 1 (2022), affirming an order entered on 19 August 2021 by Judge Vanessa E. Burton in District Court, Robeson County. Heard in the Supreme Court on 1 February 2023.

J. Edward Yeager Jr. for petitioner-appellee Robeson County Department of Social Services; and Matthew D. Wunsche, GAL Appellate Counsel, for appellee Guardian ad Litem.

Benjamin J. Kull for respondent-appellant mother.

DIETZ, Justice.

In this juvenile case, the trial court referenced a timeline introduced into evidence and expressly relied on that timeline for its determination. The court also made a key evidentiary finding that the timeline was "credible and reliable."

As explained below, this is a proper evidentiary finding because the trial court's order did not merely reference or recite a piece of evidence in the record. Instead, the trial court expressly evaluated that evidence, determined that it was credible, and stated that the court relied on that evidence to make findings of fact.

It is always a better practice for trial courts, in their written orders, to make specific findings about what the facts are, rather than reciting or referencing evidence in the record. Nevertheless, the court's findings in this case contain proper evidentiary findings and support the trial court's conclusion of law. Accordingly, we affirm the decision of the Court of Appeals, which in turn affirmed the trial court's order.

Facts and Procedural History

Respondent is the mother of Helena.[1] In June 2019, when Helena was four years old, the Robeson County Department of Social Services filed a petition alleging that Helena was neglected and dependent. DSS had been investigating a child protective services report involving respondent's newborn child, who had tested positive for cocaine and marijuana. Respondent told a social worker that she did not have her own residence and did not have the resources to care for her newborn.

During this time, Helena lived with her paternal grandmother. A social worker made a visit to Helena's grandmother's home and found several children, unsupervised and playing with dangerous objects. The social worker had a discussion with Helena's grandmother about the need for supervision. On a return trip, the social worker saw a group of children playing in the road outside of the grandmother's home and narrowly avoided hitting a small child—later discovered to be Helena. These events led DSS to file the initial juvenile petition.

The trial court placed Helena and her newborn sibling in nonsecure custody. Respondent agreed to a case plan that required her to complete substance abuse treatment and to maintain stable housing and employment.

Later in 2019, the trial court adjudicated both children as neglected based largely on respondent's failure to complete the goals in the case

1. We use a pseudonym to protect the juvenile's identity and for ease of reading.

plan. The trial court found that respondent had not completed her substance abuse assessment, did not have her own housing, and made intentional efforts to avoid the social workers who were overseeing her case.

After a review hearing early in 2020, the trial court found that social workers had not been able to contact respondent since October 2019. The trial court also found that respondent continued to require substance abuse treatment and mental health treatment and lacked stable housing and employment.

In July 2020, the trial court entered its first permanency planning order. The court found that respondent was not regularly visiting Helena and was not working on her case plan. The court also found that social workers had made numerous, unsuccessful attempts to contact or locate respondent. Respondent indicated a desire to relinquish her parental rights to Helena's grandmother. The court determined that relinquishment was not possible because of the grandmother's own living situation and history with social services. The trial court thus set a primary permanent plan of reunification with a concurrent plan of adoption.

Following a March 2021 hearing, the trial court entered a second permanency planning order. The court again found that respondent had not consistently visited Helena and had not made herself available to social workers. Although the order states that the court "does not change the plan," the court directed DSS "to primarily focus its efforts on the plan of adoption" with a secondary plan of guardianship with a court-approved caretaker.

In April 2021, DSS filed a petition to terminate respondent's parental rights to Helena. At the termination hearing, social worker Lataysha Carmichael testified about her work on respondent's case. During her testimony, DSS introduced a timeline into evidence. The timeline summarized DSS's interactions with respondent and reflected much of the key testimony from Carmichael. The timeline is titled "Affidavit" and is signed by Carmichael and notarized. Respondent did not object to the admission of the timeline:

> [DSS Counsel:]: Have you created — have you or the Department created a time line of efforts to work with [respondent] to reunite the family?
>
> [Carmichael:] I have.
>
> . . . .
>
> Q. And to your understanding are those facts in that affidavit true and accurate?

> A. Yes.
>
> Q. It's your understanding it is an accurate representation of all the efforts associated — strike that. Is it a recitation of the efforts by the Department to reunite this family?
>
> A. Yes.
>
> [DSS Counsel]: Your Honor, we would ask that Exhibit D be accepted into evidence.
>
> [Respondent's Counsel]: No objection.
>
> . . . .
>
> THE COURT: All right. It's admitted.

After the hearing, the trial court entered a written order terminating respondent's parental rights, with separate adjudicatory and dispositional sections. In the adjudication portion of the order, the trial court made the following relevant findings of fact:

> 7. That the Court takes judicial notice of the underlying Juvenile File 19JA173 and the Department's efforts to work with [respondent] . . . .
>
> 8. The mother, [respondent] has willfully left the child in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. . . .
>
> . . . .
>
> 15. The Court relies on and accepts into evidence the Timeline, marked DSS Exhibit '__", in making these findings and finds the said report to [be] both credible and reliable.

Based on these findings, the trial court concluded that "grounds exist based on clear, cogent and convincing evidence, to terminate the parental rights of the Respondent mother" because respondent "has willfully left the child in the legal and physical custody of the Robeson County Department of Social Services from June 11, 2019 until the present, for over 12 months without making reasonable progress to correct

the conditions that led to the removal of the child." The court then determined that termination of parental rights was in Helena's best interests.

Respondent timely appealed to the Court of Appeals. In a divided opinion, the Court of Appeals majority affirmed the trial court's order, holding that the trial court properly terminated respondent's parental rights for willful failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(2). *In re H.B.*, 285 N.C. App. 1, 17 (2022). The dissent asserted that there were insufficient findings to support the trial court's adjudication under subsection 7B-1111(a)(2); that the trial court's best interests findings were not supported by the record; and that the trial court improperly permitted DSS to amend the juvenile petition during the hearing to add an additional ground for termination under N.C.G.S. § 7B-1111(a)(9). *Id.* at 20–30 (Wood, J., dissenting).

Respondent appealed to this Court based on the dissent. *See* N.C.G.S. § 7A-30(2) (2021).

Analysis

I. Adjudication

[1] We begin with respondent's challenge to the findings of fact in the adjudication portion of the termination order. Respondent argues, based on the reasoning of the Court of Appeals dissent, that the trial court's findings of fact are insufficient to support termination of parental rights for willful failure to make reasonable progress under N.C.G.S. § 7B-1111(a)(2).

The crux of this issue is an exhibit that the parties referred to at the hearing as a "timeline" of respondent's interactions with DSS and its social workers. The exhibit was prepared by the DSS social worker assigned to respondent's case and chronicles DSS's involvement in this matter up to the time of the termination hearing.

The timeline demonstrates that Helena was in DSS custody for far more than a year; that respondent continually missed scheduled visits with Helena; that respondent continually failed to attend substance abuse and mental health appointments; that respondent avoided contact with social workers; and that respondent was aware of the scheduled visits with Helena and of the appointments required by respondent's case plan, primarily through conversations with Helena's grandmother, but simply failed to attend without explanation.

Ordinarily, when a trial court intends to find facts mirroring those in an exhibit, the best practice is to set out those findings in the written

order. Here, for example, the trial court could have made findings that respondent missed scheduled visits with her daughter on each of the many specific dates set out in the timeline. The court then could have made similar findings with respect to the missed substance abuse and mental health appointments, with respect to respondent's lack of explanation for her failure to attend these meetings, and so on.

Instead, the trial court incorporated the timeline by reference into the order. In Finding of Fact 15, the trial court stated that it "relies on and accepts into evidence" this exhibit and finds it to be "both credible and reliable":

> 15. The Court relies on and accepts into evidence the Timeline, marked DSS Exhibit '__", in making these findings and finds the said report to [be] both credible and reliable.

Respondent argues that Finding of Fact 15 is deficient because the trial court "made no findings of fact based on the content of that exhibit" and "the trial court's brief observations about the exhibit accomplish nothing."

We do not agree. The key portion of Finding of Fact 15 is the trial court's finding that the timeline and its contents are "credible and reliable." This distinguishes Finding of Fact 15 from findings in which a trial court merely references evidence in the record. These mere references—such as recitations of witness testimony at the hearing—are not proper evidentiary findings standing alone. *In re C.H.*, 381 N.C. 745, 759 (2022). But this sort of referential finding is sufficient if it also includes "an indication concerning whether the trial court deemed the relevant portion of the testimony credible." *In re A.E.*, 379 N.C. 177, 185 (2021) (cleaned up). When a trial court makes a credibility determination about recited evidence, that transforms the recited evidence from a "mere recitation" into a proper "evidentiary finding." *Id.* at 186.

Applying this principle here, Finding of Fact 15 is a proper evidentiary finding because the trial court did not merely accept and rely upon the timeline and its contents; the court went further and expressly evaluated those contents and determined that they were credible and reliable based on other evidence received at the hearing.

We stress that our holding today is not an endorsement of this sort of fact finding. As noted above, the better practice always will be to make specific, express findings in the written order about what the trial court determined the facts to be, rather than referencing evidence in the

record and stating that the referenced evidence is credible. Nevertheless, Finding of Fact 15 is a proper evidentiary finding that incorporates all the contents of the timeline as the trial court's findings of fact.

Although respondent challenged the sufficiency of Finding of Fact 15, respondent did not argue that this timeline and its contents are unsupported by clear, cogent, and convincing evidence in the record. Thus, Finding of Fact 15 is binding on this court. That finding, together with the trial court's other findings, support the trial court's conclusion of law that respondent willfully left her child in DSS custody for more than 12 months without making reasonable progress to correct the conditions that led to the child's removal. Accordingly, the Court of Appeals properly affirmed the trial court's adjudication under N.C.G.S. § 7B-1111(a)(2).[2]

II. Disposition

[2] We next address respondent's challenge to the trial court's disposition portion of the trial court's order. After a trial court determines that one or more grounds exist for terminating parental rights, the court moves on to the dispositional stage, where the court assesses whether termination of parental rights is in the child's best interests. N.C.G.S. § 7B-1110 (2021).

We review the trial court's best interests determination at the disposition stage solely for abuse of discretion. *In re Z.L.W.*, 372 N.C. 432, 435 (2019). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re C.S.*, 380 N.C. 709, 712 (2022) (cleaned up).

---

2. The Court of Appeals also made the following statement in its analysis:

> The trial court also makes a purported conclusion of law, which is better characterized as a finding of fact, in paragraph 3, subsection b, that reads: "The Respondent mother . . . has willfully left the child in the legal and physical custody of [DSS] from June 11, 2019 until the present, for over 12 months without making reasonable progress to correct the conditions that led to the removal of the child[.]

In re H.B., 285 N.C. at 15–16 (emphasis omitted). This is not a correct statement. This portion of the trial court's order, contained in Conclusion of Law 3(b), is a conclusion of law that tracks the statutory language in N.C.G.S. § 7B-1111(a)(2). We must treat it as such. *See, e.g.*, *In re J.C.J.*, 381 N.C. 783, 793 n.3 (2022). We therefore modify this portion of the Court of Appeals' decision as contrary to well-established law.

In evaluating a child's best interests, trial courts are required to consider a series of enumerated statutory criteria:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C.G.S. § 7B-1110(a).

The trial court must consider each of these statutory factors, but the court is "only required to make written findings regarding those factors that are relevant." *In re A.R.A.*, 373 N.C. 190, 199 (2019). "A factor is relevant if there is conflicting evidence concerning the factor." *In re E.S.*, 378 N.C. 8, 12 (2021).

"We review the trial court's dispositional findings of fact to determine whether they are supported by the evidence received before the trial court." *In re L.G.G.*, 379 N.C. 258, 272 (2021). Under this standard, we cannot reweigh the evidence or judge its credibility; we must uphold that trial court's fact findings if they are supported by *any* evidence in the record. *In re S.M.*, 380 N.C. 788, 791 (2022).

Respondent, based on the dissent in the Court of Appeals, challenges the trial court's finding that "there is no bond between the minor child and [respondent]." Respondent contends that no evidence supports this finding. This is wrong. There was *some* evidence that respondent had no bond with her child, including respondent's repeated, consistent failure to visit her child and her failure to make any efforts to contact or care for her child for a long period of time.

To be sure, there was counterevidence as well, such as the report of the guardian ad litem, which stated that the child "still has a bond" with respondent. But under the applicable standard of review, we cannot weigh this competing evidence. The trial court, as the fact finder, "is the sole judge of the credibility and weight to be given to the evidence, and it is not the role of the appellate court to substitute its judgment for

that of the trial court." *In re N.P.*, 374 N.C. 61, 66 (2020). The trial court, examining all of the competing evidence in this case, credited most of the guardian ad litem's report but rejected that particular assertion, along with the other evidence indicating a bond between respondent and her child. Instead, the court credited the testimony and evidence indicating respondent had no bond with her child, and made a corresponding finding of fact. That finding is supported by at least some evidence in the record and is therefore binding on appeal.

Respondent does not argue that the trial court's best interests determination is otherwise infirm, and it is not. The trial court made findings based on the relevant statutory criteria and its determination, in light of those findings, was well within the trial court's sound discretion. We therefore reject respondent's challenge to the trial court's disposition order.

III. Amendment of juvenile petition

[3] Finally, respondent argues that the trial court erred by permitting DSS to amend the juvenile petition during the termination hearing. This amendment added allegations under N.C.G.S. § 7B-1111(a)(9), which applies when "parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home."

Any error in amending the petition is harmless in light of our holding above. When "the trial court finds multiple grounds on which to base a termination of parental rights, and an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds." *In re E.H.P.*, 372 N.C. at 395 (cleaned up). Because we hold that the trial court properly terminated respondent's parental rights under N.C.G.S. § 7B-1111(a)(2) for willfully failing to make reasonable progress, there is no need to address the trial court's findings and conclusions concerning the other grounds. Thus, even if the trial court erred by permitting an amendment that added an additional ground for termination, that error was harmless.

Conclusion

We modify and affirm the judgment of the Court of Appeals.

MODIFIED AND AFFIRMED.

Justice MORGAN dissenting.

Although I agree with the majority that potentially there was ample evidence in the record from which the trial court in this case *could* have made findings to support its termination of respondent-mother's parental rights, I disagree with the majority that the trial court fulfilled its fact-finding duty by making findings with sufficient specificity from which an appellate forum such as this Court could determine whether those findings of fact, in turn, supported the trial court's ultimate findings of fact and conclusions of law. I also take issue with the majority's conclusion that the trial court did not abuse its discretion at the dispositional stage in finding that there was no bond between Helena and respondent-mother, when all of the competent record evidence indicated that a parent-child bond certainly did exist. I would vacate the trial court's order and remand the case for further findings by the trial court.

I. Adjudication

I agree with respondent-mother and with the dissenting view of the Court of Appeals that the trial court did not make adequate material findings of fact upon which to support its ultimate findings of fact and conclusions of law at the adjudicatory stage of respondent-mother's termination of parental rights proceeding. This Court reviews a trial court's findings at the adjudicatory stage in order to determine whether the trial court's findings of fact are supported by "clear and convincing evidence," *In re W.K.*, 376 N.C. 269, 277 (2020) (citing N.C.G.S. § 7B-1111(b) (2019)), with de novo review as to "whether those findings support the trial court's conclusions of law[,]" *In re B.O.A.*, 372 N.C. 372, 379 (2019); *see also In re J.S.*, 374 N.C. 811, 814 (2020). The appellate courts, however, are not permitted to supplement the trial court's findings of fact with additional or different findings that were not actually made by the trial court, although they may have been indicated by record evidence. *See In re Montgomery*, 311 N.C. 101, 111 (1984) ("[W]e must review the evidence in order to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law . . . [because] appellate courts should refrain from accepting as facts of a case[ ] findings that are not part of the record on appeal."); *Coble v. Coble*, 300 N.C. 708, 712–13 (1980) ("It is not enough that there may be evidence in the record sufficient to support findings which *could have been made*. The trial court must itself determine what pertinent facts are actually established by the evidence before it . . . .").

This standard recognizes the statutory duty of the trial court, when determining a legal matter on the case's facts without a jury, such as in a

termination of parental rights proceeding, to "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. § 1A-1, Rule 52(a)(1) (2021).[1] Under Rule 52(a), three "separate and distinct acts" are required of the trial court: it must "(1) find the facts specially, (2) state separately the conclusions of law resulting from the facts so found, and (3) direct the entry of the appropriate judgment." *Quick v. Quick*, 305 N.C. 446, 451 (1982). The proper recognition and implementation of this principle is critical, because as this Court has reasoned:

> The trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him. He passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If different inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected.

Knutton v. Cofield, 273 N.C. 355, 359 (1968) (citations omitted). Although the trial court is not required to recite "*all* evidentiary facts presented at [the] hearing" in its order, it is required to find "specially . . . those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *Quick*, 305 N.C. at 451 (emphasis added). "In other words, a proper finding of facts requires a specific statement of the facts on which the rights of the parties are to be determined, and those findings *must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment*." *Id.* (emphasis added).

The trial court in the present case made the following fourteen findings of fact when the tribunal entered its written termination order which terminated the parental rights of respondent-mother with respect to Helena on 19 August 2021:

> 1. The name of the juvenile is [Helena], as evidenced by the child's Birth Certificate attached to the filed Petition, which is to be made part of this paragraph as if fully set forth herein.

---

1. This Court has held that N.C.G.S. § 7B-1109(e) "places a duty on the trial court as the adjudicator of the evidence" which is equivalent to that imposed by Rule 52(a)(1). *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citing N.C.G.S. § 1A-1, Rule 52(a)(1) (2019)).

2. The child, [Helena], currently resides in a licensed foster home, under the supervision, direction and custody of the Robeson County Department of Social Services.

3. The mother of the child is [respondent-mother]. [Respondent-mother] was served with a copy of the Petition to Terminate Parental Rights on April 8, 2021. [Respondent-mother] had notice of this proceeding today.

4. That there is no father listed on the child's birth certificate. That an unknown father was served by process of publication.

5. That a Juvenile Petition and Non-Secure Custody Order were filed regarding the minor child, on June 11, 2019.

6. On September 12, 2019, the [c]ourt adjudicated the child, [Helena], as a neglected juvenile pursuant to N.C.G.S. 7B-101 (15).

7. That the Court takes judicial notice of the underlying Juvenile File 19JA173 and the Department's efforts to work with the Respondent mother . . . [and] the Respondent Unknown father of the child . . . .

8. The mother, [respondent-mother] has willfully left the child in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile. There is a high likelihood that the neglect would continue.

10. The mother, [respondent-mother] has neglected the juvenile in that the juvenile lives in an environment injurious to the juvenile['s] welfare.[2]

11. The mother, [respondent-mother] failed to pay a reasonable portion of the costs of the children's

2. The trial court did not include a Finding of Fact 9 in its order.

care for a continuous period of six months immediately preceding the filing of the petition, although physically and financially able to do so.

12. The parental rights with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home.

13. That the unknown father, has willfully left the child in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting the conditions that led to the child's removal; has failed to file an affidavit of paternity in a central registry maintained by the Department of Health and Human Services; [has not] legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose; [has not] legitimated the juvenile by marriage to the mother of the juvenile; has not provided substantial financial support or consistent care with respect to the juvenile and mother; has not established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

14. As such, and based on clear, cogent and convincing evidence, grounds exist to terminate the parental rights of the Respondent mother . . . and the Respondent unknown father.

15. The Court relies on and accepts into evidence the Timeline, marked DSS Exhibit '__", in making these findings and finds the said report to [be] both credible and reliable.

Based upon these findings of fact, the trial court drew these conclusions of law:

1. That the Court has jurisdiction over the parties and subject matter herein pursuant to Article 11 of Chapter 7B of the North Carolina General Statutes.

2. That the Petitioner, the Robeson County Department of Social Services, is authorized to file this petition pursuant to North Carolina General Statutes 7B-1103(3) for the reason that the Department has been awarded custody of the minor child, pursuant to Custody Orders entered by the undersigned, which are part of the underlying Juvenile File, 19JA173, and made part of this paragraph as if fully set forth herein.

3. That grounds exist based on clear, cogent and convincing evidence, to terminate the parental rights of the Respondent mother . . . and Respondent unknown father, pursuant to North Carolina General Statute[s] 7B-1111 in that:

    a. The juvenile has been placed in the custody of the Robeson County Department of Social Services for a continuous period of six months next preceding the filing of the [p]etition, and

    b. The Respondent mother . . . has willfully left the child in the legal and physical custody of the Robeson County Department of Social Services from June 11, 2019 until the present, for over 12 months without making reasonable progress to correct the conditions that led to the removal of the child; and

    c. The Respondent mother . . . has neglected the juvenile in that the juvenile live[s] in an environment injurious to the juvenile['s] welfare; and

    d. The Respondent mother . . . has willfully failed to pay a reasonable portion of the costs of the child's care for a continuous period of six months immediately preceding the filing of the petition, although physically and financially able to do so; and

    e. The parental rights of the [parent] with respect to another child of the parent have been [terminated] involuntarily by a court of competent jurisdiction and the parent lacks

> the ability or willing[ness] to establish a safe home; and
>
> f. That the unknown father, has willfully left the child in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made in correcting the conditions that led to the child's removal; has failed to file an affidavit of paternity in a central registry maintained by the Department of Health and Human Services; [has not] legitimated the juvenile pursuant to provisions of G.S. 49-10, G.S. 49-12.1, or filed a petition for this specific purpose; [has not] legitimated the juveniles by marriage to the mother of the juveniles; has not provided substantial financial support or consistent care with respect to the juvenile and mother; has not established paternity through G.S. 49-14, 110-132, 130A-101, 130A-118, or other judicial proceeding.

Among these conclusions, the trial court ultimately found four grounds to terminate respondent-mother's parental rights in its written order: (1) that respondent-mother had neglected Helena by allowing her to live in an environment injurious to her welfare pursuant to N.C.G.S. § 7B-1111(a)(1); (2) that respondent-mother had willfully left Helena in foster care or placement outside the home for more than twelve months without showing that reasonable progress had been made to correct those conditions which had led to her removal pursuant to N.C.G.S. § 7B-1111(a)(2); (3) that respondent-mother had willfully failed to pay a reasonable portion of the cost for Helena's care for a continuous period of six months preceding the filing of the petition although physically and financially able to do so pursuant to N.C.G.S. § 7B-1111(a)(3); and (4) that the respondent-mother's parental rights with respect to another child[3] had been terminated involuntarily and that respondent-mother lacked the ability or willingness to establish a safe home pursuant to N.C.G.S. § 7B-1111(a)(9). *See* N.C.G.S. § 7B-1111(a)(1)–(3), (9) (2021).

I disagree with the majority's determination that the trial court's findings of fact were premised on clear, cogent, and convincing evidence

3. Helena's younger brother A.L.

in order to establish the existence of grounds to terminate respondent-mother's parental rights. The trial court's findings were woefully deficient and, while the evidence in the record possibly may have amply supported sufficient findings of fact to substantiate grounds for the termination of respondent-mother's parental rights, the majority artificially bolsters the trial court's inadequate findings with an unfortunate relaxation of this Court's standards while simultaneously augmenting the trial court's shallow findings. Curiously, the majority readily acknowledges the trial court's failure to comply with the criteria for acceptable findings of fact, electing to couch the trial court's shortcomings in articulating sound findings as the forum's mere neglect to follow "the better practice" or the "best practice" of crafting proper findings of fact, instead of deeming the findings here to fall short of our stated principle that a proper finding of facts requires a sufficiently specific statement of the facts. As a result, I view the trial court's material findings of fact to be inadequate to sufficiently support its ultimate facts, and, in turn, the trial court's conclusions of law are faultily reached.

"Findings of fact are statements of what happened in space and time." *State ex rel. Utils. Comm'n v. Eddleman*, 320 N.C. 344, 351 (1987). "Facts are things in space and time that can be objectively ascertained by one or more of the five senses or by mathematical calculation" and that, "in turn, provide the bases for conclusions." *State ex rel. Utils. Comm'n v. Pub. Staff*, 322 N.C. 689, 693 (1988) (citing *Eddleman*, 320 N.C. at 351). Meanwhile, "any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." *State v. Sparks*, 362 N.C. 181, 185 (2008) (quoting *In re Helms*, 127 N.C. App. 505, 510 (1997)). "Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other." *Woodard v. Mordecai*, 234 N.C. 463, 472 (1951). "Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *In re Anderson*, 151 N.C. App. 94, 97 (2002) (quoting *Appalachian Poster Advert. Co. v. Harrington*, 89 N.C. App. 476, 479 (1988)).

The trial court's findings of material fact, findings of ultimate fact, and conclusions of law comprised an amalgamation of cluttered entries which do not afford meaningful appellate review. Except for the initial six findings of fact and the first two conclusions of law which combine to address jurisdiction and standing, in my view, none of the tribunal's findings of fact are sufficient to support its conclusions of law; consequently, the resulting conclusions of law are insufficient to support the trial court's termination of respondent-mother's parental rights.

There are several manifestations of these inadequacies in the trial court's order here. For example, Findings of Fact 8, 10, 11, and 12 are not findings of fact as contemplated by our aforementioned appellate court precedents because they are mere regurgitations of the relevant statutory language. Hence, they are plainly insufficient to allow this Court to determine whether the trial court formed its conclusions through the processes of logical reasoning and based on the specific evidentiary record before it. In *Coble*, after vacating an order requiring a mother to provide partial child support due to inadequate findings of fact by the trial court and remanding the case, we explained the outcome in this manner:

> Our decision to remand this case for further evidentiary findings is not the result of an obeisance to mere technicality. *Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by which the order's rationale is articulated.* Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. *Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.*

300 N.C. at 714 (emphases added). It is this Court's responsibility, when called upon to examine a trial court's order, to ensure that the decree at issue comports with required standards and principles. "Accordingly, this Court reviews the termination order to determine whether the trial court made sufficient factual findings to support its ultimate findings of fact and conclusions of law, regardless of how they are classified in the order." *In re Z.A.M.*, 374 N.C. 88, 97 (2020); *see also In re A.H.F.S.*, 375 N.C. 503, 510 (2020) ("Regardless of whether [a trial court's determination of willfulness] is classified as an ultimate finding of fact or a conclusion of law, it still must be sufficiently supported by the evidentiary findings of fact."). Therefore, a trial court's findings must amount to more "than a recitation of allegations. They must be the 'specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence.' " *In re Anderson*, 151 N.C. App. at 97 (alteration in original) (quoting *Montgomery v. Montgomery*, 32 N.C. App. 154, 156–57 (1977)).

Based upon these well-established guideposts for appellate review of a trial court's order—particularly an order which contains such far-reaching consequences as the termination of a parent's rights to a child—it is difficult to comprehend the majority's cavalier approach that the trial court's order in the present case merely constitutes an infraction of "better" or "best" practices, when Findings of Fact 8, 10, 11, and 12 here can hardly be rationalized to evince the trial court's engagement in the processes of logical reasoning required at an adjudicatory hearing. *See In re J.W.*, 241 N.C. App. 44, 45 ("At an adjudicatory hearing, the trial court must, *through processes of logical reasoning*, *based on the evidentiary facts before it*, find the ultimate facts essential to support the conclusions of law." (emphasis added) (quoting *In re O.W.*, 164 N.C. App. 699, 702 (2004))), *disc. review denied*, 368 N.C. 290 (2015). My application of the customary guideposts for appellate review of a trial court's order does not support the majority's satisfaction with the identified findings of fact that these findings exhibited a process of logical reasoning by the trial court when they amount only to near-verbatim recitations of the relevant statutory language, with no reference to the particular evidentiary facts or circumstances of the case which were before the trial court. Therefore, I would hold that Findings 8, 10, 11, and 12 are not sufficient determinations upon which the trial court could have drawn its conclusions of law because these insufficient findings preclude effective appellate review as to whether the trial court correctly exercised its function to find the specific facts of the case and to apply the law to such facts.

In its Finding of Fact 7, the trial court "takes judicial notice of the underlying Juvenile File 19JA173 and the Department's efforts to work with the Respondent mother . . . [and] the Respondent Unknown father of the child." As previously observed and substantiated in this viewpoint, a determination such as Finding of Fact 7 is an insufficient finding under *Quick* because no fact has been specially found, with no material fact established or ultimate fact reached from which it can be determined whether the finding is supported by the evidence. *See Quick*, 305 N.C. at 451. Additionally, such a finding which is based upon a trial court's judicial notice of an underlying case file fails to derive any factual determinations from it which could be properly reviewed on appeal. *Cf. In re J.C.M.J.C.*, 268 N.C. App. 47, 57 (2019) ("To allow the trial court to find adjudicatory facts simply by taking judicial notice of its prior findings . . . risks insulating the adjudicatory findings from appellate review and undermines the procedural safeguards for adjudications prescribed by [the General Statutes.]").

In like fashion, the trial court's Finding of Fact 15—the entry which attracts the majority's primary focus—is similarly lacking in that it is bereft of the necessary emphasized features which properly qualify it to be a sufficient finding of fact and an element of an actual ultimate fact which, in turn, could lead to a legally acceptable conclusion of law. Finding of Fact 15 indicated that the trial court "relies on and accepts into evidence the Timeline, marked DSS Exhibit '___", in making these findings and finds the said report to [be] both credible and reliable." Although the trial court clearly fails to identify what, if any, actual facts that it found in reliance on this Timeline, nonetheless the majority expressly declares that Finding of Fact 15 is supported by the undisputed evidentiary standard of "clear, cogent and convincing" by virtue of the majority's willingness to gratuitously scour the records in order to fortify the finding, despite this Court's unequivocal admonition in *In re Montgomery* against such an act which the majority has implemented.

Based upon these observations, I would vacate the trial court's written termination order and remand the case for further and fuller development of sufficient findings of fact in order to permit effective appellate review with regard to the properness of the trial court's ultimate findings of fact and resulting conclusions of law.

II. Disposition

I also agree with the positions of respondent-mother and the lower appellate court's dissent that the trial court abused its discretion by entering a finding that there was no bond between Helena and respondent-mother. This Court reviews a trial court's determination at the dispositional stage of a termination of parental rights proceeding for abuse of discretion, which requires an appellate court to defer to the lower court's decision "unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." *In re Z.A.M.*, 374 N.C. at 100 (quoting *Briley v. Farabow*, 348 N.C. 537, 547 (1998)). "The standard of review that applies to an assignment [of error] challenging a dispositional finding is whether the finding is supported by competent evidence." *In re C.M.*, 183 N.C. App. 207, 212 (2007). "The court's dispositional findings are binding on appeal if supported by any competent evidence[,]" *In re J.B.*, 379 N.C. 233, 235–36 (2021), even if there was evidence presented that would support a finding to the contrary, *In re K.S.*, 183 N.C. App. 315, 323 (2007).

In relevant part, the trial court's written order in this case contains the following dispositional finding: "[T]here is no bond between the minor child and the Respondent mother." Despite the majority's representations

to the contrary, this finding was not supported by any competent evidence. It is noteworthy that the Robeson County Department of Social Services' own witness testified during the termination of parental rights hearing that Helena recognized respondent-mother as her mother, that Helena was happy to see respondent-mother when visits between the two of them occurred, and that said visits "[w]ent well." Additionally, the guardian ad litem's report which was submitted as evidence to support the petition to terminate parental rights specifically and candidly stated that "[e]ven though [Helena had] been in foster care for over two years, she still [had] a bond with her mother" and that Helena loved and missed her mother. While the majority heavily relies upon its depiction of the record evidence that there was *some* evidence presented which tended to indicate that Helena's mother did not have a *strong* maternal bond with Helena, nonetheless there was still *no* evidence presented which showed that Helena and respondent-mother shared *no* bond whatsoever as indicated by the trial court's findings. *Cf. In re R.G.L.*, 379 N.C. 452, 464–65 (2021) (holding that a trial court's finding that a minor child had "absolutely no bond" with his parents was not supported by the evidence when the evidence tended to show that the respondent-parents attended visits with the child and a social worker testified that the child and his mother shared a bond even though evidence was presented that the respondent-parents were repeatedly tardy for and demonstrated a lack of engagement with the aforementioned visits). This is yet another example, demonstrated in the appellate review of the disposition phase of the proceedings just as it was in the adjudication phase, of the majority's unfortunate penchant for excusing the trial court's failure to adhere to established standards for rooting the lower court's findings in the record evidence through the majority's willingness to relax our clear principles in this area of the law.

Because "the weight assigned to . . . the various dispositional factors in N.C.G.S. § 7B-1110(a)[ ] is the sole province of the trier of fact[,]" *In re B.E.*, 375 N.C. 730, 749, (2020), it is impermissible upon this dissenting view to speculate as to whether the trial court would have made the same dispositional determination in the absence of the trial court's finding that Helena and respondent-mother shared no bond. I would therefore remand this case to the trial court based on the disposition phase as well.

III. Conclusion

A trial court must make sufficiently specific material findings of fact to support its ultimate findings of fact and conclusions of law such that an appellate court can determine whether the trial court has properly

exercised the forum's function to find the facts specially and to apply the pertinent law to the findings of fact. In the absence of such findings which serve as the foundation for the remainder of the elements of a trial court's proper order as illustrated in *Quick*, I would vacate the trial court's order and remand for further findings.

I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

IN THE MATTER OF R.A.F., R.G.F.

No. 274A22

Filed 28 April 2023

1. Appeal and Error—appellate jurisdiction—discretion to issue writ of certiorari—not limited by Rules of Appellate Procedure

The Court of Appeals had jurisdiction to review the trial court's order terminating a mother's parental rights where, although the mother filed a pro se notice of appeal addressed to the Supreme Court rather than to the Court of Appeals, the intermediate appellate court and opposing parties received notice of the appeal and all parties filed briefs in the correct court. The Court of Appeals properly exercised its discretion pursuant to N.C.G.S. § 7A-32(c) in issuing a writ of certiorari in aid of its jurisdiction, which was not limited by the Rules of Appellate Procedure or by any statute.

2. Termination of Parental Rights—parental right to counsel—failure of respondent to appear—dismissal of provisional counsel—statutory requirements met

The trial court acted in accordance with N.C.G.S. §§ 7B-1108.1(a)(1) and 7B-1101.1(a)(1) in a termination of parental rights matter when it dismissed respondent mother's provisional counsel after respondent failed to appear at a pretrial hearing. Respondent did not challenge the court's determination that all service and notice requirements had been met and did not argue that she lacked notice of the hearing in her arguments to the Court of Appeals, which erred by addressing the notice issue without first being presented with that issue.

Justice MORGAN concurring in part and dissenting in part.

Justice EARLS joins in this concurring in part and dissenting in part opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 284 N.C. App. 637 (2022), vacating orders entered on 15 July 2021 by Judge Mack Brittain in District Court, Henderson County, and remanding for a new hearing. Heard in the Supreme Court on 31 January 2023.

James L. Palmer for petitioner-appellants.

Peter Wood for respondent-appellee mother.

BARRINGER, Justice.

To reach the merits raised by this appeal, we first must address whether the Court of Appeals had jurisdiction to hear respondent-mother's appeal. Since we conclude that the Court of Appeals did have jurisdiction, we proceed to the merits on appeal concerning the trial court's dismissal of respondent-mother's provisional counsel upon respondent-mother's failure to appear at the termination-of-parental- rights hearing. We hold that the Court of Appeals erred by vacating the trial court's orders and remanding for a new hearing based on its concerns about the fundamental fairness of the procedures afforded respondent-mother before the trial court dismissed her provisional counsel in accordance with N.C.G.S. § 7B-1108.1(a)(1) and N.C.G.S. § 7B-1101.1(a)(1). Because the trial court complied with N.C.G.S. § 7B-1108.1(a)(1) and N.C.G.S. § 7B-1101.1(a)(1), the trial court did not err. Accordingly, we reverse the decision of the Court of Appeals and remand to the Court of Appeals to address respondent-mother's remaining argument that the trial court erred by not appointing a guardian ad litem on behalf of her minor children.

I. Jurisdiction

[1] Respondent-mother, acting pro se, filed a notice of appeal addressed to this Court, rather than the Court of Appeals, on 13 August 2021. The legislature had recently amended N.C.G.S. § 7B-1001, which addresses the right to appeal orders in matters under the Juvenile Code's Subchapter on Abuse, Neglect, and Dependency. An Act to Modify the

Right to Appeal in Termination of Parental Rights Cases, S.L. 2021-18, 2021 N.C. Sess. Laws 73. The amendments repealed the right to appeal an order terminating parental rights from a district court directly to the Supreme Court of North Carolina. § 1, 2021 N.C. Sess. Laws at 73–74. The amendments also added the right to appeal to the Court of Appeals an order terminating parental rights. § 2, 2021 N.C. Sess. Laws at 74. These changes were effective on 1 July 2021, just a month before respondent-mother filed her pro se notice of appeal. § 5, 2021 N.C. Sess. Laws at 75.

Despite the notice being addressed to the wrong court, the Court of Appeals and opposing parties received notice of the appeal and briefed the appeal in the Court of Appeals as if properly filed. A divided panel of the Court of Appeals elected to exercise its discretion to issue a writ of certiorari in aid of its jurisdiction, as authorized by N.C.G.S. § 7A-32(c). *See In re R.A.F.*, 284 N.C. App. 637, 642 (2022); *see also* N.C.G.S. § 7A-32(c) ("The Court of Appeals has jurisdiction . . . to issue the prerogative writs, including . . . certiorari . . . in aid of its own jurisdiction . . . .").

In its opinion, the Court of Appeals majority stated that "pursuant to North Carolina Rules of Appellate Procedure 21(a)(1)," it would treat respondent-mother's pro se notice of appeal to the Supreme Court of North Carolina and subsequent brief by appointed counsel as a petition for writ of certiorari. *Id.* This led the dissent to contend that the Rules of Appellate Procedure do not permit the Court of Appeals to construe these filings as a petition for a writ of certiorari because the filings "clearly do not meet the requirements set forth in Rule 21(c)." *Id.* at 650 (Tyson, J., dissenting). As a result, the dissent argued that the majority could issue the writ of certiorari only if it invoked "the provisions of Rule 2 of the Rules of Appellate Procedure" and excuse the noncompliance with Rule 21. *Id.*

This discussion of the Rules of Appellate Procedure—by both the majority and the dissent—is a non sequitur. As Rule 1 of the Rules of Appellate Procedure explains, "[t]hese rules shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law." N.C. R. App. P. 1(c).

By law, the Court of Appeals has *jurisdiction* to issue a writ of certiorari in any case in aid of its own jurisdiction. N.C.G.S. § 7A-32(c) (2021). Rule 21, by contrast, provides a *procedure* that *litigants* must use to petition for a writ of certiorari. Thus, Rule 21 does not limit the Court of Appeals itself. As we held in *State v. Ledbetter*, notwithstanding the procedural limits of Rule 21, "the Court of Appeals maintains broad jurisdiction to issue writs of certiorari unless a more specific statute revokes or limits that jurisdiction." 371 N.C. 192, 195 (2018). Here, no

statute limits the Court of Appeals' authority to issue a writ of certiorari in these circumstances, so the Court of Appeals "has jurisdiction and authority to issue the writ of certiorari here." *State v. Killette*, 381 N.C. 686, 691 (2022).

In sum, the Court of Appeals expressly indicated that it was exercising its discretion to issue a writ of certiorari. The circumstances of this case, as noted above, permit the Court of Appeals to do so in the exercise of its sound discretion. Accordingly, the Court of Appeals properly had appellate jurisdiction in this case. We reject the dissent's assertion to the contrary.

II. Dismissal of Provisional Counsel Pursuant to N.C.G.S. § 7B-1101.1(a)(1)

[2] We now turn to the merits of the appeal concerning the trial court's dismissal of respondent-mother's provisional counsel after respondent-mother failed to appear at the termination-of-parental-rights hearing.

A. Trial Court Proceedings

On 6 April 2021, petitioners filed a petition for termination of parental rights. Respondent-mother was personally served with the petition and summons and was appointed provisional counsel. Respondent-mother's provisional counsel moved for an extension of time to respond to the petition. The trial court granted the motion. Thereafter, petitioners filed a notice of hearing to proceed on all issues raised by their petition and served the notice on respondent-mother's provisional counsel but not on respondent-mother. Respondent-mother did not appear at the hearing on the noticed date. During the pre-hearing, the trial court called respondent-mother's name to see if she was present. Hearing nothing, the trial court then conducted a limited inquiry of provisional counsel, asking, "[A]ny contact from your client, ma'am?" Provisional counsel responded,

> Your Honor, she reached out to me, initially, when she was served. I did hear from her. She never came into the office for her appointment. She did contact my office and say she was in a treatment facility.
>
> I contacted that facility. She apparently graduated successfully, but has not contacted my office since then. It's been probably April since I heard from her.

Having heard this, the trial court thanked provisional counsel and said, "[S]o requested then by our legislature, I'll release you at this time."

After the termination hearing, the trial court entered orders terminating respondent-mother's parental rights. Respondent-mother appealed on the basis that the trial court abused its discretion by dismissing her provisional counsel, holding the termination hearing without respondent-mother or her provisional counsel present, and failing to properly inquire into provisional counsel's attempt to contact respondent-mother.

B. Court of Appeals' Decision

The Court of Appeals held that the trial court reversibly erred by dismissing respondent-mother's provisional counsel in accordance with N.C.G.S. § 7B-1101.1(a)(1) without asking her provisional counsel about provisional counsel's efforts to: (1) communicate with respondent-mother and (2) inform respondent-mother of the date and time of the termination hearing. *In re R.A.F.*, 284 N.C. App. at 647. In other words, "the trial court committed reversible error by not ensuring that [respondent-m]other's substantial rights to counsel and to adequate notice of such proceedings were protected." *Id.*

The dissent disagreed, arguing that the trial court was "statutorily required to 'consider the . . . [r]etention or release of provisional counsel,' and '[w]hether all summons, service of process, and notice requirements have been met.' " *Id.* at 653 (Tyson, J., dissenting) (alterations in original) (quoting N.C.G.S. § 7B-1108.1(a)(1), (3) (2021)). Subsection (a)(1) of N.C.G.S. § 7B-1101.1 additionally requires that: "At the first hearing *after service* upon the respondent parent, the court *shall dismiss* the provisional counsel if the respondent parent: [d]oes not appear at the hearing." *Id.* (quoting N.C.G.S. § 7B-1101.1(a)(1) (2021)).

In this matter, "[t]he trial court found and concluded [that] all service and notice requirements had been met and that [respondent-m]other's provisional attorney should be released, despite efforts by the respective attorney to engage the [respondent-m]other in the participation of this proceeding." *Id.* (cleaned up). Since these findings and conclusions were unchallenged, the dissent recognized that the Court of Appeals was bound to them on appeal. *Id.*

According to the dissent, the only issue was whether respondent-mother had "argued and shown an abuse of discretion and reversible error in the trial court's decision." *Id.* at 654. The dissent concluded respondent-mother had not met her burden and would have affirmed the trial court's orders. *Id.*

We agree with the dissent that respondent-mother has not shown error reversible by the Court of Appeals. Unlike prior cases addressed

by this Court, this appeal involves the unilateral dismissal of provisional counsel by the trial court in accordance with N.C.G.S. § 7B-1108.1(a)(1) and N.C.G.S. § 7B-1101.1(a)(1). These statutes are abundantly clear.

Section 7B-1108.1 states that:

> (a) The court shall conduct a pretrial hearing. However, the court may combine the pretrial hearing with the adjudicatory hearing on termination in which case no separate pretrial hearing order is required. *At the pretrial hearing, the court shall consider the following*:
>
> (1) *Retention or release of provisional counsel.*
>
> (2) Whether a guardian ad litem should be appointed for the juvenile, if not previously appointed.
>
> (3) *Whether all summons, service of process, and notice requirements have been met.*
>
> (4) Any pretrial motions.
>
> (5) Any issues raised by any responsive pleading, including any affirmative defenses.
>
> (6) Any other issue which can be properly addressed as a preliminary matter.
>
> (b) Written notice of the pretrial hearing shall be in accordance with [N.C.]G.S. [§] 7B-1106 and [N.C.] G.S. [§] 7B-1106.1.

N.C.G.S. § 7B-1108.1 (emphases added).

Subsection (a) of N.C.G.S. § 7B-1101.1 states that:

> (a) The parent has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right. The fees of appointed counsel shall be borne by the Office of Indigent Defense Services. *When a petition is filed, unless the parent is already represented by counsel, the clerk shall appoint provisional counsel for each respondent parent* named in the petition in accordance with rules adopted by the Office of Indigent Defense Services, shall indicate the appointment on the juvenile summons, and shall provide a copy of the summons and petition to the attorney. *At the first hearing after service upon the respondent parent,*

> *the court shall dismiss the provisional counsel if the respondent parent*:
>
> (1) *Does not appear at the hearing*;
>
> (2) Does not qualify for court-appointed counsel;
>
> (3) Has retained counsel; or
>
> (4) Waives the right to counsel.
>
> The court shall confirm the appointment of counsel if subdivisions (1) through (4) of this subsection are not applicable to the respondent parent. The court may reconsider a parent's eligibility and desire for appointed counsel at any stage of the proceeding.

N.C.G.S. § 7B-1101.1(a) (emphases added).

The trial court's findings of fact and conclusions of law relating to the pretrial hearing and notice are also clear and unchallenged:

> The Respondent Mother was served by Henderson County Sheriff on July 16, 2021, and upon the filing of this action, was provisionally appointed [an] attorney. . . . Returns of service for each Respondent appear in the court file, and the Notice of Hearing (filed on June 23, 2021) gives proper notice for this hearing.
>
> Neither Respondent was present at the 9:00am calendar call and was not present at the time of the hearing, which began at approximately 9:40am;
>
> The [c]ourt further finds that subject matter jurisdiction, notice of hearing, and personal jurisdiction as to the Respondents in this matter are proper;
>
> As to other pre-trial hearing matters, the court notes that . . . neither Respondent has sought to contest the Petition; there are no issues or pre-trial motions raised by any party, no responsive pleading has been submitted by the Respondent (although the court notes that a Motion and Order for extension of time in regards to the Respondent Mother appears in the court file). . . . All service and notice requirements have been met. The provisionally appointed attorneys for each Respondent should be released, despite efforts by the respective attorneys to engage the Respondent parents in the participation of this proceeding.

Given the foregoing, the trial court did not err; the trial court complied with N.C.G.S. § 7B-1108.1(a) and N.C.G.S. § 7B-1101.1(a)(1).

Notably, before the Court of Appeals, respondent-mother did not argue that she lacked notice of the termination hearing. The Court of Appeals, however, construed N.C.G.S. § 7B-1101.1(a)(1) to "presume[ ] that the respondent parent has been given notice of the hearing and, therefore, an opportunity to decide whether to participate in the proceedings" and concluded "there is no evidence in the record that [respondent-m]other *knew* about the hearing." *In re R.A.F.*, 284 N.C. App. at 645. Thus, only now, before this Court, has respondent-mother through her appellate counsel made this allegation. This Court has reiterated many times that "a party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation." *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 26 (2004) (quoting *Roberts v. Grogan*, 222 N.C. 30, 33 (1942)) (collecting cases). Further, the Court of Appeals may not address an issue not raised or argued by respondent for "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402 (2005); *see also State v. Hart*, 361 N.C. 309, 311 (2007) ("[I]n *Viar*, we held that the Court of Appeals acted improperly when it reviewed issues not raised or argued by the appellant.").

III. Conclusion

Since the trial court complied with our legislature's enactments concerning provisional counsel under N.C.G.S. § 7B-1101.1(a)(1) and considered at the pretrial hearings the issues listed in N.C.G.S. § 7B-1108.1(a)(1), we conclude that the Court of Appeals erred by concluding that the trial court erred. Therefore, we reverse the decision of the Court of Appeals and remand for consideration of the remaining argument presented by respondent-mother that the Court of Appeals did not reach.

REVERSED AND REMANDED.

Justice MORGAN concurring in part and dissenting in part.

I fully agree with the majority's conclusion that the Court of Appeals properly exercised its discretion in this matter in order to obtain jurisdiction here in the manner in which it did. However, I must respectfully disagree with my learned colleagues in the majority that the Court of Appeals erred in vacating the trial court's orders and remanding the

matter for a new hearing because the lower appellate court determined that the trial court improperly released respondent-mother's provisional counsel in light of the trial court's failure to fully and correctly ascertain statutorily mandated information regarding the parent's absence from the scheduled termination of parental rights hearing prior to the trial court's dismissal of respondent-mother's provisional counsel. The dispositive issue is whether respondent-mother's parental rights to her children may be terminated at a hearing (1) conducted outside of the parent's presence, (2) without any legal representation on the parent's behalf, (3) upon the release of the parent's provisional counsel, (4) without any attempt by the trial court to determine whether the parent had notice of the hearing, and (5) despite the existence of circumstances presented to the trial court by the parent's provisional counsel that the parent received notice of the hearing. Due to the majority's demonstrated and disappointing disregard for fundamental fairness here which is otherwise routinely recognized and protected when an individual's inherently significant parental rights to one's children are being determined, I respectfully dissent and would instead affirm the decision of the Court of Appeals.

This Court has observed that "[i]n order to adequately protect a parent's due process rights in a termination of parental rights proceeding, the General Assembly has created a statutory right to counsel for parents involved in termination proceedings." *In re K.M.W.*, 376 N.C. 195, 208 (2020). When respondent-mother did not appear for the scheduled 15 July 2021 hearing on the petition for termination of parental rights after there had been service only on respondent-mother's attorney and not respondent-mother, the trial court conducted a pretrial hearing at which respondent-mother's provisional counsel was present. During the pretrial hearing, the trial court had the following exchange with respondent-mother's provisional counsel, Kassia Walker:

> THE COURT: Ms. Walker, any contact from your client, ma'am?
>
> MS. WALKER: Your Honor, she reached out to me, initially, when she was served. I did hear from her. She never came into the office for her appointment. She did contact my office and say she was in a treatment facility.
>
> I contacted that facility. She apparently graduated successfully, but has not contacted my office since then. It's been probably April since I heard from her.

> THE COURT: Thank you. And so requested then by our legislature, I'll release you at this time.

The majority acknowledges the applicability to this case of the statutory provisions contained in N.C.G.S. § 7B-1101.1(a)(1) and N.C.G.S. § 7B-1108.1(a)(1) and (a)(3). Subsection 7B-1101.1(a) states, in pertinent part:

> At the first hearing *after service upon the respondent parent*, the court shall dismiss the provisional counsel if the respondent parent:
>
> (1) Does not appear at the hearing[.]

N.C.G.S. § 7B-1101.1(a) (2021) (emphasis added). Subsection 7B-1108.1(a) reads, again in pertinent part:

> (a) The court shall conduct a pretrial hearing . . . . At the pretrial hearing, the court *shall consider* the following:
>
> (1) *Retention or release of provisional counsel.*
>
> . . .
>
> (3) *Whether all summons, service of process, and notice requirements have been met.*

N.C.G.S. § 7B-1108.1(a) (2021) (emphases added).

It is clear from the content of these statutory provisions that the trial court is required to determine at the obligatory pretrial hearing whether all notice requirements have been satisfied as the trial court considers the appropriateness of the retention or the release of provisional counsel, with the trial court mandatorily releasing the provisional counsel at the first hearing after the parent has been served if the parent does not appear at the hearing. During the trial court's scant colloquy with respondent-mother's provisional counsel, the attorney related that respondent-mother had contacted counsel upon initial service and that respondent-mother had "apparently graduated successfully" from a treatment facility in the interim time period during which there had been no communication between respondent-mother and the parent's provisional counsel. While the record plainly shows that respondent-mother was not served with notice of the 15 July 2021 termination of parental rights hearing, provisional counsel for respondent-mother could only speculate about the parent's whereabouts and circumstances as the attorney attempted to offer a comprehensive response to the trial court's limited and narrow inquiry to counsel, "Ms. Walker, any contact from your client, ma'am?"

The trial court's sole question to respondent-mother's provisional counsel was not sufficiently focused upon the issue of notice, as contemplated by N.C.G.S. §§ 7B-1101.1(a)(1) and 7B-1108.1(a)(1) and (3), to provide the requisite information to the trial court to determine whether all notice requirements had been met regarding respondent-mother's knowledge of the 15 July 2021 termination of parental rights hearing so as to be able to responsibly consider the retention or release of provisional counsel, particularly in light of the prospect that if notice of the hearing had not been served upon respondent-mother, then the 15 July 2021 hearing would not have qualified as "the first hearing after service upon the respondent parent" under N.C.G.S. § 7B-1101.1(a)(1) so as to require the trial court's dismissal of the provisional counsel. *See* N.C.G.S. § 7B-1101.1(a).

This omission by the trial court is compounded by its failure to develop the record with further inquiries of respondent-mother's provisional counsel beyond the initial question, including the efforts which counsel had undertaken to alert respondent-mother as to the date of the hearing. This Court has instructed that "before allowing an attorney to withdraw or relieving an attorney from any obligation to actively participate in a termination of parental rights proceeding when the parent is absent from a hearing, the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected." *In re K.M.W.*, 376 N.C. at 210 (quoting *In re D.E.G.*, 228 N.C. App. 381, 386–87 (2013)). Ultimately, however, in its written termination of parental rights order, despite no inquiry into whether respondent-mother had notice of the termination of parental rights hearing and no evidence otherwise of such notice in the record, the trial court nonetheless found that "[a]ll service and notice requirements have been met" and "[t]he provisionally appointed attorney[ ] for [respondent-mother] should be released, despite efforts by the . . . attorney[ ] to engage [the respondent-mother] in the participation of this proceeding."

Here, the record on appeal indicates that after respondent-mother was served with the termination of parental rights petition in this case, she communicated her desire to her provisional counsel to contest the petition and to seek extensions of time to respond. The time period of such demonstrated engagement by respondent-mother with this matter correlates with her admission to a substance abuse treatment facility. In my view, such circumstances, when coupled with the cited statutory law, the legal precedent from this Court, and the trial court's lack of adherence to these governing authorities, raise the haunting specter

of respondent-mother's lack of notice of the termination of parental rights proceeding and undergird the correctness of the decision of the Court of Appeals.

Accordingly, I respectfully dissent in part.

Justice EARLS joins in this concurring in part and dissenting in part opinion.

IN THE MATTER OF S.R.

No. 172PA22

Filed 28 April 2023

1. Termination of Parental Rights—grounds for termination—willful failure to pay child support—sufficiency of findings—correct standard of review

In a private termination of parental rights action, the trial court's determination that grounds were not established to terminate respondent father's parental rights to his daughter based on willful failure to pay child support (N.C.G.S. § 7B-1111(a)(4)) was affirmed where the trial court made no findings that an order existed requiring respondent to pay support—despite evidence that respondent had paid support but that his payments stopped after petitioner mother elected to stop garnishment of his wages through centralized collections—or that respondent's failure to provide support was willful. The correct standard of review at the adjudication stage is whether the findings of fact are supported by clear, cogent, and convincing evidence, and whether the findings support the conclusions of law; to the extent the Court of Appeals' opinion affirming the trial court's decision could be read to instead apply the abuse of discretion standard, that portion of its opinion was modified.

2. Termination of Parental Rights—grounds for termination—neglect—willful abandonment—sufficiency of evidence

In a private termination of parental rights action, the trial court's determination that grounds were not established to terminate respondent father's parental rights to his daughter based on neglect or willful abandonment (N.C.G.S. § 7B-1111(a)(1), (7)) was affirmed where there was no record evidence demonstrating that respondent had previously neglected the child, that there was a

likelihood of future neglect if she were to be placed in his care, or that respondent showed an intention to give up all parental rights to her, particularly where there was evidence that petitioner mother actively prevented respondent from forming a relationship with the child.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 283 N.C. App. 149 (2022), affirming an order entered on 8 June 2021 by Judge Caroline S. Burnette in District Court, Granville County. Heard in the Supreme Court on 1 February 2023.

Edward Eldred for petitioner-appellant.

Wendy C. Sotolongo, Parent Defender, and Jacky L. Brammer, Assistant Parent Defender, for respondent-appellee father.

EARLS, Justice.

This case involves a petition to terminate parental rights in a private setting with no Department of Social Services involvement. Cases involving divorce and the breakdown of marital relationships are often contentious, and each party may have their own version of what has transpired. In cases involving children and the termination of parental rights, both parents have a "fundamental liberty interest . . . in the care, custody, and management of their child," and this interest "does not evaporate simply because they have not been model parents." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). To protect this vital interest and others, our legal system operates under a set of procedures, one of which dictates that the trial court is the finder of fact. *In re N.W.*, 381 N.C. 851, 857 (2022) ("[T]he trial court . . . [has the] responsibility for evaluating the credibility of the witnesses, weighing the evidence, and determining the relevant facts." (citing *In re R.D.*, 376 N.C. 244, 258 (2020))). In contrast, this Court is not a fact-finding court. *See id.*

In the context of termination of parental rights proceedings, the proper inquiry is often fact-dependent and the trial court, as a fact-finding court, is in the best position to determine the credibility of the witnesses before it and make findings of fact. *See id.* With this in mind, this opinion underscores the importance of following these procedures and the correct standard of review by applying the law only to those findings of fact made by the trial court. In doing so, we affirm the Court of

Appeals' decision regarding the denial of the petition to terminate Mr. Savard's parental rights but modify its decision to clarify the correct standard of review at both the adjudication and the dispositional stage.

I. Factual Background

The petitioner, Tiffany Roberto, and the respondent, Bruce Savard, were previously married. On 23 April 2014, their only child, Sarah,[1] was born. The day before Sarah was born, Mr. Savard experienced a mental health related incident and threatened to kill himself. Ms. Roberto contacted her current husband, Joe Roberto, who successfully retrieved the gun from Mr. Savard. In June 2014, Ms. Roberto sought and received an ex parte domestic violence protective order against Mr. Savard, in part based on this incident. The couple then separated, and Mr. Savard, who was an active-duty member of the United States Marine Corps, continued living on the military base. Ms. Roberto went to live with Mr. Roberto.

Ms. Roberto and Mr. Savard's divorce decree was entered on 8 June 2016. Despite Ms. Roberto knowing Mr. Savard's telephone number and home address, Mr. Savard was served with notice of the complaint for divorce by publication and only learned of the divorce eight days later, on 16 June 2016, through a text message from Ms. Roberto. That same day, and in the same text message, Mr. Savard also learned that as part of the divorce proceedings, Ms. Roberto was granted "the sole and exclusive care, custody, and control" of Sarah.

Ms. Roberto and Mr. Roberto were married on 22 November 2016. Mr. Savard paid child support for Sarah, which was withheld from his paycheck and mailed to North Carolina Centralized Collections. Ms. Roberto sought legal advice about terminating Mr. Savard's parental rights and was counseled to stop the garnishment of his wages through North Carolina Centralized Collections, such that Mr. Savard would be personally responsible for payment and nonpayment could be used as a ground to terminate his parental rights.

Toward the end of 2018, Ms. Roberto "closed [Mr. Savard's] support case" but "Mr. Savard was under the impression that he was no longer required to pay child support as Ms. Roberto never informed him that he as [sic] not make payments directly to her after his child support case was closed." Thus, once child support payments were no longer collected through the garnishment of his wages, the child support

1. This is a pseudonym used to protect the identity of the minor child.

payments stopped. As a result, Mr. Savard accumulated past-due child support obligations. Ms. Roberto asked Mr. Savard to relinquish his parental rights to Sarah in exchange for her forgiving his child support debt, but he declined this request.

In its order denying the petition to terminate Mr. Savard's parental rights, the trial court found that Mr. Savard made an effort to have a relationship with Sarah. It also found that he attempted to exercise his supervised visitation rights with Sarah and sent Ms. Roberto text messages asking about Sarah. However, Ms. Roberto ultimately blocked Mr. Savard's telephone number, and he was no longer able to contact her by phone. Ms. Roberto also blocked Mr. Savard from contacting her on social media. This left Mr. Savard with no reliable way to contact Sarah or her mother. The trial court further found that "Mr. Savard regularly checks Facebook for pictures of [Sarah]. He prints them out and keeps them in an album. While he has been blocked from Facebook by most of Ms. Roberto's family, he still finds a way to find those pictures."

The trial court also found that Mr. Savard had reached out to Ms. Roberto about adding Sarah to his "insurance," but Ms. Roberto never responded. Taking this information together, the trial court concluded that Ms. Roberto knew how to contact "Mr. Savard when it benefited [sic] her but ignored him at all other times" and this "benefitted her agenda which was to terminate [Mr. Savard's] parental rights."

On 25 July 2019, Ms. Roberto had Sarah's last name legally changed from Savard to Roberto. No service was effectuated on Mr. Savard, and "[h]e had no clue his child's name had been changed and had absolutely no notice of the proceedings." At the time of the trial court's 8 June 2021 order, Sarah was seven years old and had "no clue that Mr. Savard [wa]s her father." Ultimately, the trial court found that Mr. Roberto and Ms. Roberto had planned to terminate Mr. Savard's parental rights since at least 2018 and Ms. Roberto had "actively hindered and . . . precluded Mr. Savard from being part of [Sarah's] life."

On 22 June 2020, Ms. Roberto filed a petition to terminate Mr. Savard's parental rights. She alleged that grounds for termination existed under N.C.G.S. §§ 7B-1111(a)(1), (4), and (7) for neglect, failure to pay child support, and willful abandonment of Sarah. On 10 September 2020, Mr. Savard filed his answer. The case was heard in the trial court on 28 January 2021 and 18 March 2021. The trial court entered its order on 8 June 2021, denying Ms. Roberto's petition and concluding that Ms. Roberto had failed to establish grounds to terminate Mr. Savard's parental rights. The trial court concluded that Sarah was not neglected, nor

had Mr. Savard "*willfully failed without justification*," to pay child support for Sarah or "*willfully*" abandoned Sarah. Ms. Roberto appealed, and the Court of Appeals unanimously affirmed the trial court's order. *In re S.R.*, 283 N.C. App. 149 (2022). Now, we affirm the Court of Appeals' decision regarding the denial of the petition to terminate Mr. Savard's parental rights but modify its decision to clarify the correct standard of review at both the adjudication and the dispositional stage.

II. Standard of Review

There are two stages involved in a termination of parental rights proceeding. *In re Q.P.W.*, 376 N.C. 738, 741 (2021). These are the adjudication stage and the dispositional stage. *Id.* A different standard of review applies to each stage. *Id.* "At the adjudication stage, the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. 244, 247 (1997). If "[a] trial court's finding of fact . . . is supported by clear, cogent, and convincing evidence[, it will be] deemed conclusive even if the record contains evidence that would support a contrary finding." *In re B.O.A.*, 372 N.C. 372, 379 (2019). We review whether the findings of fact support the conclusions of law, and conclusions of law are reviewed de novo. *In re K.N.*, 381 N.C. 823, 827 (2022) (citing *In re S.C.L.R.*, 378 N.C. 484, 489 (2021)).

At the dispositional stage, the trial court's assessment of the best interests of the child is reviewed for abuse of discretion. *In re C.B.*, 375 N.C. 556, 560 (2020). "[A]buse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (alteration in original) (quoting *In re T.L.H.*, 368 N.C. 101, 107 (2015)). "We review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence[,]" *id.* (quoting *In re J.J.B.*, 374 N.C. 787, 793 (2020)), mindful that N.C.G.S. § 7B-1110 provides that at the disposition stage "[t]he court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, that the court finds to be relevant, reliable, and necessary to determine the best interests of the juvenile." N.C.G.S. § 7B-1110(a).

Moreover, as is always true, a mistake of law is an abuse of discretion. *State v. Rhodes*, 366 N.C. 532, 536 (2013) (citing *Koon v. United States*, 518 U.S. 81, 100 (1996) ("[An abuse of discretion] standard does not mean a mistake of law is beyond appellate correction. A [trial] court by definition abuses its discretion when it makes an error of law." (citation omitted)). At the dispositional stage, as with the adjudication stage,

the trial court's conclusions of law are reviewable de novo on appeal. *In re Q.P.W.*, 376 N.C. at 741. Because the present case did not proceed past the adjudication stage, the proper standard of review in this case first requires this Court to assess whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence even if the record contains evidence that would support a contrary finding. *In re B.O.A.*, 372 N.C. at 379.

III. The Child Support Order

[1] A trial court may terminate parental rights if

> [o]ne parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parents, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement.

N.C.G.S. § 7B-1111(a)(4) (2021). In *In re C.L.H.*, this Court explained that the party petitioning for termination of parental rights under N.C.G.S. § 7B-1111(a)(4) must show "the existence of a support order that was enforceable during the year before the termination petition was filed." 376 N.C. 614, 620 (2021) (quoting *In re I.R.L.*, 263 N.C. App. 481, 485 (2019)). There, this Court concluded that because the trial court had not made any "findings of fact that a child support order existed in the year prior to the filing of the petition to terminate respondent's parental rights," those factual findings could not support termination pursuant to N.C.G.S. § 7B-1111(a)(4). *Id.* at 621.

Ms. Roberto argues that, although "not explicit, it is apparent" the trial court and the Court of Appeals accepted that the child support order existed and was enforceable. Ms. Roberto also argues that Mr. Savard also accepted this as true, stating in his brief to the Court of Appeals that "[a]n [o]rder establishing Mr. Savard's child support obligation was entered on 24 November 2014." Ms. Roberto states that because of this admission and implicit acceptance of a child support order existing and being enforceable, the trial court and Court of Appeals both erred in concluding Mr. Savard's parental rights could not be terminated.

However, the Court of Appeals found that although there was evidence in the record to support termination of parental rights pursuant to N.C.G.S. § 7B-1111(a)(4), the trial court did not make any findings of

fact to this effect. *In re S.R.*, 283 N.C. App. at 159–60. In doing so, the Court of Appeals analogized the present case to *In re C.L.H.*, determining that a trial court must make findings of fact as to whether a support order exists. *Id.* at 159. In *In re C.L.H.*, this Court concluded that when "the trial court fails to make findings of fact indicating that a child support order existed or that the parent failed to pay support as required by the child support order, its findings are insufficient to support the conclusion that grounds for termination exist pursuant to N.C.G.S. § 7B-1111(a)(4)." *In re C.L.H.*, 376 N.C. at 620 (cleaned up). Here, the trial court only made findings that Mr. Savard paid child support and that his child support payments stopped after Ms. Roberto elected to stop garnishment of his wages through North Carolina Centralized Collections. However, the trial court did not make a finding that an order existed requiring Mr. Savard to pay child support.

Ms. Roberto urges this Court to apply *In re Faircloth*, which states that "by failing to deny . . . certain allegations contained in the petition, [the respondent], in fact, admitted" those allegations. 153 N.C. App. 565, 576 (2002). However, not only is this case not binding on this Court, but here Ms. Roberto had the burden of proof and cannot satisfy that burden simply by alleging unproven assertions that are not directly denied. *See In re K.S.D-F.*, 375 N.C. 626, 632 (2020) ("At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." (quoting *In re A.U.D.*, 373 N.C. 3, 5–6 (2019))). Accordingly, the conclusion of the trial court and the Court of Appeals that no grounds to terminate Mr. Savard's parental rights existed under N.C.G.S. § 7B-1111(a)(4) was correct. *See In re C.L.H.*, 376 N.C. at 620.

Furthermore, N.C.G.S. § 7B-1111(a)(4) requires that "for a period of one year or more next preceding the filing of the petition or motion" a parent act "willfully" and "without justification [in failing] to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement." N.C.G.S. § 7B-1111(a)(4). To this effect, the trial court found that in the "one year or more next preceding the filing of the petition," Mr. Savard had not "*willfully failed without justification* to pay for [Sarah's] care, support and education . . . as required by decree or custody agreement." Thus, the trial court properly concluded that Mr. Savard's parental rights should not be terminated pursuant to N.C.G.S. § 7B-1111(a)(4).

Because we find that the trial court made no findings of fact related to the existence of a child support order or the willfulness of the

respondent's failure to pay during the relevant period of time, we affirm that grounds were not established to terminate Mr. Savard's parental rights under N.C.G.S. § 7B-1111(a)(4).

Subsection 7B-1111(a) provides that "[t]he court *may* terminate the parental rights" if it finds "one or more" of the grounds enumerated in the statute. N.C.G.S. § 7B-1111(a) (2021) (emphasis added). Here, while the trial court found that Mr. Savard had stopped making child support payments once Ms. Roberto stopped the wage garnishment through North Carolina Centralized Collections, it also found that Ms. Roberto never informed Mr. Savard he was required to make child support payments directly to her.[2] Moreover, according to the trial court's findings, Ms. Roberto tried to use Mr. Savard's resulting child support debt as a bargaining chip, promising to forgive the debt if he relinquished his parental rights to Sarah.

The trial court also found that Ms. Roberto previously consulted an attorney who counseled her to stop the wage garnishment so that if Mr. Savard failed to pay child support, she could use that as a ground to seek termination of his parental rights. Importantly, in weighing the evidence before it, the trial court determined that Ms. Roberto "knew how to reach out to Mr. Savard when it benefitted her but ignored him at all other times," and this "benefit[t]ed [Ms. Roberto's] agenda which was to terminate [Mr. Savard's] parental rights." In the end, after weighing the evidence, the trial court concluded the grounds necessary to terminate Mr. Savard's parental rights were not present.

However, because this case involves the adjudication phase in a termination of parental rights proceeding, the abuse of discretion standard is not applicable. Thus, to the extent the Court of Appeals opinion could be read to be applying an abuse of discretion standard at the adjudication stage, we modify that portion of the decision and note the correct standard of appellate review at this stage is whether the findings of fact are supported by clear, cogent, and convincing evidence, and whether the findings support the conclusions of law. *In re B.O.A.*, 372 N.C. at 379.

---

2. Our decision should not be read as stating that a parent does not have a duty to "pay a reasonable portion of the [financial] cost of care for [their] children." *See In re S.E.*, 373 N.C. 360, 366 (2020) (explaining that a parent "cannot hide behind a cloak of ignorance to assert her failure to pay a reasonable portion of the cost of care for her children was not willful."). As we said in that case, "[t]he absence of a court order, notice, or knowledge of a requirement to pay support is not a defense to a parent's obligation to pay reasonable costs, because parents have an inherent duty to support their children." *Id.* (cleaned up).

IV. Neglect and Abandonment

[2] Although the Court of Appeals did not complete an analysis of these termination grounds, it concluded that the record did not support termination on either ground. *In re S.R.*, 283 N.C. App. at 158. Our review of the record yields the same result. Under N.C.G.S. § 7B-1111(a)(1) parental rights can be terminated if the "parent has . . . neglected the juvenile . . . within the meaning of [N.C.G.S. §] 7B-101." Under the statute, a neglected juvenile is

> [a]ny juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking under G.S. 14-43.15 or (ii) whose parent, guardian, custodian, or caretaker does any of the following:
>
> a. Does not provide proper care, supervision, or discipline.
>
> b. Has abandoned the juvenile.
>
> c. Has not provided or arranged for the provision of necessary medical or remedial care.
>
> d. Or whose parent, guardian, or custodian has refused to follow the recommendations of the Juvenile and Family Team made pursuant to Article 27A of this Chapter.
>
> e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.
>
> f. Has participated or attempted to participate in the unlawful transfer of custody of the juvenile under G.S. 14-321.2.
>
> g. Has placed the juvenile for care or adoption in violation of law.
>
> In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

N.C.G.S. § 7B-101(15) (2021). Grounds of abandonment are established where a

> parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion, or the parent has voluntarily abandoned an infant pursuant to G.S. 7B-500 for at least 60 consecutive days immediately preceding the filing of the petition or motion.

N.C.G.S. § 7B-1111(a)(7). Because the Court of Appeals determined the record did not support either of these grounds it necessarily concluded the trial court's findings of fact were supported by competent evidence. *In re S.R.*, 283 N.C. App. at 158.

First, regarding termination on the ground of neglect, Ms. Roberto asserts that parental rights can be terminated for neglect if a parent neglects their child by abandonment, citing *In re K.C.T.*, 375 N.C. 592, 599–600 (2020). The relevant period for determining neglect by abandonment "is not limited to the six consecutive months immediately preceding the filing of a termination petition." *In re N.D.A.*, 373 N.C. 71, 81 (2019). In some cases "a trial court may terminate a parent's rights based on neglect that is currently occurring at the time of the termination hearing." *In re M.A.*, 378 N.C. 462, 466 (2021). "However, for other forms of neglect, the fact that 'a child has not been in the custody of the parent for a significant period of time prior to the termination hearing' would make 'requiring the petitioner in such circumstances to show that the child is currently neglected by the parent . . . impossible.' " *Id.* (alteration in original) (quoting *In re N.D.A.*, 373 N.C. at 80). In those cases, "evidence of neglect by a parent prior to losing custody of a child . . . is admissible in subsequent proceedings to terminate parental rights," but "[t]he trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect." *Id.* (second alteration in original) (quoting *In re Ballard*, 311 N.C. 708, 715 (1984)). If after weighing the evidence the trial court finds "a likelihood of future neglect by the parent," then it can find a neglect ground to terminate parental rights. *Id.* (quoting *In re R.L.D.*, 375 N.C. 838, 841 (2020)).

Ms. Roberto claims that the trial court impermissibly limited its review to the six months before Ms. Roberto filed the petition. However, this is incorrect as the trial court explicitly noted "[t]he history of this case is extremely relevant in the analysis of this matter," and given that the trial court's findings of fact go as far back as 2014, there is no reason to conclude that the relevant history was limited to the six months before Ms. Roberto filed her petition. Furthermore, the trial court specifically stated that it reviewed Mr. Savard's conduct outside of the

six-month window to assess his credibility. *See In re C.B.C.*, 373 N.C. 16, 22 (2019) ("[T]he trial court may consider a parent's conduct outside the six-month window *in evaluating a parent's credibility and intentions* . . . ." (quoting *In re D.M.O.*, 250 N.C. App. 570, 573 (2016))).

Ms. Roberto also argues that the trial court did not ask whether Mr. Savard previously neglected Sarah or whether there was a likelihood of future neglect if Sarah was placed in Mr. Savard's care. Ms. Roberto points to Mr. Savard's prior suicidal behavior as proof that he "assaulted Ms. Roberto in Sarah's presence" and that there was a likelihood of future neglect because Mr. Savard has not adequately addressed his mental health needs. *See In re G.C.*, No. 241A22, 2023 WL 2799798, at *5 (N.C. Apr. 6, 2023) ("[T]here must be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide proper care, supervision, or discipline." (cleaned up)). But Ms. Roberto's characterization of Mr. Savard's suicidal ideation as an assault is not supported by the trial court's findings of fact. Rather, the trial court found that although Mr. Savard had threatened suicide in Ms. Roberto's presence, he was "not threatening or combative" towards her or their unborn child, Sarah. Accordingly, the Court of Appeals was correct in holding that no grounds existed to terminate Mr. Savard's parental rights under N.C.G.S. § 7B-1111(a)(1).

Second, regarding termination on the ground of willful abandonment, the determinative period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition. N.C.G.S. § 7B-1111(a)(7); *In re A.A.M.*, 379 N.C. 167, 172 (2021). "Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re C.B.C.*, 373 N.C. at 19 (quoting *In re Young*, 346 N.C. at 251). Willful "intent is an integral part of abandonment and this is a question of fact to be determined from the evidence." *Id.* (quoting *Pratt v. Bishop*, 257 N.C. 486, 501 (1962)). "If a parent withholds that parent's presence, . . . love, . . . care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Id.* (cleaned up).

Ms. Roberto asserts that our holding in *In re C.B.C.* is instructive in analyzing Mr. Savard's actions during the relevant six-month period from 22 December 2019 to 22 June 2020. In *In re C.B.C.*, this Court determined the parent had willfully abandoned his daughter because he did not make an effort to pursue a relationship with her. *In re C.B.C.*, 373 N.C. at 23. Specifically, the parent did not send cards or letters or contact the petitioners to ask about the child's well-being. *Id.* The

parent also did not take steps to modify the custody order, resume visitation, or provide financial support for his daughter. *Id.* Although Ms. Roberto argues that Mr. Savard's actions are like that of the parent in *In re C.B.C.*, the trial court saw the evidence differently. Namely, the trial court found that "[w]hile Mr. Savard [had] not made valiant efforts to forge a relationship with his daughter, he [had] made some efforts" and these efforts were "often times . . . thwarted by Ms. Roberto." Indeed, the trial court found that "Ms. Roberto has actively hindered and essentially precluded Mr. Savard from being part of [Sarah]'s life." Perhaps most importantly, the trial court also found that Mr. Savard had "not shown an intention to give up all parental rights to [Sarah]."

While Ms. Roberto claims that *In re C.B.C.* is instructive, that case does not contemplate a situation, such as here, where one parent actively thwarts the other parent's ability to have a relationship with their child. Furthermore, to the extent that Ms. Roberto claims that her efforts to preclude Mr. Savard from being a part of Sarah's life were justified by Mr. Savard's prior domestic violence towards her, the trial court did not make any findings of fact to support that any abuse had occurred. The trial court made no findings that Mr. Savard had sexually assaulted Ms. Roberto or that he had threatened her with a gun. Furthermore, as noted above, and as it relates to Mr. Savard's suicidal behavior, the trial court found that when Mr. Savard threatened suicide, he was not acting in a manner that was "threatening or combative" towards Ms. Roberto or their unborn child. Thus, based on the record before it, the Court of Appeals was correct to conclude that no grounds existed to terminate Mr. Savard's parental rights for willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(7).

We affirm the Court of Appeals' decision and hold that there are no grounds to terminate Mr. Savard's parental rights to Sarah pursuant to N.C.G.S. § 7B-1111(a)(1), (4), or (7). We modify the decision of the Court of Appeals to the extent the Court of Appeals' decision could be read to be applying an abuse of discretion standard of review at the adjudicatory stage of this proceeding to reiterate that our review at the adjudicatory stage is to determine whether there is clear, cogent, and convincing evidence in the record to support the trial court's findings of fact, and whether the findings of fact support the conclusions of law.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA
v.
SCOTT WARREN FLOW

No. 202PA21

Filed 28 April 2023

Constitutional Law—right to be present at criminal trial—waiver—voluntariness of absence—suicide attempt—competency

The trial court's decision to proceed with a criminal trial in defendant's absence, without conducting further inquiry into defendant's capacity to proceed with the trial after defendant made an apparent suicide attempt partway through the trial by jumping off a balcony at the county jail, did not violate defendant's statutory protections with regard to competency to stand trial (pursuant to N.C.G.S. §§ 15A-1002 and 15A-1443) or his constitutional due process rights. Based on evidence taken by the trial court regarding the incident and defendant's mental health as well as arguments from defense counsel and the State, there was not substantial evidence that defendant may have lacked competency at the time of his apparent suicide attempt. The trial court's determination that defendant's absence from trial was voluntary because he committed an intentional act was supported by the court's prior colloquies with defendant (during which defendant waived his right to testify or to present evidence on his own behalf), the court's own direct observation of defendant's demeanor, and the court's review of evidence—including surveillance footage—of defendant's actions and demeanor at the time he jumped.

Justice EARLS dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 277 N.C. App. 289 (2021), affirming the judgments entered on 20 December 2019 by Judge Nathan H. Gwyn, III in Superior Court, Gaston County. This matter was calendared for argument in the Supreme Court on 9 February 2023 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Joshua H. Stein, Attorney General, by Rebecca E. Lem, Assistant Attorney General, for the State-appellee.

Mark Montgomery for defendant-appellant.

MORGAN, Justice.

Defendant's appeal in this criminal case raises the issue of whether the trial court erred in declining to conduct further inquiry into defendant's capacity to proceed following his apparent suicide attempt on the morning of the sixth day of trial before the jury was given its instructions, but after the jury had heard closing arguments from both sides. We hold that, within the particular facts and overall context of this case, the trial court acted in accordance with the Constitution of the United States and the North Carolina General Statutes by receiving evidence concerning defendant's medical history and defendant's state of mind at the time of his apparent suicide attempt and by determining that defendant's actions voluntarily absented him from further court proceedings. Accordingly, we affirm the decision of the Court of Appeals, which found no error in the judgments entered by the trial court.

I. Procedural and Factual Background

Defendant was indicted by a grand jury for the criminal offenses of first-degree rape, first-degree burglary, first-degree kidnapping, first-degree sexual offense, possession of a firearm by a convicted felon, and violation of a protective order in connection with events occurring between 26 May 2018 and 27 May 2018 in Dallas, North Carolina. Defendant's charges were joined for trial. His trial began on 9 December 2019. Defendant stipulated to the existence of his prior felony conviction and pleaded not guilty to the charges lodged against him. The trial court conducted the following colloquy with defendant to ensure that defendant was entering this stipulation freely, voluntarily, and intelligently:

> THE COURT: All right. For the record, Mr. Flow, among the charges you face is one that's called felony possession of a firearm while being a convicted felon. The State, by this piece of paper, has handed up something that says, on February 3rd, 2003, in Lancaster County, South Carolina, under File Number 02GS29-862, the defendant – that's you – was convicted of a felony that was committed on May 1st, 2002.
>
> I am told that you and your attorney and the State have considered whether or not to go along with that stipulation. This is a decision that is yours and yours alone. It's not up to your attorney, it's not up to

anyone in your family, it's not up to the DA, it's not up to me, it is yours and yours alone.

Do you understand everything I have said so far?

THE DEFENDANT: Yes, sir.

THE COURT: So knowing that, you are – if you sign off on this stipulation, knowing that you would be admitting to something that the State has got the burden of proving by proof beyond a reasonable doubt, and that you don't have to enter into that stipulation if you don't want to, is this what you're asking to do?

Are you so stipulating and are you comfortable with doing that?

Do you want to talk to your attorney a little bit more?

You can. Just do it privately so I don't hear you.

THE DEFENDANT: Yes, sir.

(Discussion off record)

THE DEFENDANT: Yes, I – yes, sir.

THE COURT: Okay. Now, before I write this up, are you fully aware of what you're doing?

THE DEFENDANT: Yes, sir.

THE COURT: You're not taking any mind-altering medications or substances are you?

THE DEFENDANT: No, sir.

THE COURT: Do you have any questions of me about what this might mean for you —

THE DEFENDANT: No, sir.

THE COURT: — that haven't already been answered by your attorney?

THE DEFENDANT: No, sir.

THE COURT: So you make this decision to make this stipulation freely and voluntarily and of your own free will?

THE DEFENDANT: Yes.

THE COURT: And you know what the legal consequences might be for you?

THE DEFENDANT: Yes, sir.

THE COURT: Do you want any additional time to talk to your attorney?

If you want additional time we can take this up later.

THE DEFENDANT: No, sir.

THE COURT: You're good to make the call now?

THE DEFENDANT: Yes, sir.

THE COURT: Does that satisfy you, Mr. Higdon, and, Ms. Monteleone?

MR. HIGDON: Yes, Your Honor.

MS. MONTELEONE: Yes, Your Honor.

THE COURT: Okay. Well, I'll hand it back to both of you for signing.

It still needs to be signed by Mr. Flow, and you, Mr. Higdon.

And the stipulation as to that will be accepted by the Court.

Throughout the course of the trial, the State elicited evidence through the testimony of thirteen witnesses. The evidence presented at trial tended to show the following: in the early morning hours of 27 May 2018, law enforcement officers of the Gaston County Police Department's Emergency Response Team entered the home of defendant's ex-girlfriend, Hannah,[1] where she was being held at gunpoint by defendant. Sergeants Anderson Holder and Matthew Hensley testified at trial that the Emergency Response Team had to initiate an emergency rescue of Hannah after three and a half hours of negotiations with defendant failed to secure her release. Holder testified that the police team placed an explosive charge on the front door of Hannah's home to gain entry to the residence and that he subsequently ran inside, kicked open

1. The pseudonym "Hannah" is used throughout this opinion to protect the identity of the victim.

the door to the master bedroom, and made his way into a small bathroom where defendant had his legs around Hannah and was holding a pistol to her head. Sergeant Holder then engaged in a physical confrontation with defendant in order to disarm and detain him while Sergeant Hensley removed Hannah from the bathroom.

Hannah and her teenage daughter, Brooklin, provided testimony regarding the relationship between Hannah and defendant leading up to 26 May 2018. Hannah testified that she met defendant in the spring of 2017. At first, Hannah and defendant were just friends, but later they began dating while refraining from engaging in sexual relations with one another. Both Hannah and Brooklin testified about an argument that took place between Hannah and defendant around Thanksgiving of 2017 during which defendant began "cussing and raging" at Hannah after defendant had taken a wrong turn while driving with her and Brooklin in the car. Afterward, Hannah chose to end her relationship with defendant and, in response, defendant told Hannah that she would come to "regret the day [that she] ever met [him]." Around Christmas of 2017, Hannah and Brooklin discovered that someone had damaged Hannah's vehicle by puncturing the tires on the right side of the vehicle; after that incident, Hannah sought and was granted a domestic violence protective order (DVPO) against defendant in February 2018 pursuant to N.C.G.S. § 50B-1(b)(6).

Hannah further testified that she resumed contact with defendant after he came to visit Hannah's mother in the hospital after the mother had fallen and had developed double pneumonia. Defendant apologized to Hannah for puncturing Hannah's tires, and they soon resumed seeing each other. Hannah testified that she was afraid to stop speaking with defendant because he told Hannah that he would never leave her alone and that the protective order would not prevent defendant from contacting her. Hannah stated that she never contacted law enforcement about defendant's violation of the protective order because Hannah did not want to get defendant into trouble. Instead, Hannah tried to get defendant "on the right path" and to get him involved with "some good men at church" for support. Although they renewed their dating relationship and would hug and kiss each other, Hannah and defendant never had consensual sex.

On 26 May 2018, Hannah testified that she picked up Brooklin to go shopping in Lincolnton, North Carolina. While the two were on their way to Lincolnton, defendant called Hannah and screamed about driving down the road while being the target of gunshots. After defendant ended the telephone call, Hannah called him back to ask about the situation.

Defendant responded that his friend's father or father-in-law had started shooting at him and that he did not know why, but that he was going to go home and would call Hannah back later. While Hannah and Brooklin were in the Walmart store in Lincolnton, defendant called Hannah back on FaceTime[2] and asked her if she knew where he was. Hannah recognized defendant's location as her niece's house. Hannah asked defendant what he was doing at her niece's house and defendant responded that he was "hiding out from the law." Hannah tried to call defendant again after she and Brooklin left Walmart, but he did not answer Hannah's call. Later that day, after Hannah had returned home, defendant called her again and told Hannah that he was "going to kill a ni**er." Hannah was concerned that defendant was referring to the Black boyfriend of Hannah's older daughter Brittany, about whom defendant had spoken in the past. Hannah then left her residence to drive to Brittany's house to make sure that defendant was not there; after verifying that he was not, Hannah turned around to return home. During Hannah's return trip to her residence, she called defendant's father by telephone; defendant's father commented that defendant was "not his normal self." While talking to defendant's father, Hannah missed several telephone calls and text messages from both Brooklin and defendant.

Brooklin testified that she had been left at Hannah's house with Brooklin's two young nieces, Armoni and Daeja, while Hannah went to determine whether defendant was at Brittany's house. Brooklin put Daeja in the youngster's crib and was in the kitchen with Armoni when defendant pulled his vehicle into the driveway of Hannah's residence. Brooklin told Armoni to run upstairs; Brooklin locked the door of the home and proceeded to go upstairs with Armoni. Brooklin told Armoni to hide in the bed in Brooklin's bedroom and turned off the light; Brooklin then went into the laundry room, where Daeja's crib had been placed, to check on Daeja. From the laundry room, Brooklin looked through the window and saw defendant exit his car, approach the residence, bang on the back door of the home, and subsequently kick in the back door in order to enter the house.

Brooklin watched as defendant walked toward her mother Hannah's bedroom and heard defendant as he rummaged through Hannah's dresser drawers. When defendant left the bedroom, Brooklin saw one of Hannah's guns in his hand. Brooklin asked defendant for what purpose he had acquired her mother's gun, and he started to walk towards her.

---

2. A communication method available to specified cellular telephone users which allows them to see one another while they talk to each other.

Brooklin then retreated into her room as defendant yelled at her, asking Brooklin why her mother Hannah was ignoring him and demanding that Brooklin call Hannah. Brooklin told defendant to stop because he was scaring her and because her young nieces were in the house. Nonetheless, defendant continued to yell and "lunged" at Brooklin with the gun behind his back. Brooklin attempted to reach Hannah via text messages and telephone calls throughout this encounter, but Hannah did not answer; as an alternative, Brooklin texted and then called her neighbor, Brittany Brady, to tell Brady that defendant had broken into the house and that Brooklin needed help to remove the children from the residence. Defendant then exited the house and stood outside.

When Hannah returned home, she saw defendant's vehicle in her driveway. After Hannah parked her vehicle in the driveway, defendant attempted to get into Hannah's vehicle. Hannah then exited her vehicle and walked into the house with defendant following her. Hannah asked defendant for the reason that both of the doors to Hannah's home were open and for the reason that his glasses were in a broken condition outside of the carport. Defendant shrugged in response. Brooklin informed her mother Hannah that defendant had retrieved both of Hannah's guns after kicking in the doors to the house and that defendant was going to try to kill them. Their neighbor Brady then pulled her own vehicle into Hannah's driveway as Brady and Brooklin endeavored to remove the children, Armoni and Daeja, from the house while defendant and Hannah went upstairs. Brooklin noticed that defendant was holding Hannah by the arm. Brooklin told her mother that Brooklin was going to call the police. Defendant continued to hold Hannah by the arm so that Hannah was unable to leave after Hannah escorted Armoni and Daeja down the stairs in order to exit the house with Brooklin and Brady.

After Brooklin, Brady, Armoni, and Daeja departed from Hannah's house, defendant removed the wristwatch from his arm and threw it onto the ground, causing the wristwatch to break and scatter into pieces. Defendant then grabbed Hannah and began dragging her upstairs. He pushed Hannah into her bedroom and then cocked her gun and made sure that it was loaded. Defendant locked the door, put the gun to the back of Hannah's head, and threatened to "blow [her] brains out." Hannah began praying, at which point defendant pulled her up from the floor and pushed her into the small bathroom attached to her bedroom. Defendant then shut the bathroom door and locked it behind him, confining the two of them to the bathroom. Defendant grabbed Hannah by the neck, placed the gun against her temple, and began to tell her that she had "used" him. He pushed the gun into Hannah's eye socket and

continued to threaten her. Hannah begged for her life. Defendant then ordered Hannah to sit on the floor and to keep her hands flat on the floor while he began to empty his pockets and to throw the contents into the sink in search of cigarettes and a lighter. When defendant found his cigarettes and lighter, he sat on the edge of the shower and began to smoke a cigarette. Defendant blew smoke from the cigarette into Hannah's face. Defendant talked about how "it wasn't supposed to end like this" and that he had intended to kill himself, defendant's father, and Hannah when they were all in South Carolina to visit defendant's father for the elder's birthday. Defendant then spoke of getting into a confrontation with a man with whom he formerly worked and wanting to "kill that ni**er."

Defendant continued to blow smoke from his cigarette into Hannah's face while they were locked in the small bathroom adjacent to Hannah's bedroom. Hannah asked defendant to turn on the ceiling fan or to crack the bathroom door because the temperature inside the bathroom was hot. Defendant refused Hannah's request and then he stood up, stating that he had heard something. Defendant cracked the bathroom door and noticed that blue lights were flashing from a law enforcement vehicle across the street. Defendant instructed Hannah to call the emergency telephone number 911 and to tell emergency personnel to "cut those blue lights off" or he would "blow [her] brains out." After Hannah satisfied defendant's commands so that defendant would not kill her, defendant directed Hannah to sit back down in the bathroom with her hands on the floor. When Hannah moved her hand to redirect some of her hair that had fallen across her face, defendant struck Hannah with the butt of the firearm. Later, defendant told Hannah that he needed to use the bathroom. Defendant forced Hannah to straddle the commode and to unzip his pants for him. Defendant then ordered Hannah to pull out his penis and to aim it toward the toilet bowl. Defendant continued to hold Hannah's gun while he urinated. Hannah was unable to direct defendant's urine into the toilet bowl and the urine went "everywhere" while he "just stood there."

Defendant allowed Hannah to wipe some of his urine from her legs and feet with a towel. He then instructed her to get off of the commode. Defendant began to jerk at Hannah's pants and told her to remove them. Hannah said no. In response, defendant threatened to "blow [off her] kneecaps." Defendant pointed the gun at Hannah and she removed her pants. Defendant then directed Hannah to remove her shirt; Hannah complied. Defendant pushed Hannah toward the commode, removed his own pants, and unsuccessfully attempted to put his penis into Hannah's rectum. Defendant next tried to put his penis into Hannah's vagina, also without success.

Defendant unlocked the bathroom door and pulled Hannah out of the bathroom and into her bedroom. He pushed Hannah toward the bed and ordered her to get onto her knees. Defendant then got behind Hannah, put the gun to her back, and stuck his penis into her vagina and began to have intercourse with her. Defendant made Hannah turn over as he continued to have intercourse with her. At this point, Hannah's telephone was ringing as law enforcement was attempting to get into contact with her. Defendant then compelled Hannah to lie across the bed and forced her to put his penis into her mouth to perform fellatio. Subsequently, defendant allowed Hannah to put her clothing back on. Defendant stated that he was thirsty and that he wanted a bottle of water. Hannah offered to obtain a bottle of water from the kitchen for defendant, but he would not allow her to leave the bedroom without him. Instead, defendant put his arm around Hannah's neck and placed the gun at her temple before leaving the bedroom with her.

When defendant and Hannah entered the living room, defendant attempted to turn on the light, but mistakenly flipped the switch for the ceiling fan instead. Defendant then began to holler that "they've cut the lights off" and pulled Hannah backwards into another bathroom. Hannah's telephone rang and defendant answered it; he began speaking to law enforcement about his desire for some water. Hannah used the bathroom and both she and defendant drank some water from the faucet of the bathroom sink before he pulled her back into the bedroom. Defendant then ended the telephone call with law enforcement and instructed Hannah to take off her clothes again. He directed Hannah to lie on the bed and defendant inserted his penis into her vagina. Defendant then rolled onto his back and told Hannah to get on top of him. Defendant continued to hold the firearm throughout these occurrences. After defendant allowed Hannah to get off of him, defendant positioned himself behind her and again inserted his penis into her. When defendant had finished, he allowed Hannah to put back on her shirt and pants.

Throughout the night, defendant periodically allowed Hannah to answer telephone calls from law enforcement officers. He also directed Hannah to call her pastor, the pastor's wife, and Hannah's friend Laurie Parker. Neither Hannah's pastor nor the pastor's wife answered Hannah's calls, but Parker called Hannah back. Defendant told Hannah that Hannah "better talk to [Parker] now while [she could]." At one point, defendant permitted Hannah to answer a telephone call from law enforcement while defendant attempted to contact his uncle on his own telephone. Defendant's uncle did not answer defendant's calls, and defendant then attempted to reach his uncle's daughter, Jennifer.

When Jennifer answered defendant's telephone call, he told Jennifer that he needed to speak with her father and that he had done something "really bad." Defendant's telephone subsequently lost power to operate. Defendant then looked over at Hannah and said "it's time." Defendant told Hannah that he was going to kill her and then himself. Hannah began to scream and to attempt to get away from defendant. Hannah then heard a "big boom," which was the explosion that the Gaston County Police Department's Emergency Response Team had initiated in order to make entry into the house.

After the Emergency Response Team successfully removed Hannah from the house, Hannah was reunited with her daughters. Hannah told law enforcement that defendant had raped her twice. Hannah's older daughter Brittany then transported Hannah to the local hospital, where medical professionals recorded Hannah's medical history and Hannah's description of defendant's assault on her. Hospital staff took photographs of Hannah's injuries; conducted a physical examination of Hannah; and took swabs of Hannah's fingernails, breast, mouth, vaginal, and external genital areas. The anal, vaginal, and external genital swabs all tested positive for defendant's DNA[3] profile. Hannah's injuries included bald patches on her scalp where defendant had pulled at her hair, bruises on her arms and the back of her head, abrasions to her leg and knee, a broken toe, and both internal and external lacerations to her vagina.

After the State had rested its case on Friday, 13 December 2019, defense counsel made a motion to dismiss each charged offense and all lesser-included offenses against defendant on the grounds that the State's evidence was insufficient as a matter of law. The trial court granted defendant's motions to dismiss both of the first-degree kidnapping charges and allowed the first-degree burglary charge to go forward as second-degree but denied the remainder of defendant's motions to dismiss. Upon defendant's election not to testify or to present evidence on his own behalf, the trial court conducted the following colloquies to ensure that defendant was making these choices freely, voluntarily, and intelligently. The first colloquy occurred on 13 December 2019 in the following manner:

> [DEFENSE COUNSEL]: I just want for Your Honor to inquire with my client regarding he understands he has the right to testify. It's my belief he's going to elect not to testify at this time. I just wanted to get that on the record.

3. Deoxyribonucleic acid.

THE COURT: I will put that on the record now. And I will also re-address it Monday, and give him an opportunity to think about it over the weekend.

Mr. Flow, have you been able to go over with your attorneys your choice of whether or not you want to testify?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Just answer yes or no.

You have?

THE DEFENDANT: Yes.

THE COURT: And have they answered all of your questions about that?

THE DEFENDANT: Yes, sir.

THE COURT: And how are you feeling today?

Is your mind clear?

THE DEFENDANT: Yes.

THE COURT: Are you taking any kind of medicines or any kind of substances at all that would affect how you think or feel?

THE DEFENDANT: No, sir.

THE COURT: So your mind is clear as we have this conversation?

THE DEFENDANT: Correct, yes, sir.

THE COURT: And you realize you have the right not to testify?

THE DEFENDANT: Yes, sir.

THE COURT: Do you also realize, as a result of your conversation with the attorneys, that you have the right to testify?

THE DEFENDANT: Yes, sir.

THE COURT: You have both of those rights.

THE DEFENDANT: Right.

THE COURT: And you understand that at this juncture, at this point in the trial, it is your decision entirely as to whether or not you decide to testify or not.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: It is not your lawyer's decision, it's not the DA's decision, it's not my decision, it's your decision and your decision alone.

So have you been able to think some this afternoon about whether or not you want to testify?

THE DEFENDANT: Yes, sir, I have.

THE COURT: And what is your decision?

THE DEFENDANT: I'm not going to testify.

THE COURT: Okay. Well, that is certainly your right.

Let the record reflect the Court has had the colloquy with Mr. Flow outside the presence of the jury, at the request of his counsel. And the decision at this point, 10 till 4 on December 13th, is not to testify.

Is that correct, sir?

THE DEFENDANT: Correct, sir.

THE COURT: Do you have any questions about your decision to testify or not?

THE DEFENDANT: No, sir.

THE COURT: How far did you go in school?

THE DEFENDANT: I have a GED, and I had some technical college.

THE COURT: And some technical beyond a GED?

THE DEFENDANT: Yes, sir.

THE COURT: So then you can read and write?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Does that satisfy —

> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> THE COURT: — you, Mr. Higdon, about the colloquy the Court is required to have?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.

On Monday, 16 December 2019, the trial court conducted the following additional colloquy to ensure that it was defendant's legally acceptable choice not to present evidence or to testify on his own behalf:

> [DEFENSE COUNSEL]: The defendant will not be putting on any evidence.
>
> THE COURT: Okay. If you would please stand.
>
> (The defendant complied)
>
> THE COURT: You've been over that choice of yours with both Ms. Monteleone and you[r] attorney Mr. Higdon?
>
> THE DEFENDANT: Yes, yes, Your Honor.
>
> THE COURT: Do you have any questions about that?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Do you realize it's your choice and your choice alone as to whether or not you put on evidence or not?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: That you have the constitutional right to present evidence?
>
> THE DEFENDANT: Yes.
>
> THE COURT: To offer witnesses on your behalf?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And also you have the constitutional right not to.
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: It is not your lawyer's decision, it is not your family's decision, it's not mine, or the assistant DA's, it is yours and yours alone.

> Do you have any questions about that?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Have all of your questions about that issue been satisfactorily answered by your attorneys, Ms. Monteleone and Mr. Higdon?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Okay. You may have a seat.
>
> (The defendant complied)
>
> THE COURT: I am finding that that choice, like his choice not to testify, is made freely, voluntarily, and intelligently, and that he has had the opportunity to confer with counsel about that.
>
> . . . .
>
> THE COURT: Have you thought anymore about your decision not to testify?
>
> I take it that by you not presenting any evidence you also mean for that to mean you're not going to testify?
>
> (The defendant stood)
>
> THE DEFENDANT: Yes, Your Honor.

Following this exchange, defense counsel renewed the motion, on defendant's behalf, to dismiss all of the charges against defendant. The trial court denied the motion and the jury charge conference took place. The jury was then brought into the courtroom and it heard closing arguments from both sides before trial proceedings concluded for the day.

On the next day of Tuesday, 17 December 2019—the sixth day of trial and the day that the jury was scheduled to receive its instructions prior to the start of its deliberations in this case—defendant jumped off of the second-story mezzanine of the Gaston County Jail by first hanging onto a balcony railing before jumping a distance of sixteen feet onto the floor below and striking a steel table feet-first. Defendant was subsequently taken to the CaroMont Regional Medical Center via emergency transport, where he received surgery for his injuries which resulted from his actions. Defense counsel challenged defendant's competency under N.C.G.S. § 15A-1002 to continue with the trial proceedings and asked the trial court to delay any further proceedings until such a time as the court was satisfied that it had made an inquiry as to whether defendant had

the capacity to proceed. In response, the State argued that defendant's apparent suicide attempt did not implicate his capacity to proceed, but instead represented a voluntary absence and therefore constituted a waiver of his constitutional right to be present at every stage of his trial. The trial court instructed defense counsel to acquire information on defendant's condition and on the events leading to his absence.

Following a recess from trial proceedings during which both defense counsel and the State gathered evidence regarding the events being explored and defendant's circumstances, defense counsel called an investigator with the public defender's office, Shana Withers, to testify as to defendant's condition at CaroMont. Withers testified that defendant was "clearly medicated" and had been fitted with a neck brace as well as an immobilizing device on his left leg. Withers also testified that defendant's trauma surgeon spoke to defendant regarding a surgery that defendant needed in order to repair the upper femur of defendant's left leg; the doctor also reported that defendant had broken two ribs. Withers noted that defendant's responses to the doctor were "[r]elatively inaudible" and that defendant appeared to be having a "hard time responding." According to Withers, the hospital's legal counsel was unable to release defendant's medical records without a court order, and Withers further testified that sheriff's deputies had informed her that no one from the psychological department of the hospital had examined defendant. Defense counsel asserted that this testimony met the "textbook definition of incapable of proceeding," given that defendant was heavily medicated and was unable to provide intelligible responses.

In order to determine whether defendant had forfeited his right to be present for the trial's ongoing proceedings by his own actions, the trial court also received testimony from Assistant Chief Deputy of the Gaston County Sheriff's Office Darrell Griffin and reviewed camera footage of the incident. Griffin testified that nothing in his investigation suggested that any other parties were involved in defendant's actions. Griffin related that this event occurred when defendant told jail officials that defendant wanted to return to his jail cell to retrieve his glasses before being brought to court. The trial court asked Griffin whether defendant had demonstrated any instances of mental or emotional disturbance during the time that defendant had been at the jail; Griffin testified that Griffin was not aware of any such occasion. No other witnesses were called forward to testify by either the State or the defense. The State argued that defendant had voluntarily absented himself from the trial proceedings due to defendant's actions, whereas defense counsel contended that the resumption of trial proceedings in defendant's absence "would violate his due process rights, his right to a

jury trial, under the Federal Constitution, the State Constitution, and the applicable statutes under North Carolina law." The State also submitted that defendant's actions may not have been suicidal in nature at all in light of the specific aspects of his jump.

The trial court observed that its inquiry was "limited to a very narrow issue" of whether defendant's actions were voluntary, rather than the question of whether his actions amounted to a suicidal gesture. Upon concluding that defendant's injuries were entirely caused by defendant's own voluntary actions, the trial court determined that defendant had voluntarily absented himself from the trial proceedings and that the trial could go forward properly in his absence. Neither the defense nor the State requested any additional findings from the trial court; however, defense counsel objected to the trial court's determination on the record before the parties participated in the remainder of the jury charge conference.

After deliberating for the remainder of the afternoon of Tuesday, 17 December 2019 and the beginning of the following morning of Wednesday, 18 December 2019, the jury returned a verdict of guilty on each of the charges against defendant while he was absent from the trial proceedings. For sentencing purposes, the trial court submitted for the jury's consideration the State's only requested aggravating factor, to wit: defendant knowingly violated a valid protective order in the course of constituting the second-degree burglary and first-degree kidnapping. The jury found the existence of this aggravating factor for purposes of sentencing defendant for his commission of these two particular crimes. Defense counsel repeatedly made motions to strike the jury verdicts as violations of defendant's rights to due process and to a jury trial under the Constitution of the United States and the Constitution of North Carolina. The trial court denied these motions and entered judgments against defendant. On Friday, 20 December 2019, after defendant had returned to court and in accordance with the jury's verdicts, the trial court sentenced defendant to consecutive sentences of incarceration of 276 to 392 months each for the commission of the crime of first-degree forcible sexual offense and both commissions of the crime of first-degree forcible rape. Defendant's convictions for first-degree kidnapping, second-degree burglary, DVPO violation with a deadly weapon, possession of a firearm by a felon, and false imprisonment were consolidated for judgment with defendant being sentenced to 180 to 228 months of incarceration to run consecutively to his three other consecutive sentences. Lastly, defendant was ordered to register as a sex offender for the remainder of his natural life.

Defendant appealed to the Court of Appeals, arguing that the trial court erred in denying defense counsel's motion to conduct an inquiry into defendant's capacity to proceed. Defendant also contended before the lower appellate court that the trial court's instructions on first-degree sexual offense deprived defendant of his right to a unanimous jury verdict; however, this issue is not the subject of the present appeal. In an opinion filed on 4 May 2021, *State v. Flow*, 277 N.C. App. 289 (2021), a unanimous Court of Appeals panel found no error in the judgments entered by the trial court. The lower appellate court acknowledged this Court's holding in *State v. Sides*, 376 N.C. 449, 450 (2020), in which we determined that the trial court in that case had erred in concluding that the defendant Sides had waived her constitutional right to be present at her trial as the result of her suicide attempt and by the trial court's subsequent failure to conduct a competency hearing *sua sponte* to determine whether the defendant had possessed the capacity to waive her right to be present where substantial evidence was presented to show that the defendant may have been incompetent at the time of her suicide attempt. *Flow*, 277 N.C. App. at 296–97, 299. In *Sides*, we concluded that "[o]nce the trial court had substantial evidence that defendant may have been incompetent, it should have sua sponte conducted a competency hearing to determine whether she had the capacity to voluntarily waive her right to be present during the remainder of her trial." 376 N.C. at 457. This Court observed:

> In such cases, the issue is whether the trial court is required to conduct a competency hearing before proceeding to determine whether the defendant made a voluntary waiver of her right to be present, or, alternatively, whether it is permissible for the trial court to forego a competency hearing and instead assume a voluntary waiver of the right to be present on the theory that the defendant's absence was the result of an intentional act.

Id. at 456. We further opined, however, that

> the issue of whether substantial evidence of a defendant's lack of capacity exists so as to require a sua sponte competency hearing requires a fact-intensive inquiry that will hinge on the unique circumstances presented in each case. Our holding should not be interpreted as a bright-line rule that a defendant's suicide attempt automatically triggers the need for a competency hearing in every instance. Rather, our

> decision is based on our consideration of all the evidence in the record when viewed in its totality.

Id. at 466. The Court of Appeals in the present case noted that, unlike in *Sides*, nothing in defendant's prior record, conduct, or actions provided the trial court with notice or evidence that defendant may have been incompetent. *Flow*, 277 N.C. App. at 299. Furthermore, the trial court here had the opportunity to personally observe defendant's conduct and demeanor at the time of his apparent suicide attempt, to hear arguments from both the State and the defense, and to receive evidence concerning defendant's competency before concluding that defendant had voluntarily absented himself from the trial proceedings. *Id.* Finally, unlike the defendant in *Sides*, defendant in this case engaged in multiple lengthy colloquies with the trial court and waived his right to testify or to present evidence on his own behalf. *Id.* at 300.

Here, the Court of Appeals decided that there was no substantial evidence which tended to show, or to support a finding, that defendant may have been incompetent apart from his apparent suicide attempt; consequently, the trial court was not required to preside over an additional *sua sponte* hearing regarding defendant's competency after having already conducted an appropriate fact-intensive inquiry into whether defendant had voluntarily waived his right to be present for the rest of the trial proceedings due to his intentional actions. *Id.* at 302. After further holding that the trial court did not deprive defendant of his right to a unanimous jury verdict with the trial court's jury instruction on first-degree sexual offense, the lower appellate court concluded that defendant had received a fair trial, free from prejudicial errors, and therefore affirmed the jury's verdicts and judgments thereupon entered. *Id.* at 303–04.

Defendant petitioned this Court for discretionary review pursuant to N.C.G.S. § 7A-31(c) to consider: (1) whether the trial court erred by failing to conduct further inquiry into defendant's capacity to proceed, and (2) whether the trial court's instruction on sexual offense deprived defendant of his right to a unanimous jury verdict. This Court allowed review as to the first issue and denied review as to the second issue by way of a special order issued on 17 August 2022. As such, our review in this matter is limited to whether the trial court erred by failing to conduct further inquiry into defendant's continued capacity to proceed following defendant's apparent suicide attempt on 17 December 2019 after the trial court had determined that defendant had voluntarily absented himself from the court proceedings as the result of his actions.

II. Analysis

Defendant depicts his appeal as presenting two interrelated arguments in his claim that the trial court erred in declining to conduct further inquiry into defendant's capacity to proceed—one statutory claim arising out of the North Carolina General Statutes and one constitutional claim arising out of the Due Process Clause of the Fourteenth Amendment. Because defendant's claims present questions of law concerning the trial court's alleged nonconformance with statutory requirements and alleged violations of defendant's constitutional rights, our review is de novo. *State v. Watlington*, 216 N.C. App. 388, 394 (2011); *State v. Ortiz-Zape*, 367 N.C. 1, 10 (2013). In evaluating defendant's contentions, we hold that the trial court did not err in declining to make further inquiry into defendant's capacity to proceed during the trial proceedings because the trial court received all of the evidence which the defense was prepared to present at the original hearing and there was not substantial evidence to indicate that defendant may have lacked capacity at the time of his apparent suicide attempt.

A. Defendant's Statutory Claim

First, defendant asserts that the trial court acted in violation of the North Carolina General Statutes by allowing criminal proceedings to continue against defendant while he was incompetent to stand trial. The pertinent statutory law states:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C.G.S. § 15A-1001(a) (2021). Relevant statutory provisions further provide that a question regarding a defendant's capacity to proceed "may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court" and that, once a defendant's capacity to stand trial is called into question, the trial court is required to "hold a hearing to determine the defendant's capacity to proceed." N.C.G.S. § 15A-1002(a)–(b) (2021). When a competency hearing is conducted, "[r]easonable notice shall be given to the defendant and prosecutor, and the State and the defendant may introduce evidence." N.C.G.S. § 15A-1002(b)(1). "A defendant has the burden of proof to show incapacity or that he is not competent to stand trial." *State v. O'Neal*, 116

N.C. App. 390, 395 (1994) (citing *State v. Gates*, 65 N.C. App. 277, 283 (1983)). At the conclusion of such a competency hearing, "[t]he order of the court shall contain findings of fact to support its determination of the defendant's capacity to proceed." N.C.G.S. § 15A-1002(b1) (2021). "Where the procedural requirement of a hearing has been met, defendant must show that the trial court abused its discretion in denying the motion [for an evaluation of defendant's capacity to stand trial] before reversal is required." *Gates*, 65 N.C. App. at 284 (citing *State v. McGuire*, 297 N.C. 69 (1979), *cert. denied sub nom. McGuire v. State*, 444 U.S. 943 (1979)).

Defendant calls our attention to a definitive request that his counsel made for a competency hearing after defendant injured himself on 17 December 2019. Specifically, the attorney stated to the trial court:

> [DEFENSE COUNSEL]: Your Honor, at this time the defense makes a motion, based on the best available information that I have, that this may be a suicide attempt, and I'm going to challenge my client's competency under 15A-1002, and the Court should delay any further proceedings until the Court is satisfied that it has made an inquiry as to whether or not the defendant has the capacity to proceed at trial.

We agree that this motion was plainly sufficient to trigger the statutory requirement that the court "hold a hearing to determine the defendant's capacity to proceed." N.C.G.S. § 15A-1002(b)(1). However, the relevant queries then become (1) whether the inquiry subsequently conducted by the trial court sufficed to meet the statutory requirements provided by N.C.G.S. § 15A-1002 and (2) if not, whether defendant has demonstrated that he was prejudiced by the trial court's failure to conduct a statutorily sufficient hearing. *See* N.C.G.S. § 15A-1443(a) (2021).

Section 15A-1002 provides sparse guidance regarding the procedural and substantive requirements of the competency hearing mandated by the statutory enactment. "Although the present statute requires the court to conduct a hearing when a question is raised as to a defendant's capacity to stand trial, no particular procedure is mandated. The method of inquiry is still largely within the discretion of the trial judge." *Gates*, 65 N.C. App. at 282. Indeed, this area of the General Statutes is largely characterized by permissive language delineating what the trial court *may* do when conducting a competency hearing, including, but not limited to, the court's issuance of an order for a medical examination of the defendant. On the other hand, there is correspondingly little reference in the statutes

to what the trial court *shall* do. *See*, *e.g.*, N.C.G.S. § 15A-1002(b)(1a) and (2). As a result, our appellate courts have ascertained that "[t]he hearing requirement . . . appears to be satisfied as long as it appears from the record that the defendant, upon making the motion, is provided an opportunity to present any and all evidence he or she is prepared to present." *Gates*, 65 N.C. App. at 283.

Consistent with this appropriate construction of the applicable statutory provisions and applying it to the instant case, we therefore hold that the inquiry conducted by the trial court following defense counsel's motion in this case was statutorily sufficient because defendant was provided an opportunity to present any and all evidence relating to his competency that he was prepared to present. Specifically, the trial court released defense counsel to visit defendant in the hospital and to gather any evidence pertaining to defendant's absence from court that the defense saw fit to present. When the parties reconvened and proceedings resumed, the trial court solicited evidence regarding whether defendant had a history of mental illness, evidence regarding whether anyone had witnessed previous instances of mental or emotional disturbance from defendant, and evidence regarding defendant's behavior leading up to, and at the time of, his apparent suicide attempt. In accordance with N.C.G.S. § 15A-1002(b)(1), both the State and the defense were permitted to introduce evidence for the trial court's consideration. The trial court was even able to review videographic evidence which showed defendant as he jumped from the jail's second-story mezzanine. At the conclusion of this hearing, the trial court determined that defendant had voluntarily absented himself from further proceedings.

Although the trial court declined to specifically consider whether defendant had manifested a "suicidal gesture" at the time of his jump, we do not deem the trial court's approach to connote inadequate contemplation by the tribunal of the evidence presented on defendant's capacity. Suicidality does not automatically render one incompetent; conversely, a defendant may be found incompetent by way of mental illness without being determined to be suicidal. However, a defendant cannot be found to have acted voluntarily if he lacked capacity at the time of his conduct in question. *See Sides*, 376 N.C. at 459 ("Logically, competency is a necessary predicate to voluntariness."). By receiving evidence concerning defendant's state of mind leading up to, and at the time of, his apparent suicide attempt, the trial court was able to determine whether defendant had acted voluntarily and had thereby waived his right to be present at all stages of his trial. *See State v. Woods*, 293

N.C. 58, 64 (1977) ("Clearly, the trial court considered all information relative to defendant's capacity which was presented to it and found, implicitly at least, that defendant was competent to proceed to trial."). Therefore, the trial court was not required to make a specific determination regarding whether defendant's acts amounted to a suicidal gesture.

Because we hold that the trial court's inquiry into defendant's capacity to proceed at the time of his apparent suicide attempt was statutorily sufficient, we therefore do not need to reach the issue of whether defendant has demonstrated prejudice. We do note, however, that defendant has made no showing that he was prejudiced by any failure on the part of the trial court to conduct any further inquiry. In order to demonstrate prejudicial statutory error in accordance with N.C.G.S. § 15A-1443(a), defendant would have to prove that there was a reasonable possibility that, had the trial court conducted further inquiry into his capacity to proceed, a different outcome would have resulted at his trial. Defendant was only absent from trial for the trial court's rendition of the charge to the jury and the announcement of the jury verdicts. Defendant himself expressly waived his right to present evidence and to testify on his own behalf after two lengthy colloquies with the trial court prior to his apparent suicide attempt. The trial court instructed the jury that it was not to speculate about the reason for defendant's absence or to infer anything from the fact that defendant was not physically present in court prior to the jury's deliberations. Defendant returned to court in person for sentencing on 20 December 2019. Therefore, assuming *arguendo* that there was any error in the trial court's execution of defendant's N.C.G.S. § 15A-1002 hearing, there are no grounds existent to vacate the trial court's judgment because it did not prejudice defendant.

B. Defendant's Constitutional Due Process Claim

Second, defendant contends that the trial court violated his constitutional rights because the Due Process Clause of the Fourteenth Amendment provides that (1) a criminal defendant has the right to be present at all stages of his own trial "whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge," *Snyder v. Massachusetts*, 291 U.S. 97, 105–06 (1934), and (2) a criminal defendant cannot be tried unless he is competent to stand trial, *Medina v. California*, 505 U.S. 437, 439 (1992). Although competency hearings mandated by state statute are largely within the discretion of the trial judge, do not confer onto defendants the right to a medical examination, and merely require that both sides be afforded an opportunity to present evidence bearing on the issue of competence, hearings arising under the Due Process Clause require

trial judges to actively "elicit adequate information" to "dispel[] the concerns that would ordinarily arise regarding competency." *United States v. Loyola-Dominguez*, 125 F.3d 1315, 1319 (9th Cir. 1997); *see also State v. Whitted*, 209 N.C. App. 522, 529 (2011). Under some circumstances, a trial court may even be constitutionally required to order a psychiatric examination to determine a defendant's ongoing capacity to stand trial. *State v. Rich*, 346 N.C. 50, 61 (1997); *State v. Heptinstall*, 309 N.C. 231, 235–36 (1983). However, a defendant is not entitled to a competency hearing under the Due Process Clause unless substantial evidence is presented which tends to demonstrate his or her incompetence.

"[T]he standard for competence to stand trial is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (extraneity omitted). "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Drope v. Missouri*, 420 U.S. 162, 181 (1975). Specifically, a trial court may be required to investigate a defendant's competency when presented with evidence which "create[s] a sufficient doubt of his competence to stand trial." *Id.* at 180; *see also State v. Young*, 291 N.C. 562, 568 (1977) ("A trial court has a constitutional duty to institute, *sua sponte*, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent." (extraneity omitted)). Generally, this right cannot be waived. *See Pate v. Robinson*, 383 U.S. 375, 384 (1966) ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial."). However, a defendant who voluntarily induces his own inability to proceed may nonetheless be required to stand trial. *See, e.g.*, *United States v. Crites*, 176 F.3d 1096, 1097–98 (8th Cir. 1999) (holding that trial court did not err in finding that defendant was voluntarily absent after a suicide attempt left him unconscious and hospitalized); *Moore v. Campbell*, 344 F.3d 1313, 1324 (11th Cir. 2003) (denying defendant's petition for habeas corpus after state court found that defendant forfeited the right to be present by refusing to eat or drink, resulting in his incapacity).

On the other hand, a defendant in a non-capital case may ordinarily waive his right to be present at all stages of his trial:

> Where the offense is not capital and the accused is not in custody, the prevailing rule has been, that if,

> after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.

Taylor v. United States, 414 U.S. 17, 19 (1973) (extraneity omitted). Moreover, "a defendant may waive the benefit of statutory or constitutional provisions by conduct inconsistent with a purpose to insist upon it." *Young*, 291 N.C. at 567. However, the Supreme Court of the United States has cautioned that, in order to voluntarily waive his or her right to be present at trial, a defendant "must be aware of the processes taking place, of his right and of his obligation to be present, and he must have no sound reason for remaining away." *Taylor*, 414 U.S. at 19–20 n.3 (quoting *Cureton v. United States*, 396 F.2d 671, 676 (D.C. Cir. 1968)). In other words, a defendant's voluntary waiver must be "an intentional relinquishment or abandonment" of his right to be present. *Id.* at 19 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Consequently, this Court has held that a trial court, whenever presented with substantial evidence of a defendant's incompetence, must first determine whether a defendant possessed the capacity to voluntarily waive his constitutional right to be present at trial before determining that he or she had voluntarily absented himself or herself from the proceedings. *Sides*, 376 N.C. at 459 ("[I]f there is substantial evidence suggesting that a defendant may lack the capacity to stand trial, then a sufficient inquiry into her competency is required before the trial court is able to conclude that she made a voluntary decision to waive her right to be present at the trial . . . .").

As in *Sides*, this case raises a "classic 'chicken and egg' dilemma regarding how a trial court must proceed when faced with a situation where a defendant intentionally engages in conduct harmful to [himself] that has the effect of absenting [him] from trial" and potentially causing his present incompetence. *Id.* at 456. As in *Sides*, the determinative issue will be whether the trial court in the instant case had substantial evidence that defendant may have lacked capacity at the time of his apparent suicide attempt which resulted in his subsequent incompetence and inability to be present for the remainder of his trial. *Id.* at 457. Finally, like in *Sides*, the resolution of this issue "requires a fact-intensive inquiry that will hinge on the unique circumstances presented in [this] case." *Id.* at 466. Notably, this Court has previously established the legal principle,

which we have already applied here, that an apparent suicide attempt does not, standing alone, "automatically trigger[ ] the need for a competency hearing in every instance." *Id.* at 466. Because a suicide attempt does not inherently constitute sufficient evidence that a defendant may be incompetent so as to require a court to conduct further inquiry into his or her ongoing competence to stand trial prior to making a determination that the defendant had voluntarily absented himself or herself, we must therefore consider what, if any, additional evidence existed to support the conclusion that defendant lacked capacity at the time of his apparent suicide attempt in order to ascertain whether the trial court was required to conduct further inquiry into defendant's competence before concluding that defendant had voluntarily absented himself from further proceedings.

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Bowman*, 193 N.C. App. 104, 112 (2008) (quoting *State v. Denny*, 361 N.C. 662, 664–65 (2007)), *cert. denied*, 363 N.C. 657 (2009). "[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required" but there are "no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed." *Drope*, 420 U.S. at 180. Furthermore, the trial court "may have insights" into a defendant's competency that are "not conveyed by the record" available to an appellate court. *Pierce v. Underwood*, 487 U.S. 552, 560 (1988); *see also Miller v. Fenton*, 474 U.S. 104, 116–17 (1985).

Defendant argues that defense counsel presented the trial court with substantial evidence in the form of three broad categories which called into question defendant's ongoing competence to stand trial. First, defendant underscores his behavior in the events leading up to his arrest, noting that several trial witnesses testified to his excessive acts on 26 May 2018, including, *inter alia*, his rants to Hannah on the telephone about being the target of gunshots and later being pursued by police while Hannah was driving in her car with her daughter Brooklin, his repeated and allegedly uncharacteristic use of a racial slur, his claimed inability to control his own urination, his threats of suicide, and his action of smashing his own wristwatch with no apparent purpose. Defendant emphasizes that both Hannah and defendant's father observed that defendant was "not himself" that day, thus leading Hannah to wonder if defendant was operating under the influence of mind-altering substances. Second, defendant points to his apparent suicide attempt on the sixth

day of his trial, which he contends "suggests a rather substantial degree of mental instability" standing on its own. *Drope*, 420 U.S. at 181. Lastly, defendant references Public Defender Investigator Withers' testimony that defendant was "clearly medicated" and had trouble communicating when she went to visit him in the hospital following defendant's apparent suicide attempt.

At the outset of our analysis of defendant's assertions as to the existence of substantial evidence of his ongoing incapacity to proceed in his trial, we view Ms. Withers' testimony as failing to provide any insight into the salient question of whether there was substantial evidence before the trial court that defendant may have lacked capacity *at the time of his apparent suicide attempt*. The fact that there was evidence indicating that defendant might have been incompetent to stand trial due to the influence of medication prescribed to him as a result of his self-inflicted injuries is irrelevant, because the evidence is not substantial that defendant lacked capacity independent of the administration of medication to him *after the time of his apparent suicide attempt*. Furthermore, as related above, while a defendant's attempt to commit suicide is "an act which suggests a rather substantial degree of mental instability" by itself, *id.*, it does not automatically trigger the need for a competency hearing in every case. *Sides*, 376 N.C. at 466. This Court is, therefore, left to consider whether any additional indicia of defendant's incompetence can be combined with his apparent suicide attempt to support the conclusion that he may have lacked the capacity on 17 December 2019 to voluntarily absent himself from court proceedings, thereby necessitating further inquiry into his competence under the Due Process Clause. *See Bowman*, 193 N.C. App. at 112.

Aside from Ms. Withers' testimony and his self-injurious act on 17 December 2019, the only indicia that defendant offers to support his assertion that the trial court was presented with substantial evidence which tended to show that he might have lacked capacity on the date at issue were the oddities of his behavior in the events leading up to his arrest in 2018. As a preliminary matter, although the nature of defendant's crimes and his key behaviors during the scrutinized events may be of some probative value in determining whether the trial court was presented with substantial evidence of defendant's incompetence, they too "cannot be equated with mental incompetence to stand trial." *Nguyen v. Reynolds*, 131 F.3d 1340, 1346 (10th Cir. 1997) ("Although the crime itself was horrific and irrational, that alone cannot be equated with mental incompetence to stand trial."). Indeed, even if defendant's offenses and behavioral absurdities may have been indicative of genuine mental

disturbance, they do not necessarily bear on the issue of competency to stand trial because "[n]ot every manifestation of mental illness demonstrates incompetence to stand trial." *United States ex rel. Foster v. De Robertis*, 741 F.2d 1007, 1012 (7th Cir. 1984). "Similarly, neither low intelligence, mental deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial." *Medina v. Singletary*, 59 F.3d 1095, 1107 (11th Cir. 1995). "[R]ather, the evidence must indicate a present inability to assist counsel or understand the charges." *De Robertis*, 741 F.2d at 1012.

Although characterizable as bizarre, defendant's behavior in the events leading up to his arrest in May 2018, combined with his later apparent suicide attempt, is inadequate to support the conclusion that defendant may have lacked the ability to understand the proceedings against him or to assist counsel in preparing defendant's defense in December 2019. Unlike in *Sides*, the trial court in the instant case was not presented with any evidence tending to indicate that defendant experienced a prolonged history of severe mental illness that could have hindered his ability to make a voluntary decision to absent himself from further proceedings. 376 N.C. at 464–65; *see also Pate*, 383 U.S. at 378–85. Nor, as in cases such as *Loyola-Dominguez*, did defendant give any indication in his interactions with the trial court or with defense counsel that defendant either failed to understand the nature and consequences of the proceedings against him or that he was unable to assist properly in his own defense prior to, or at the time of, his apparent suicide attempt. 125 F.3d at 1319. With these uncommon circumstances of a criminal defendant's apparent suicide attempt which was made during the course of trial proceedings, the trial court here was uniquely equipped to receive not only oral testimony which detailed defendant's behaviors leading up to his injurious act, but also videographic evidence which showed defendant at the exact time of his apparent suicide attempt. The trial court was, therefore, in an unusually enabled position to evaluate whether defendant's apparent suicide attempt evidenced such a sudden and severe decline in his mental health that defendant had lost the capacity to voluntarily absent himself from further proceedings without the trial court's need to conduct any further inquiry into defendant's capacity at that time. *See id.*

Moreover, the trial court in this case had ample opportunity to evaluate defendant's interactions with counsel and to conduct multiple lengthy colloquies with defendant throughout the course of trial, including such a conversational engagement between the trial court and defendant as recently as a single day prior to defendant's apparent

suicide attempt. During the three separate colloquies that the trial court conducted with defendant in the week leading up to defendant's apparent suicide attempt, defendant was lucid and appropriate in his responses. In open court, defendant confirmed that his head was "clear," that he wasn't under the influence of any mind-altering medications or substances, and that he had conferred with his attorney in electing to stipulate to his prior felony offense and to decline to testify and/or present evidence on his own behalf. In addition to his appropriate "yes, sir" and "no, sir" responses to the trial court's narrowly designed questions, defendant capably provided coherent details about his attained level of education and literacy when prompted. As a result, the trial court was able to conclude that defendant was entering into these strategic legal decisions "freely, voluntarily, and intelligently" with the assistance of counsel.

This form of evidence is especially pertinent because it directly relates to the crux of competency—whether a defendant, regardless of any mental or emotional disturbance, has the present ability to understand and to engage meaningfully with his trial counsel and with the legal proceedings brought against him. *See Heptinstall*, 309 N.C. at 236 (crediting the fact that, although the defendant provided testimony that was "bizarre and nonsensical" in response to inquiries about morality or religion, he was "accurately oriented" to his present circumstances, including the charges against him); *State v. Badgett*, 361 N.C. 234, 260 (2007) (stating that "[t]he record shows that defendant was able to interact appropriately with his attorneys during the trial[,]" that he "followed their advice by declining to testify during the guilt-innocence phase[,]" and that he "also responded directly and appropriately to questioning during the capital sentencing proceeding as well as to the trial court's inquiries throughout the trial"). *Cf. Drope*, 420 U.S. at 180–81 (stating that "as a result of petitioner's absence" during a "crucial portion" of his trial, "the trial judge and defense counsel were no longer able to observe him in the context of the trial and to gauge from his demeanor whether he was able to cooperate with his attorney and to understand the nature and object of the proceedings against him"). In addition, unlike in *Heptinstall* and *Badgett*, defendant's interactions with the trial court in this case were exclusively lucid and provided no indication of incompetency or even any degree of mental disturbance.

Based upon our review of the record, we conclude that, taking the facts on the whole which were before the trial court in the present case, there was not substantial evidence here which tended to cast doubt on defendant's competency at the time of his apparent suicide attempt. The

trial court was able to directly observe defendant over the course of the trial; to conduct multiple lengthy colloquies with defendant in the days of the trial which immediately preceded defendant's absence; and to receive and review evidence, including surveillance footage, detailing defendant's actual demeanor at the time of his apparent suicide attempt. Unlike other cases in which this Court has held that sufficient evidence existed to warrant additional inquiry into a defendant's capacity under the Due Process Clause, the trial court in this case was not presented with any evidence which tended to indicate that defendant had a history of mental illness; likewise, none of defendant's interactions with the trial court tended to cast doubt upon his ability to appropriately participate in and to understand the legal proceedings against him. Rather, the only evidence which tended to indicate defendant's incompetence on the morning of 17 December 2019 was: (1) his apparent suicide attempt itself, and (2) the nature of defendant's crimes and his behaviors at the time that his criminal offenses were committed in May 2018. We hold that these indicia, standing alone or in combination with each other, were not adequate to support the conclusion that defendant may have lacked competency at the time of his apparent suicide attempt. Therefore, the trial court was not constitutionally required to conduct any further inquiry into defendant's competency prior to making its determination that defendant had voluntarily absented himself from the trial proceedings.

III. Conclusion

In light of our determination that the trial court was not required to conduct further inquiry into defendant's continued capacity to proceed following the trial court's hearing concerning defendant's apparent suicide attempt, we affirm the decision of the Court of Appeals, thereby affirming the jury's verdicts at trial and the trial court's judgments which were entered against defendant.

AFFIRMED.

Justice EARLS dissenting.

A criminal defendant's right not to stand trial unless competent to do so is a vital part of American jurisprudence, with its origin tracing back to the common law. *See*, *e.g.*, *Medina v. California*, 505 U.S. 437, 446 (1992); *see also Youtsey v. United States*, 97 F. 937, 940 (6th Cir. 1899) (collecting cases). This right is enshrined in our federal Constitution under the Due Process Clause of the Fifth and Fourteenth Amendments.

U.S. Const. amend. V; U.S. Const. amend. XIV; *see also Pate v. Robinson*, 383 U.S. 375 (1966) (holding that when a defendant is not provided with procedures adequate to protect their right not to be tried or convicted while incompetent, their due process right to a fair trial is violated). Importantly, our federal Constitution guarantees every criminal defendant due process protection, no matter how heinous their crime. *See* U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"); *see* U.S. Const. amend. XIV ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]"); *see also Drope v. Missouri*, 420 U.S. 164, 180 (1975) (finding a due process, competency to stand trial violation, for a defendant who was charged along with two others in the forcible rape of his wife); *see also Pate*, 383 U.S. at 376, 385–86 (finding that a defendant who murdered his common-law wife had his due process rights "abridged" because he did not "receive an adequate hearing on his competence to stand trial").

As early as 1899, the Sixth Circuit explained that "[i]t is fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or after trial, receive judgment, or, after judgment, undergo punishment." *Youtsey*, 97 F. at 940. The United States Supreme Court has since explained that "a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial." *Drope v. Missouri*, 420 U.S. at 171. This Court has held that "a trial court has a constitutional duty to institute, sua sponte, a competency hearing if there is substantial evidence before the court indicating that the accused may be mentally incompetent." *State v. Young*, 291 N.C 562, 568 (1977) (cleaned up) (quoting *Crenshaw v. Wolff*, 504 F.2d 377 (8th Cir. 1974)). Furthermore, because a defendant's competency status can change over time, "a trial court must always be alert to circumstances" that may signal a change in a defendant's competency. *State v. Sides*, 376 N.C. 449, 458 (2020) (quoting *Drope*, 420 U.S. at 181). Indeed, questions of competency can arise at any time, even for the first time during trial. *Id.*

In like manner, North Carolina also affords defendants a statutory protection against being subjected to trial when they are not competent. *See* N.C.G.S. § 15A-1001(a) (2021); *see also* N.C.G.S. § 15A-1002(a) & (b)(1) (2021). Thus, at the time of Mr. Flow's proceeding, the trial court had at least two reasons to conduct a competency hearing: one based on North Carolina's statutory protections, and another based on Mr. Flow's federal constitutional rights.

As the majority carefully documents, the crime in this case was undoubtedly beyond horrific for the victims. Without question, "[t]he Government's interest in bringing to trial an individual accused of a serious crime is important." *Sell v. United States*, 539 U.S. 166, 180 (2003). "[T]he Government seeks to protect through application of the criminal law the basic human need for security." *Id.* (citing *Riggins v. Nevada*, 504 U.S. 127 at 135–136 (1992) ("[P]ower to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace." (alteration in original) (quoting *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (Brennan, J., concurring)))). However, at the same time, "the Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one." *Id.* To be fair, the trial must comport with statutory and constitutional guarantees. "If a defendant is incompetent, due process considerations require suspension of the criminal trial until such time, if any, that the defendant regains the capacity to participate in his defense and understand the proceedings against him." *Medina*, 505 U.S. at 448 (citing *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)). If we decide that defendants who commit especially heinous crimes do not need to be afforded due process rights, we undermine the very foundation of the rule of law. Furthermore, to be clear, as we said in *Sides*, a retrospective competency hearing rather than a new trial is a possible remedy in these circumstances. *See Sides*, 376 N.C. at 466.

A. Statutory Protections

In North Carolina a defendant has a statutory right not to be

> tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C.G.S. § 15A-1001(a). When a defendant meets the above criteria, they are said to have "incapacity to proceed." *Id.* A court must "hold a hearing to determine the defendant's capacity to proceed" if a question is raised regarding the defendant's capacity. N.C.G.S. § 15A-1002(b)(1). A defendant's capacity to proceed "may be raised at any time on a motion by the prosecutor, the defendant, the defense counsel, or the court." N.C.G.S. § 15A-1002(a). Under this framework, once the question of capacity is raised, the defendant is not required to show evidence of incapacity to trigger a hearing. N.C.G.S. §§ 15A-1001(a) & 15A-1002(a). This is a

significant distinction. The issue here is not whether the evidence demonstrates that Mr. Flow was, at the time of his attempted suicide, not competent to stand trial. Rather it is simply whether the evidence was substantial enough to trigger the right to a hearing on that question.

In this case, as he was being brought to court for trial proceedings, Mr. Flow jumped off the second story of the Gaston County Jail and was seriously injured, requiring surgery. Mr. Flow's counsel subsequently raised the issue of competency and asked that the court make an inquiry into Mr. Flow's capacity to proceed. Defense counsel specifically noted, that "based on the best available information" Mr. Flow's actions may have been "a suicide attempt" and counsel thus raised a challenge to Mr. Flow's competency pursuant to N.C.G.S. § 15A-1002. Accordingly, defense counsel asked the court to delay proceedings until a hearing addressing Mr. Flow's capacity to proceed had been conducted. The trial court took the matter under advisement and asked defense counsel to obtain additional information on the length of Mr. Flow's unavailability. While the trial court ultimately held a hearing, this hearing did not meet the requirements delineated in N.C.G.S. § 15A-1002. Under that statute, Mr. Flow was entitled to a hearing to determine whether he had the "capacity to proceed" with trial. N.C.G.S. § 15A-1002(b)(1). However, rather than considering whether Mr. Flow was competent to proceed, the trial court examined whether his jump from the second story of the Gaston County Jail was a voluntary action absenting him from court. Those are two different questions. *Compare Ryan v. Gonzales*, 568 U.S. 57, 66 (2013) (holding that a defendant is competent to stand trial if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him" (cleaned up)) *with Taylor v. United States*, 414 U.S. 17, 19 & n.3 (1973) (holding that a defendant in a non-capital case waives his right to be present if he voluntarily absents himself while being aware of the processes taking place, of his right and obligation to be present and having no sound reason for remaining away).

The majority contends that because N.C.G.S. § 15A-1002 provides little guidance on the appropriate procedural and substantive requirements for a competency hearing, any hearing that allows a defendant to present "any and all evidence [they] are prepared to present" is sufficient to satisfy the statutory requirement. *State v. Gates*, 65 N.C. App. 277, 283 (1983). In the first instance, the problem with this approach is that what matters is not simply whether the defendant can present evidence but what question the hearing is intended to resolve, what facts are relevant

to that question, and what legal standard applies. Moreover, contrary to the majority's assertion, N.C.G.S. § 15A-1002's language does provide the trial court with important guidance. Namely, that a court must "hold a hearing to determine the defendant's capacity to proceed" if a question is raised as to defendant's capacity. N.C.G.S. § 15A-1002(b)(1). This means that Mr. Flow was entitled to a hearing to determine whether he had the "capacity to proceed" with trial and not a hearing to determine whether his absence from the courtroom was the result of a voluntary action. *See* N.C.G.S. § 15A-1002. This is precisely what we held in *Sides*, 376 N.C. at 456.

Crucially, a court cannot consider if a defendant's actions were taken voluntarily without first determining if the defendant had the capacity to take a voluntary action. *Sides*, 376 N.C. at 457. When a defendant voluntarily absents themselves from trial, they make an "intentional relinquishment or abandonment of a known right or privilege." *Taylor*, 414 U.S. at 19 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see also Sides*, 376 N.C at 458–59 ("[I]n order to waive the right to be present [at trial], there must be an intentional relinquishment or abandonment of that right." (cleaned up)). Thus, it follows that assessing the voluntariness of a defendant's actions without first determining their competency "put[s] the cart before the horse," as a defendant cannot engage in a voluntary action unless they are competent to do so. *Sides*, 376 N.C. at 457. Accordingly, because the trial court's hearing addressed whether Mr. Flow acted voluntarily when he jumped from the second story of the Gaston County Jail, and not whether he had the competency to proceed with trial, the hearing pursuant to N.C.G.S. § 15A-1002 was inadequate to satisfy the statutory mandate.

B. Constitutional Protections

Mr. Flow also has a constitutional due process right not to be tried unless he is competent to stand trial. U.S. Const. amend. V; U.S. Const. amend. XIV; *see also Pate v. Robinson*, 383 U.S. 375 (1966). This constitutional right establishes a trial court's duty to hold a competency hearing *sua sponte* if the court is presented with substantial evidence calling a defendant's competence into question. *Young*, 291 N.C. at 568; *Sides*, 376 N.C. at 458. Adherence to this requirement ensures that only competent defendants are subjected to trial.

While it is true that a non-capital defendant can waive their right to be present at trial by voluntarily absenting themselves, *Taylor*, 414 U.S. at 19, it is also true that a defendant must be competent to take a voluntary action. *Pate*, 383 U.S. at 384. This means that, as with the statutory

right, under the constitutional analysis a court cannot determine the voluntariness of a defendant's actions or whether they waived their right to be present at trial through those actions, without first determining their competency. *Sides*, 376 N.C. at 457, 459. Indeed, as this Court explained in *Sides*, "[a] defendant cannot be deemed to have voluntarily waived her constitutional right to be present at her own trial unless she was mentally competent to make such a decision in the first place. Logically, competency is a necessary predicate to voluntariness." *Id.* at 459.

State v. Sides is directly on point and controlling here. A court cannot "essentially skip[ ] over the issue of competency and simply assum[e] that [a] defendant's suicide attempt was a voluntary act that constituted a waiver of [their] right to be present during . . . [their] trial." *Id.* at 456–57. Instead, in circumstances where a trial court has "substantial evidence that [a] defendant may have been incompetent," it is required to conduct a competency hearing "to determine whether [the defendant] had the capacity to voluntarily waive [their] right to be present" at trial. *Id.* at 457. Following United States Supreme Court precedent, *Sides* articulated a standard, which provides that "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required." *Id.* at 462 (quoting *Drope*, 420 U.S. at 180).

Although in *Sides* this Court stated "that a defendant's suicide attempt [does not] automatically trigger[ ] the need for a competency hearing in every instance," *id.* at 466, *Sides* also explained that a "defendant's suicide attempt itself 'suggests a rather substantial degree of mental instability.' " *Id.* at 464 (quoting *Drope*, 420 U.S. at 181). The United States Supreme Court and some federal circuit courts have also indicated the same. *Drope*, 420 U.S. at 181 (stating that suicide "suggests a rather substantial degree of mental instability"); s*ee also United States v. Loyola-Dominguez*, 125 F.3d 1315, 1319 (9th Cir. 1997) ("[Defendant]'s suicide attempt on the eve of trial raised significant doubts regarding his competency to stand trial. In these circumstances, due process required a hearing to ascertain whether or not he was competent."); *Maxwell v. Roe*, 606 F.3d 561, 570–71 (9th Cir. 2010) (holding that defendant's attempted suicide "in the midst of trial" was a significant factor warranting a competency inquiry); *United States v. Mason*, 52 F.3d. 1286, 1287, 1293 (4th Cir. 1995) (determining that the district court should have granted a retrospective competency hearing after defendant attempted suicide following his conviction on federal drug charges); *Estock v. Lane*, 842 F.2d 184, 186, 189 (7th Cir. 1988) (per curiam) (concluding that at a retrospective competency hearing, the federal district court

properly concluded that petitioner had not been competent at his plea hearing, in part, because he had attempted suicide six days prior)[1]; *Saddler v. United States*, 531 F.2d 83, 86 (2nd Cir. 1976) (per curiam) (holding that when evidence of defendant's history of mental illness, including a suicide attempt, became known to the trial court, it was error for the court not to order an evaluation into defendant's competency). Thus, even though a suicide attempt standing alone may not automatically trigger the need for a competency hearing in every instance, *Sides* 376 N.C. at 466, evidence of a suicide attempt must be analyzed alongside other evidence in the record of a "defendant's irrational behavior, [their] demeanor at trial, and any prior medical opinion on competence to stand trial." *Sides*, 376 N.C. at 462 (quoting *Drope*, 420 U.S. at 180–81).

In *Drope*, the United States Supreme Court noted that it "was sufficiently likely that in light of the evidence of [defendant's] behavior including his suicide attempt . . . [that] the correct course was to suspend the trial until such an evaluation could be made." *Drope*, 420 U.S. at 181. There, the additional evidence in the record included, *inter alia*, testimony from defendant's wife that she believed "her husband was sick and needed psychiatric care" and that he had tried to choke and kill her the night before. *Id.* at 165–66. Furthermore, in *Pate v. Robinson*, the Court reviewed testimony in the record detailing the defendant's history of disturbed behavior, including instances of erratic conduct and paranoia. 383 U.S. 375, 378–79 (1966). In both cases, the Court determined that the defendant was entitled to a competency hearing and the trial court's failure to provide such a hearing was a violation of the defendant's constitutional rights. *Id.* at 386; *Drope*, 420 U.S. at 172, 180.

Similarly, in Mr. Flow's case, Hannah testified that on the day of the incident Mr. Flow was talking in a way "[she] had never heard him talk before," and that when she called Mr. Flow's father to ask what was "going on with [him]," his father stated that Mr. Flow was "not his normal self." Hannah further testified that Mr. Flow had acted strangely by "grabb[ing] his watch and jerk[ing] it off his arm" and for no apparent reason "sl[inging]" it onto the floor where it broke into pieces. When Hannah and Mr. Flow entered Hannah's living room, and reached a tall lamp that Hannah owned, "[Mr. Flow] stopped and slammed [the

1. The standard for competence to stand trial is the same as the standard for competence to plead guilty and to waive the right to the assistance of counsel. *Godinez v. Moran*, 509 U.S. 389, 398 (1993) ("[W]e reject the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard.").

lamp] on the ground and stepped over it." Hannah responded by asking "what are you doing, why are you acting like this, what's going on." She later said to him "what are you talking about, you're talking crazy, I don't understand anything you are saying." Furthermore, Hannah testified that during the commission of Mr. Flow's crime, while the police were attempting to speak with him, rather than engage in conversation with them, Mr. Flow "was saying something about water." Mr. Flow had experienced suicidal ideation on at least two prior occasions, both of which he shared with Hannah during the incident that led to his arrest. The first was when Mr. Flow told Hannah "it wasn't supposed to be this way" because she was "supposed to [have gone] to South Carolina" with him where he was "gonna kill [his] daddy and then [Hannah] and then [himself]." The second time was while Hannah was on the phone with the police, and Mr. Flow stated "[I]t's time . . . I'm gonna kill you and I'm gonna kill myself." This evidence was relevant to whether Mr. Flow was competent at the time of his suicide attempt during trial. As in *Pate* and *Drope*, Mr. Flow was entitled to a hearing to determine whether he was competent to stand trial. *Pate*, 383 U.S. at 386; *Drope*, 420 U.S. at 180. The trial court's failure to examine the issue of his competency was a violation of Mr. Flow's constitutional right to a fair trial. *See Pate*, 383 U.S. at 385; *see Drope*, 420 U.S. at 172, 180.

The State argues and the majority agrees that the trial court's colloquies with Mr. Flow refute the presence of substantial evidence sufficient to raise doubt as to Mr. Flow's competency. In *Pate*, the United States Supreme Court explained the role that colloquies between the court and the defendant might have in determining competency to stand trial. 383 U.S. at 386. There, despite having information suggesting the defendant was incompetent, the Illinois Supreme Court ultimately determined this evidence was not sufficient to warrant a competency hearing because the defendant had displayed "mental alertness and understanding . . . in [his] colloquies with the trial judge." *Id.* at 385 (cleaned up). Nevertheless, the United States Supreme Court concluded that even though the defendant had exhibited "mental alertness and understanding" in his exchanges with the trial court, this information while relevant, could not be used to dispense with a competency hearing. *Id.* at 385–86.

In this case the trial court engaged in three relevant colloquies with Mr. Flow. The first colloquy took place on 9 December 2019 when the court asked Mr. Flow whether he was willing to stipulate to his prior felony conviction, and after consulting with defense counsel, Mr. Flow replied "Yes, I - - yes, sir." The court subsequently asked Mr. Flow if he was making this decision "freely and voluntarily and of [his] own

free will." Mr. Flow stated that he was. During the second colloquy on 13 December 2019, the Court asked Mr. Flow if his "mind was clear," and Mr. Flow answered "Yes." In the third colloquy on 16 December 2019, the court asked Mr. Flow if he had discussed his choice not to present evidence with defense counsel, whether he had any questions about this, and whether he understood that it was his choice and only his choice to decide whether he wanted to present evidence. Mr. Flow responded "Yes, Your Honor," indicating his understanding. Mr. Flow also acknowledged his constitutional right and indicated he did not want to testify on his own behalf.

The majority finds these colloquies to be "especially pertinent" in determining whether substantial evidence of Mr. Flow's incompetence to stand trial was presented to the trial court. Namely, the majority states that these colloquies speak to whether Mr. Flow had the ability to understand the legal proceedings against him, and meaningfully consult with his attorney. The majority believes that because Mr. Flow was "lucid and appropriate in his responses" the trial court was not required to hold a competency hearing; however, this cannot be true. For "[e]ven when a defendant is competent at the commencement of his trial," this can change, and "a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." *Sides*, 376 N.C. at 458 (alteration in original) (quoting *Drope*, 420 U.S. at 181). Thus, while these colloquies may be relevant in ascertaining Mr. Flow's competency at the time they occurred, they are not instructive as to Mr. Flow's competency on the day of his suicide attempt, the days following his suicide attempt, or at the time defense counsel raised the issue of competency. Accordingly, these colloquies are relevant to but not sufficient to "dispense with a hearing" to determine Mr. Flow's competency. *See Sides*, 376 N.C. at 463 (quoting *Pate*, 383 U.S. at 385–86).

In addition, the State argues that Mr. Flow's actions leading up to his suicide attempt showed that he was competent at the time he jumped from the Gaston County Jail's second story, and thus that action was taken voluntarily. On the day Mr. Flow attempted suicide, the officer removed him from his cell for court. Mr. Flow asked the officer if he could return to his cell to retrieve his glasses and the officer allowed him to do so. Shortly thereafter a radio call went out stating that Mr. Flow was hanging off the second floor of the Gaston County Jail. The State suggests that Mr. Flow's actions leading up to his suicide attempt imply that he acted voluntarily in absenting himself from court. Specifically, the State contends that because Mr. Flow jumped off the jail mezzanine instead of retrieving his glasses from his cell, and attempted suicide by

hanging off the second story of the jail before landing on a table sixteen feet below, this guarantees that Mr. Flow was "lucid" when he jumped.

However, the proper analysis in this case requires a trial court to consider Mr. Flow's evidence of incompetency in the aggregate, including his previous suicidal ideation and erratic behavior on the day of his arrest. *Drope*, 420 U.S. at 180 (stating the defendant's "attempt to commit suicide 'did not stand alone' " (quoting *Moore v. United States*, 464 F.2d 663, 666 (9th Cir. 1972))). In the end, "[w]hatever the relationship between mental illness and incompetence to stand trial, in this case the bearing of the former on the latter was sufficiently likely that, in light of the evidence of petitioner's behavior including his suicide attempt . . . the correct course was to suspend the trial until" an evaluation into his competency was made. *Id.* at 181.

The competency to stand trial standard requires that a defendant have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam). While it is true that competency to stand trial must be determined by an analysis of the relevant evidence in the record, and that a suicide attempt is but one piece of that evidence, a defendant whose suicide attempt is the result of psychotic symptoms may not be competent to stand trial.[2] Defendants who experience psychotic symptoms may exhibit "cognitive or perceptual dysfunction, mainly delusions or hallucinations." Jeffrey A. Lieberman & Michael B. First, *Psychotic Disorders*, 379 New England J. of Med. 270, 270 (2018). In many cases, people experiencing these symptoms do not possess the ability to have a "rational understanding of the proceedings against [them]."[3] *See Dusky*, 362 U.S. 402 (1960). Only a trained

---

2. Psychotic symptoms can be present in several psychiatric conditions. For example, a person suffering from schizophrenia, bipolar disorder, or depression with psychotic features can experience symptoms of psychosis. Jeffrey A. Lieberman & Michael B. First, *Psychotic Disorders*, 379 New England J. of Med. 270, 271 (2018).

3. Studies investigating the relationship between mental illness and competency to stand trial have "generally found that a large portion . . . of defendants [experiencing psychosis] are judged incompetent." Jodi Viljoen, Ronald Roesch, and Patricia A. Zapf, *An Examination of the Relationship Between Competency to Stand Trial, Competency to Waive Interrogation Rights, and Psychopathology*, 26 Law and Hum. Behav. 481, 484 (2002). Furthermore, in one study, defendants with primary psychotic disorders were found to have performed significantly worse on tests measuring three factors: (1) their understanding of the nature and object of their legal proceedings, including arrest, the charges against them, the role of key participants, the legal process itself, pleas and courtroom procedures; (2) their understanding of the potential consequences of the legal proceedings; and (3) their ability to communicate with counsel. *Id.* at 488, 493–494.

mental health professional can determine whether Mr. Flow's behavior is consistent with psychosis. Ultimately, because the trial court did not hold a hearing assessing Mr. Flow's competency, we cannot yet know whether Mr. Flow's suicide attempt during trial was indicative of, or resulted from, a mental condition that would render him incompetent to stand trial.

C. Adequacy of the Trial Court's Hearing

The hearing conducted by the trial court was inadequate for at least three reasons. As previously stated, N.C.G.S. § 15A-1002(b)(1) does not contemplate a hearing to determine the voluntariness of a defendant's actions; instead, it mandates that a hearing be held to determine a "defendant's capacity to proceed." N.C.G.S. § 15A-1002(b)(1). Thus, when defense counsel raised the question of Mr. Flow's competency, the trial court was required to hold a hearing addressing Mr. Flow's competency, not the voluntariness of his actions. *See* N.C.G.S. § 15A-1002(b)(1). Additionally, our decision in *Sides*, as well as United States Supreme Court precedent, requires a trial court to first determine whether a defendant is competent prior to determining whether their suicide attempt was the result of a voluntary action. *Sides*, 376 N.C. at 459; *Pate*, 383 U.S. at 384. However, the trial court acted in a manner contrary to *Sides* by only considering whether Mr. Flow acted voluntarily when he jumped from the second story of the Gaston County Jail. *See Sides*, 376 N.C. at 459 ("[I]f there is substantial evidence suggesting that a defendant may lack the capacity to stand trial, then a sufficient inquiry into her competency is required before the trial court is able to conclude that she made a voluntary decision to waive her right to be present at trial through her own conduct.").

Lastly, in the hearing it did hold, the trial court failed to take into account all the evidence before it. Specifically, it declined to consider whether Mr. Flow's actions were the result of "suicidal gesture." This was despite defense counsel having noted Mr. Flow's absence from court was "surrounded by mental health issues and a suicide attempt."[4] The trial court incorrectly reasoned that its task to determine whether the trial should proceed in Mr. Flow's absence was divorced from whether Mr. Flow's actions had been caused by suicidal behavior.

---

4. The Court of Appeals has previously stated that "[b]ecause defense counsel is usually in the best position to determine that the defendant is able to understand the proceedings and assist in his defense, it is well established that significant weight is afforded to a defense counsel's representation that his client is competent." *State v. McRae*, 163 N.C. App. 359, 369 (2004). Thus, it follows that "significant weight" should also be afforded to defense counsel's representation that their client may not be competent. *See id.*

Instead, the court made findings of fact related to whether the defendant had taken a voluntary action or if "perhaps [he] had [been] pushed" or may have "slipped." Ultimately, the trial court decided Mr. Flow had acted voluntarily when he jumped off the second story of the jail building and "that the trial [would] in fact go forward." However, whether a defendant's actions are suicidal in nature speaks directly to the issue of competency, and although it is true that a suicide attempt in and of itself does not automatically determine the need for a competency hearing, it suggests the presence of mental instability and should be analyzed alongside other evidence in the record. *Sides*, 376 N.C. at 464 (citing *Drope*, 420 U.S. at 181).

Accordingly, the trial court's hearing was inadequate because it not only side stepped the issue of competency by only addressing the voluntariness of Mr. Flow's actions, but also because in doing so, the court failed to properly consider all the evidence relevant to whether Mr. Flow was competent at that point to stand trial.

D. *State v. Sides*

This Court decided *Sides* a little over two years ago. The majority attempts to distinguish *Sides* from the instant case on the grounds that, because a defendant's suicide attempt does not automatically trigger the need for a competency hearing in every case, "[t]his Court is, therefore, left to consider whether any additional indicia of defendant's incompetence can be combined with his apparent suicide attempt to support that he may have lacked the capacity to . . . voluntarily absent himself from the court proceedings." The majority suggests that Mr. Flow's crimes and his behavior during those crimes are not relevant to whether the trial court was presented with substantial evidence of Mr. Flow's incapacity to proceed, and thus the trial court was not required to hold a competency hearing. However, our opinion in *Sides* is not this narrow. Instead, whether there is substantial evidence of a defendant's incompetence to stand trial is a "fact intensive inquiry" into "evidence of a defendant's irrational behavior, his demeanor at trial and any prior medical opinion on competence to stand trial." *Sides*, 376 N.C. at 462, 466. Moreover, a defendant's "history of disturbed behavior, including instances of erratic conduct" are also relevant in determining whether substantial evidence existed to warrant a competency hearing. *Id.* at 462–63 (citing *Pate*, 383 U.S. at 378–79).

There was substantial evidence before the trial court to trigger the need for a competency hearing and defense counsel explicitly requested one. The majority fails to properly apply *Sides* and concludes that it was

not error in these circumstances to deny counsel's request for a competency hearing. I would remand the case to the trial court for a retrospective hearing based on all the evidence in the record relevant to Mr. Flow's mental state at the time the competency hearing was requested by counsel. Therefore, I respectfully dissent.

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS