

STATE OF NORTH CAROLINA
COUNTY OF WAKE
NORTH CAROLINA LEAGUE OF
CONSERVATION VOTERS, INC., *et al.*,

Plaintiffs,

COMMON CAUSE,

Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL, in his official
capacity as Chair of the House Standing Committee
on Redistricting, *et al.*,

Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 21 CVS 015426

STATE OF NORTH CAROLINA
COUNTY OF WAKE

REBECCA HARPER, *et al.*,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his official
capacity as Chair of the House Standing Committee
on Redistricting, *et al.*,

Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 21 CVS 500085

***HARPER* PLAINTIFFS' RESPONSE TO
LEGISLATIVE DEFENDANTS' PROPOSED REMEDIAL MAPS**

It is now the law of this State that North Carolina's redistricting plans must give "voters of all political parties substantially equal opportunity to translate votes into seats across the plan." *Harper v. Hall*, No. 413PA21, Order ¶ 6 (N.C. Feb. 4, 2022). In particular, "voters are entitled to have substantially the same opportunity to elect[] a supermajority or majority of

representatives as the voters of the opposing party would be afforded if they comprised” a given percentage “of the statewide vote share in that same election.” *Harper v. Hall*, No. 413PA21, slip op. ¶ 169 (N.C. Feb. 14, 2022). “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 the legislative body.” *Id.*

Legislative Defendants’ proposed remedial congressional and Senate plans flout the Supreme Court’s order and opinion. They do not provide voters of both parties remotely equal opportunity to elect representatives. Rather, their proposed remedial plans fail several key measures of partisan symmetry—and are substantially worse than the remedial plans *Harper* Plaintiffs have proposed. Legislative Defendants’ own expert, Dr. Barber, shows Legislative Defendants’ proposed plans to be Republican gerrymanders.

These skewed results are not surprising. The congressional and Senate plans enacted by the General Assembly last week were forced through the committees and passed on strict party-line votes in both chambers. These proposed plans replicate central unconstitutional features of the now-invalidated plans. For example, this Court found that the 2021 congressional plan’s “creation of three safe Republican districts in the Piedmont Triad area”—by placing Greensboro, High Point, and Winston-Salem in separate districts—was “designed in order to accomplish the legislature’s predominant partisan goals.” Judgment, FOF ¶¶ 473, 480. Yet Legislative Defendants’ proposed remedial congressional plan does *the same thing*. And Legislative Defendants’ Senate plan recreates the splitting of voters in Wilmington that the three-judge panel found unconstitutional in *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *53 (N.C. Super. Sep. 03, 2019).

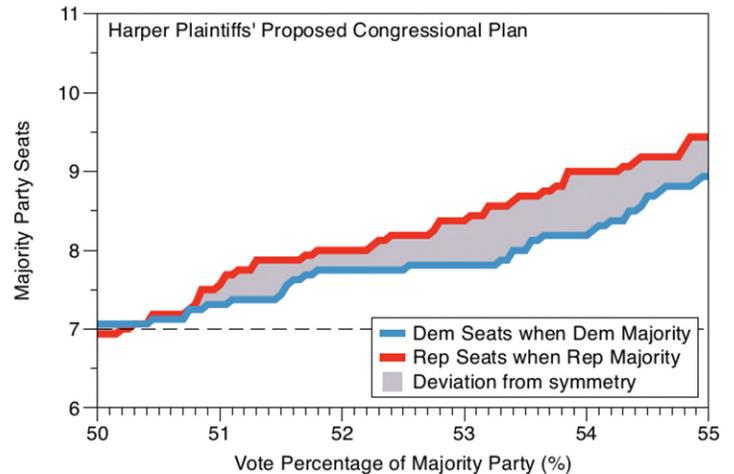
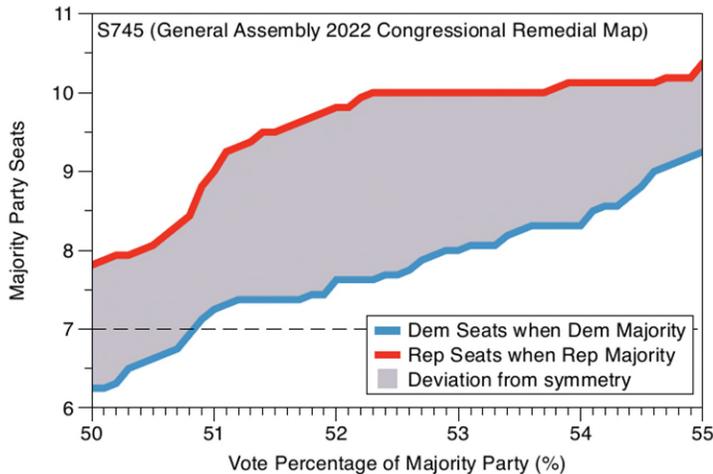
This Court should reject Legislative Defendants’ unconstitutional congressional and Senate plans and should instead adopt *Harper* Plaintiffs’ proposed plans, which are superior on every metric the Supreme Court identified and would afford voters of both parties an equal opportunity to translate votes into seats.

I. Legislative Defendants’ Proposed Remedial Congressional Plan Is Unconstitutional
Legislative Defendants’ plan does not provide voters substantially equal voting power.

Legislative Defendants’ proposed congressional plan, S.B. 745, fails on the key measures that the Supreme Court identified as dispositive. For starters, the Supreme Court repeatedly emphasized that “partisan symmetry” is essential to ensuring that all voters have substantially equal voting power. Order ¶ 5; slip op. ¶ 4. Requiring a “substantially equal opportunity to translate votes into seats across the plan,” slip op. ¶ 163, is the essence of partisan symmetry analysis. Accordingly, Dr. Jonathan Mattingly and his Duke colleague Dr. Gregory Herschlag in their report submitted with this response measured the partisan symmetry of S.B. 745 using the same metric described in *Harper* Plaintiffs’ written submission regarding their own proposed plans. *See Harper* Pls.’ Feb. 18, 2022 Stmt. 4-6; Mattingly-Herschlag Remedial Rep. 2-3. This partisan-symmetry metric measures the *absolute deviation* between the number of seats that the two parties are expected to elect at the same given vote share, calculated based on the results of 16 recent statewide elections applying a variety of “uniform swings.” Mattingly-Herschlag Remedial Rep. 2-3. Legislative Defendants’ expert Dr. Michael Barber endorses this approach to evaluating partisan symmetry: “The basic idea is to look at the vote share in each district and increase/decrease the vote share in each district by a uniform amount across a range of outcomes,” and “as Democrats gain more votes statewide, the translation of those votes to seats should be similar to when Republicans gain an equally large share of the votes.” Barber Remedial Rep. 17-18.

For S.B. 745, the symmetry deviation is **1.575 seats**. Mattingly-Herschlag Remedial Rep. 3. Thus, for any given statewide election, the difference between the number of Democratic and Republican seats elected at the same respective party vote fraction will more often than not be **2 seats** of only 14 total seats available. *Id.* This is *an extreme asymmetry*. And nothing in North Carolina’s political geography requires it. If Legislative Defendants had simply picked 20 plans at random from Dr. Mattingly’s ensemble—which was not even designed with partisan symmetry in mind—there is a 99.998% chance they would have found a plan with better partisan symmetry than S.B. 745. *Id.* In sharp contrast, *Harper* Plaintiffs’ proposed congressional plan shows a deviation of only **0.36875 seats**; meaning that for any given statewide election, the number of Democratic and Republican seats elected at a given vote fraction will typically be the same. *Id.*

Figure 2 from Dr. Mattingly and Dr. Herschlag’s report illustrates the huge partisan asymmetry in S.B. 745, with the red line showing the average number of expected seats when Republicans win a particular vote share, and the blue line showing the same figure for Democrats when they win the same vote share. *Id.* at 4. To produce these figures Drs. Mattingly and Herschlag conducted a partisan swing analysis for all 16 statewide elections in 2016 and 2020, then calculated the average seat share for each party at different vote shares. *Id.* at 3-4. The contrast between S.B. 745 and *Harper* Plaintiffs’ proposed remedial congressional plan is stark, particularly for the closer, frequently occurring vote shares near 50%:



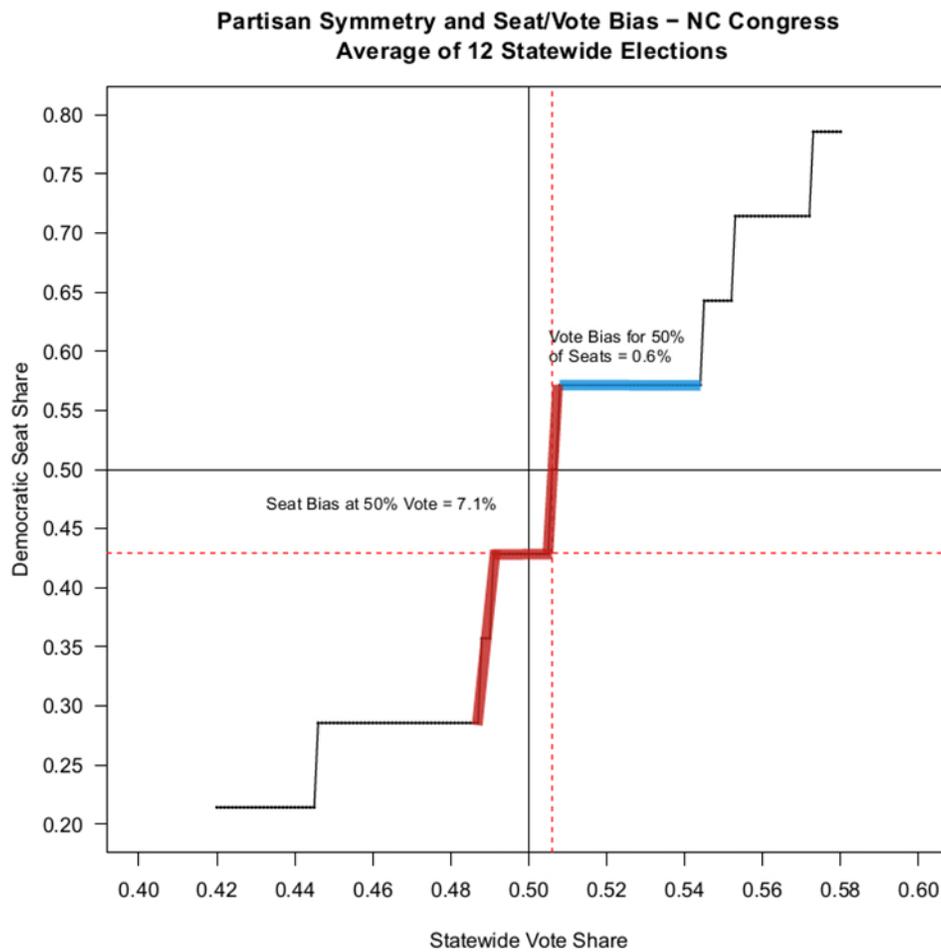
The asymmetry in S.B. 745 is also clear based on raw expected seats for both parties under various historical elections. As Figure 1 from the Mattingly-Herschlag report shows using purple markers, in half (3 of 6) of the statewide elections in 2016 and 2020 where the Democrats won a majority of the vote (AG16, AG20, and GV20), they still win only 6 seats (a minority) under S.B. 745. But there is not a single election where the Republicans win a majority of votes but a minority of seats. As another example, under the 2016 Presidential election, where Democrats won 48% of the vote, Democrats win only 4 seats under S.B. 745. Yet under the 2020 Governor election, where Republicans won just over 48% of the vote, Republicans win 6 seats. This significant, inescapable asymmetry affects real seats across a range of elections. By contrast, with *Harper* Plaintiffs' proposed plan (as shown with green markers), the party with a majority of votes wins at least half the seats in every single election.

Legislative Defendants’ proposed congressional plan also fails two other metrics the Supreme Court identified as significant: the mean-median difference and the efficiency gap. Legislative Defendants’ plan has an average efficiency gap of 7.312% (calculated by conducting uniform swings on the 16 historical election results), which is above the 7% threshold of presumptive constitutionality identified by the Supreme Court. Mattingly-Herschlag Rep. 3; *see Harper*, slip op. ¶ 167. And Legislative Defendants’ mean-median difference is 1.01%, which exceeds the 1% threshold identified by the Supreme Court. Mattingly-Herschlag Rep. 3; *see Harper*, slip op. ¶ 166. By comparison, *Harper* Plaintiffs’ proposed congressional plan has an efficiency gap of less than 3% and a mean-median difference of 0.4504%, well within the Supreme Court’s thresholds. Mattingly-Herschlag Rep. 3. Even accounting for the difference that choices of election can make, Dr. Barber’s efficiency gap and mean-median difference calculations for the Legislative Defendants’ congressional plan are *simply wrong*. The publicly available website PlanScore reports a mean-median gap of 1.1% favoring Republicans and an efficiency gap of 6.4% favoring Republicans for S.B. 745.

Dr. Barber’s results show that S.B. 745 fails partisan symmetry. Dr. Barber’s own partisan symmetry analysis, in his Figure 3(b), shows that S.B. 745 dramatically favors Republicans in their ability to translate increasing vote shares into increased seat counts. As shown below using blue highlighting on Dr. Barber’s Figure 3(b), Dr. Barber concludes that even when Democrats increase their vote share from approximately 50.6% to nearly 55%—in North Carolina, a landslide—they still can win only eight congressional seats. By contrast, as shown using red highlighting, Republicans, by increasing their vote share from merely 49.4% to approximately 51% gain an 8th, 9th, and even *10th* seat. In other words, even under Dr. Barber’s analysis, Democrats can gain nearly 4.5% vote share (to a whopping 55%) without gaining even

one additional seat (and even then win only 8 total); whereas Republicans need only an increase of approximately 1.6% vote share to gain *three additional seats* (and 10 total). Clearly, Legislative Defendants’ plan does not give voters from both political parties “substantially the same opportunity” to elect representatives at a given percentage “of the statewide vote share in that same election.” *Harper*, slip op. ¶ 169.

(b) 2022 Remedial plan



Dr. Barber’s “close-votes-close-seats analysis” is even more damning. Barber Remedial Rep. 16. Dr. Barber uses a four-square plot (Figure 2) to show which recent statewide election results would produce a “majoritarian outcome” (where the party with a majority vote share wins a majority of seats) versus an “antimajoritarian outcome” (where a majority of votes does not

yield a majority of seats). His plot shows only one election that produces an antimajoritarian outcome: the 2016 Attorney General race, where Democrats won over a majority of votes but would get only 6 seats under Legislative Defendants’ map.

But Dr. Barber’s analysis selectively excluded four recent statewide elections—*two* of which (2016 Governor and 2016 Attorney General) are antimajoritarian. No surprise, both of these excluded antimajoritarian elections disfavor the Democrats. As shown in Table 1 from the Mattingly-Herschlag report, once Dr. Barber’s selectively deleted elections are added back in, his analysis shows that in fully half (3 of 6) of the statewide elections in 2016 and 2020 where the Democrats won a majority of the vote, they still win 6 seats (a minority) under S.B. 745.¹ By comparison, under *Harper* Plaintiffs’ proposed plan, the party who wins the majority of the vote wins at least 50% of the seats every single time.

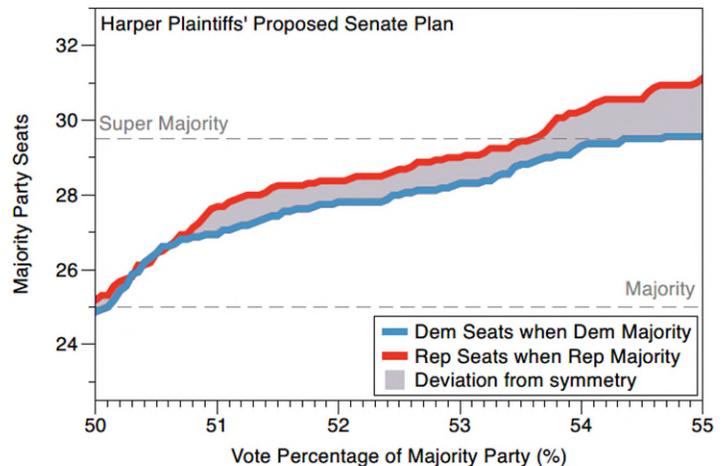
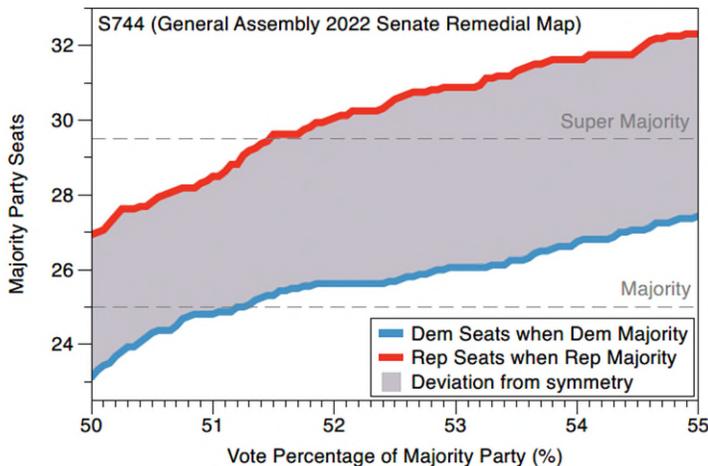
Democratic Elections						Republican Elections					
Election	Democratic Vote (%)	S745 (Cong.)		Plaintiffs’ Cong.		Election	Republican Vote (%)	S745 (Cong.)		Plaintiffs’ Cong.	
		Dem. Seats	Dem. Split or Won Majority	Dem. Seats	Dem. Split or Won Majority			Rep. Seats	Rep. Split or Won Majority	Rep. Seats	Rep. Split or Won Majority
GV16	50.05	6	No	7	Yes	PR20	50.64	9	Yes	8	Yes
AG20	50.13	6	No	7	Yes	CL20	50.78	9	Yes	7	Yes
AG16	50.20	6	No	7	Yes	USS 20	50.86	8	Yes	8	Yes
AD20	50.88	7	Yes	7	Yes	LG20	51.60	10	Yes	8	Yes
SST20	51.21	8	Yes	7	Yes	CI20	51.73	10	Yes	7	Yes
GV20	52.32	8	Yes	8	Yes	PR16	51.98	10	Yes	7	Yes
						TR20	52.53	10	Yes	8	Yes
						USS 16	53.02	10	Yes	8	Yes
						LG16	53.41	10	Yes	8	Yes
						CA20	53.85	10	Yes	9	Yes

¹ Dr. Barber suggests that he selectively excluded these 4 elections because Dr. Mattingly’s merits-phase report did. That is wrong. Dr. Mattingly analyzed the 2021 congressional map using all 16 2016 and 2020 statewide elections, *see* Mattingly Rep. 75-76, 95-97, and all of his statewide analysis for the state Senate and House plans used those same 16 elections, *id.* at 11, 19, 22, 28.

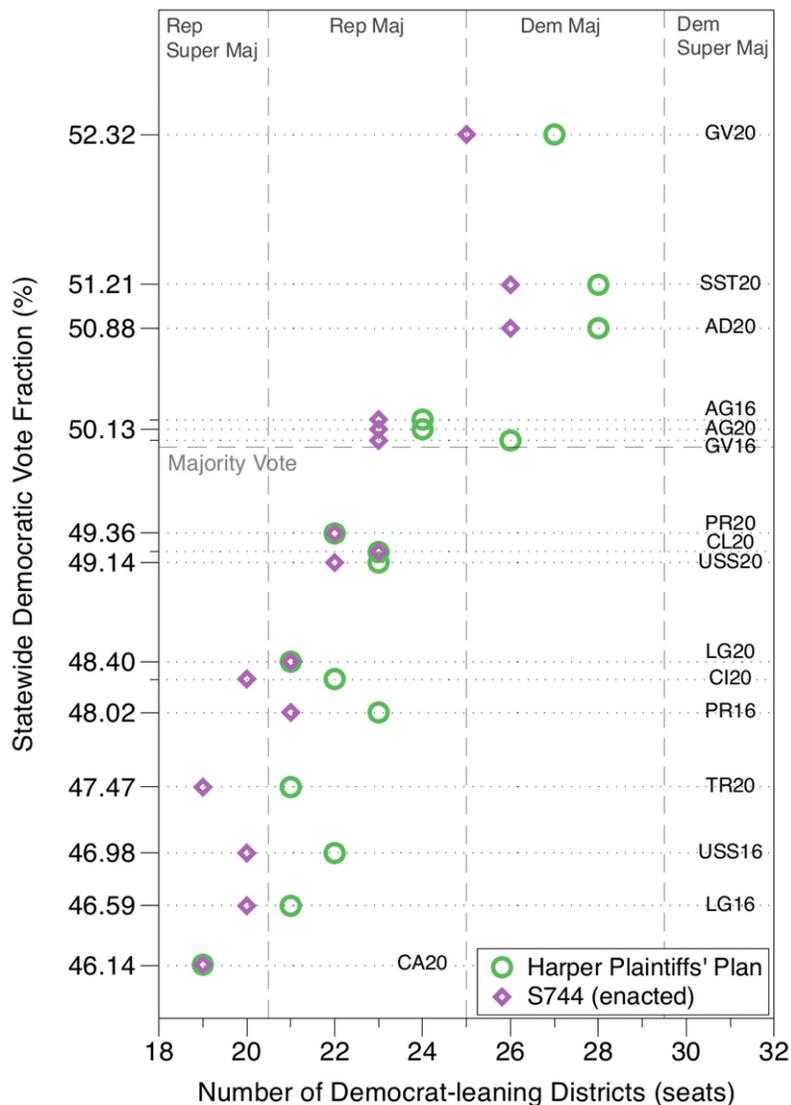
II. Legislative Defendants' Proposed Remedial Senate Plan Is Unconstitutional

Legislative Defendants' Senate plan does not provide voters substantially equal voting power. *Harper* Plaintiffs' proposed Senate plan produced an average deviation in seats won at a given party vote share of only **1.04375 seats**. The deviation in Legislative Defendants' plan is nearly quadruple that: **4.0125 seats**. If Legislative Defendants had selected *even a single random plan* from Dr. Mattingly's ensemble—which again was not drawn to prioritize partisan symmetry in any way—that plan would have had better partisan symmetry than S.B. 744 with **99.6%** probability. Mattingly-Herschlag Rep. 6.

And as with the congressional plan, this asymmetry is significant across election outcomes, as shown in Figure 4 from the Mattingly-Herschlag report, which shows the number of seats for each party that are expected at the same vote share in S.B. 744 and in *Harper* Plaintiffs' proposed Senate plan, using uniform swing analysis. Once again, the contrast is stark; it shows that S.B. 744 isn't even trying to ensure that the parties have a substantially equal opportunity to translate votes into seats:



Seat counts under historical elections confirm S.B. 744’s extreme asymmetry. Figure 3 from the Mattingly-Herschlag report shows that—just like with the congressional plan—Democrats win a minority of seats in *half* the elections where they won a majority of the vote. Yet again, this antidemocratic result is not symmetrical: there isn’t a single election where the Republicans win a majority of votes but a minority of seats. The asymmetry also protects Republican supermajorities: When Democrats win 51.21% of the vote under the 2020 Secretary of State election, they barely win a majority of seats. Meanwhile, when Republicans get a similar vote share under the 2020 Commissioner of Insurance election, they win a safe supermajority:



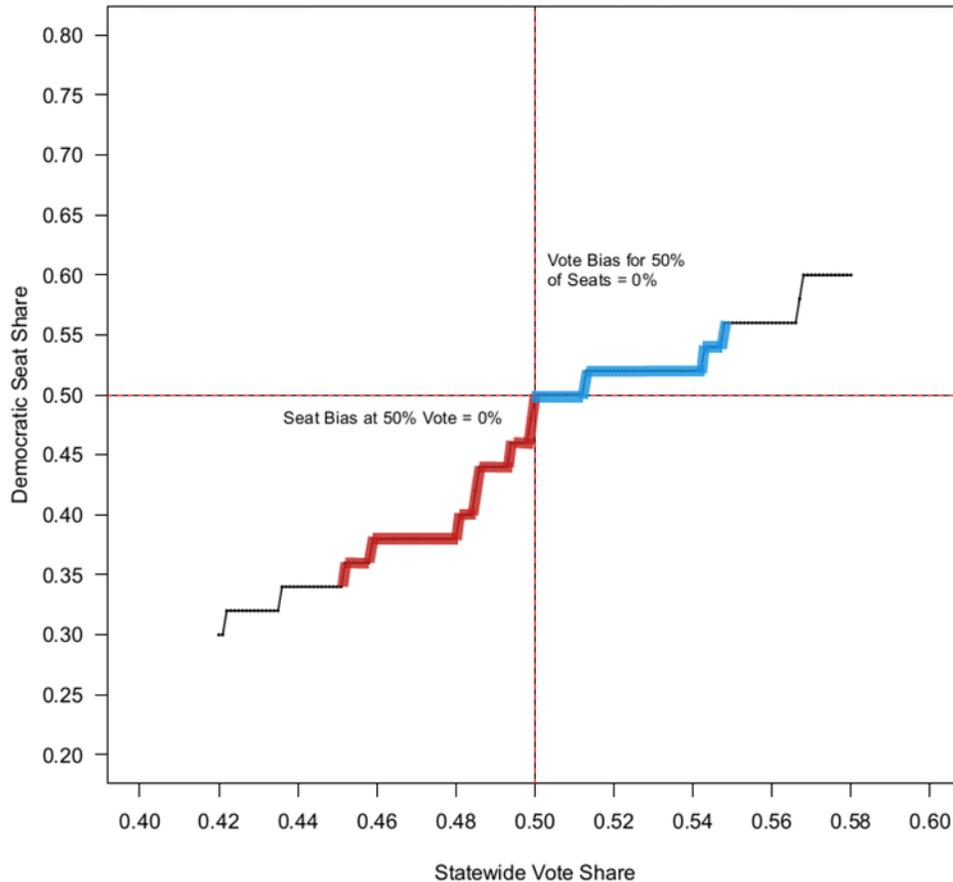
Legislative Defendants' proposed Senate plan also fails the 1% mean-median threshold identified by the Supreme Court as presumptively constitutional, with a mean-median difference of 1.304%. Mattingly-Herschlag Remedial Rep. 6. As with the proposed congressional plan, Dr. Barber's mean-median calculation here (of 0.61%) is wrong: The public website PlanScore reports a 2.2% difference favoring Republicans for S.B. 744.² By comparison, *Harper* Plaintiffs' proposed Senate plan has a mean-median difference of 0.228% and an efficiency gap of less than 2%. Mattingly-Herschlag Remedial Rep. 6.

Dr. Barber's analysis confirms that S.B. 744 fails partisan symmetry. As with Legislative Defendants' proposed congressional plan, Dr. Barber's analysis confirms the lack of partisan symmetry in their Senate plan. As shown in Dr. Barber's Figure 9(b), highlighted in red and blue below, Democrats need dramatic increases in vote share to produce additional seats and have effectively no chance at winning a supermajority even at unprecedented vote shares. For example, Democrats must ascend from 50% vote share to nearly 55% vote share before gaining a 28th seat, and are still 2 seats short of a supermajority. If Republicans experience that same 5-point increase from 50% to 55%, their seat count jumps to 33 seats—well over a supermajority.

² <https://planscore.campaignlegal.org/plan.html?20220218T174649.330672091Z>

(b) 2022 Remedial plan

Partisan Symmetry and Seat/Vote Bias – NC Senate
Average of 12 Statewide Elections



III. Ensemble Comparisons, While Inappropriate, Confirm That Legislative Defendants’ Plans Are Gerrymanders

The ensemble analysis presented to this Court at trial established that the 2021 maps were partisan gerrymanders. But the North Carolina Supreme Court’s ruling has made clear that the question is no longer simply whether a given map compares favorably with an ensemble of randomly generated plans. None of Plaintiffs’ experts simulated plans were designed to maximize partisan fairness or symmetry, and performing at the median of a random sample of maps that were *not* designed to maximize partisan fairness would not necessarily show that voters are being treated fairly and equally. Rather, North Carolina’s Constitution requires

mapmakers to affirmatively draw maps to secure partisan symmetry, unless partisan symmetry is not possible while preserving counties, ensuring equal population, and drawing compact maps. As *Harper* Plaintiffs' proposed Congressional and Senate map shows, it is easy to draw maps that show a high degree of partisan symmetry without sacrificing any of those objectives and while protecting incumbents.

But the General Assembly's remedial maps are outliers even under ensemble analysis. For example, S.B. 744 still gives Republicans a Senate supermajority when they get just under 48.4% of the statewide vote, a result that almost never occurred in Dr. Mattingly's ensemble. Mattingly Rep. 28. And S.B. 744 still gives Republicans a majority even when Democrats win 52.32% of the statewide vote, also a result that almost never occurred in Dr. Mattingly's ensemble. Mattingly Rep. 28. (The proper comparison is to Dr. Mattingly's secondary Senate ensemble that did not minimize municipality splits, because the Supreme Court did not identify municipality preservation as a principle that could justify partisan asymmetries.)

Likewise, S.B. 745 still guarantees a 10-4 split favoring Republicans unless the Democrats win at least 49% of the statewide vote. Those results are well outside the median range of Dr. Mattingly's congressional ensemble. Mattingly Rep. 74. And as described above, both of the legislature's proposed remedial plans compare poorly to the ensembles on basic measures of partisan symmetry even though the ensembles weren't designed with that in mind. Mattingly-Herschlag Remedial Rep. 3, 6.

IV. The Court Should Address Article II's Residency Requirements

The *NCLCV* Plaintiffs have asked the Court to order that, if any citizen has established his or her residence in a Senate or House district modified by any remedial redistricting plan adopted or approved by this Court, then that citizen shall be qualified to serve if elected, notwithstanding any requirements that Sections 6 and 7 of Article II of the North Carolina

Constitution would otherwise impose. *See* NCLCV Pls.’ Cmts. 23-24 (citing *Covington v. North Carolina*, 267 F. Supp. 3d 664, 668 (M.D.N.C. 2017)). *Harper* Plaintiffs join that request.

Respectfully submitted, this the 21st day of February, 2022.

By: /s/ Narendra K. Ghosh

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing *by email*, addressed to counsel for all other parties.

This the 21st day of February, 2022.

/s/ Narendra K. Ghosh
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