No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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REBECCA HARPER; AMY CLARE OSEROFF; DONALD RUMPH; JOHN ANTHONY BALLA; RICHARD R. CREWS; LILY NICOLE QUICK; GETTYS COHEN, JR.; SHAWN RUSH; JACKSON THOMAS DUNN, JR.; MARK S. PETERS; KATHLEEN BARNES; VIRGINIA WALTERS BRIEN; and DAVID DWIGHT BROWN	)	
v.	)	
REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH HISE, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES TIMOTHY K. MOORE; PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE PHILIP E. BERGER; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; and DAMON CIRCOSTA, in his official capacity	)	Wake County
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR.; DANDRIELLE LEWIS; TIMOTHY CHARTIER; TALIA FERNÓS; KATHERINE NEWHALL; R. JASON PARSLEY; EDNA SCOTT; ROBERTA SCOTT; YVETTE ROBERTS; JEREANN KING JOHNSON; REVEREND REGINALD WELLS;	)	

YARBROUGH WILLIAMS, JR.; REVEREND DELORIS L. JERMAN; VIOLA RYALS FIGUEROA; and COSMOS GEORGE

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; SENATOR WARREN DANIEL, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR RALPH E. HISE, JR., in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; SENATOR PAUL NEWTON, in his official capacity as Co-Chair of the Senate Standing Committee on Redistricting and Elections; REPRESENTATIVE TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives; SENATOR PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA, in his official capacity as Chairman of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as Secretary of the North Carolina State Board of Elections; JEFF CARMON III, in his official capacity as Member of the North Carolina State Board of Elections; STACY EGGERS IV, in his official capacity as Member of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as Member of the North Carolina State Board of Elections; and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections

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ORDER

This matter was heard on direct appeal from an order of a three-judge panel of the Superior Court in Wake County, filed 11 January 2022. The case was fully briefed and argued before this Court on 2 February 2022 and is ready for decision. Because time is pressing, the Court enters the following order, to be followed by an opinion; based on the matters presented to the Court, including the findings of fact of the three-judge panel, it is ordered:

1. "It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992). The North Carolina General Assembly, in turn, has the duty to reapportion North Carolina's congressional and state legislative districts; however, exercise of this power is subject to limitations imposed by other constitutional provisions, including the Declaration of Rights. "The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution," including the free elections clause, N.C. Const. art. I, § 10, the equal protection clause, N.C. Const. art. I, § 19, the free speech clause, N.C. Const. art. I, § 14, and the freedom of assembly clause, N.C. Const. art. I, § 12, "are individual and personal rights entitled to protection against state action." *Corum*, 330 N.C. at 782. It is the duty of this Court "to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State," *id.* at 783, including the legislative power

of apportionment. *See Stephenson v. Bartlett*, 355 N.C. 354, 380–81 (2002). We conclude that claims asserting that congressional and state legislative districting plans enacted by the General Assembly are unlawful partisan gerrymanders that violate the free elections clause, the equal protection clause, the free speech clause, and the freedom of assembly clause of the Declaration of Rights in article I, sections 10, 19, 14, and 12, respectively, of the North Carolina Constitution are, consistent with the text and structure of our State's constitution and our system of separation of powers, justiciable in North Carolina courts.

2. This Court concludes that, to the extent Legislative Defendants have challenged any of the trial court's findings of fact, these findings are supported by competent evidence and are therefore not clearly erroneous. Accordingly, all of the trial court's factual findings are binding on appeal and we adopt them in full.

3. Based on the trial court's factual findings, we conclude that the congressional and legislative maps enacted in S.L. 2021-175 ("An Act to Realign North Carolina House of Representatives Districts Following the Return of the 2020 Federal Decennial Census"), S.L. 2021-173 ("An Act to Realign the Districts of the North Carolina State Senate Following the Return of the 2020 Federal Decennial Census"), and S.L. 2021-174 ("An Act to Realign the Congressional Districts Following the Return of the 2020 Federal Decennial Census") are 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. We hereby enjoin the use of these maps in any future elections, commencing with the upcoming candidate filing period scheduled to commence on **24 February 2022** for elections in 2022, including primaries scheduled to take place on **17 May 2022**.

4. To comply with the limitations contained in the North Carolina Constitution which are applicable to redistricting plans, the General Assembly must not diminish or dilute any individual's vote on the basis of partisan affiliation. The fundamental right to vote includes the right to enjoy "substantially equal voting power and substantially equal legislative representation." *Stephenson*, 355 N.C. at 382. This encompasses the opportunity to aggregate one's vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views. When, on the basis of partisanship, the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size—the General Assembly unconstitutionally infringes upon that voter's fundamental right to vote.

5. The General Assembly violates the North Carolina Constitution when it deprives a voter of his or her right to substantially equal voting power on the basis of partisan affiliation. Showing that a reapportionment plan makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters—

which can be measured either by comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect, or by comparing the relative chances of voters from each party electing a supermajority or majority of representatives under various possible electoral conditions—suffices to establish the diminishment or dilution of a voter's voting power on the basis of his or her views. Here, the trial court specifically found that the General Assembly diminished and diluted the voting power of voters affiliated with one party on the basis of party affiliation. *See, e.g., N.C. League of Conservation Voters, Inc. v. Hall*, No. 21 CVS 015426, 2022 WL 124616, at *29 (N.C. Super. Ct. Jan. 11, 2022) (¶¶ 140, 142). Such a plan is subject to strict scrutiny and is unconstitutional unless the General Assembly can demonstrate that the plan is "narrowly tailored to advance a compelling governmental interest." *Stephenso*n, 355 N.C. at 377. Achieving partisan advantage incommensurate with a political party's level of statewide voter support is neither a compelling nor a legitimate governmental interest.

6. There are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander. In particular, mean-median difference analysis, efficiency gap analysis, close-votes, close seats analysis, and partisan symmetry analysis may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew

necessarily results from North Carolina's unique political geography. If some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan, then the plan is presumptively constitutional. The General Assembly shall submit to the trial court in writing, along with their proposed remedial maps, an explanation of what data they relied on to determine that their districting plan is constitutional, including what methods they employed in evaluating the partisan fairness of the plan.

7. Federal law does not prohibit consideration of partisanship and incumbency protection in the redistricting process. *Stephenson*, 355 N.C. at 371. The federal Constitution does not prohibit reliance on partisan criteria in an effort to "achieve 'political fairness' between the political parties." *Gaffney v. Cummings*, 412 U.S. 735, 736 (1973). Incumbency protection may be a permissible redistricting criterion if it is applied evenhandedly, is not perpetuating a prior unconstitutional redistricting plan, and is consistent with the equal voting power requirements of the state constitution.

8. To comply with this Order, redistricting plans shall adhere to traditional neutral districting criteria and not subordinate them to partisan criteria. Traditional neutral districting criteria as enumerated in the North Carolina Constitution and this Court's precedents include the drawing of single-member districts which are as nearly equal in population as is practicable, which consist of contiguous territory, which are geographically compact, and which maintain whole counties. N.C. Const.

art. II, §§ 3, 5. The "Whole County Provision" must be applied in a manner consonant with the requirements of the Voting Rights Act and federal "one-person, one-vote" principles. *Stephenson*, 355 N.C. at 382. The General Assembly must first assess whether, using current election and population data, racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African-American voters. Partisan advantage is not a traditional neutral districting criterion under state law.

9. In accordance with N.C.G.S. § 120-2.4(a), the General Assembly shall have the opportunity to submit new congressional and state legislative districting plans that satisfy all provisions of the North Carolina Constitution. The General Assembly shall submit such plans for review to the trial court on or before **18 February 2022** at 5:00 p.m. Should the General Assembly choose not to submit new congressional and state legislative districting plans on or before this deadline, the trial court will select a plan which comports with constitutional requirements based upon the findings it entered in its prior order. Regardless, all parties to this proceeding and intervenors may submit to the trial court proposed remedial districting plans by **18 February 2022** at 5:00 p.m., and comments on any maps submitted shall be filed with the trial court by **21 February 2022** at 5:00 p.m. The trial court will approve or adopt compliant congressional and state legislative districting plans no later than noon on **23 February 2022**. Any emergency application for a stay pending appeal

must be filed no later than **23 February 2022** at 5:00 p.m.

10. State Defendants are advised to anticipate that new districting plans for Congress, the North Carolina Senate, and the North Carolina House of Representatives will be available by **23 February 2022** and are directed to take all necessary measures to ensure that the **17 May 2022** primary election and all subsequent elections occur as scheduled using the remedial districting plans. Further, all ballot items, including referenda, that would have appeared on the **8 March 2022** ballot prior to this Court's prior Order enjoining elections for public office shall appear on the **17 May 2022** ballot; municipal elections in circumstances where a second primary is not required under N.C.G.S. § 163-111 will be conducted on **26 July 2022**.

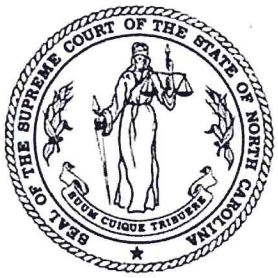
Opinion to follow.

Remanded to the trial court for remedial proceedings.

By order of the Court in conference, this the 4th day of February 2022.

Robin E. Hudson
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4 day of February 2022.



Amy L. Funderburk
AMY L. FUNDERBURK
Clerk of the Supreme Court

Chief Justice NEWBY dissenting.

I dissent from the decision of the Court which violates separation of powers by effectively placing responsibility for redistricting with the judicial branch, not the legislative branch as expressly provided in our constitution. As predicted by the Supreme Court of the United States, this Court's decision results in an "unprecedented expansion of judicial power." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019). " '[J]udicial action must be governed by *standard*, by *rule*,' and must be 'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws. Judicial review of partisan gerrymandering does not meet those basic requirements." *Id.* (alteration and emphases in original) (citation omitted) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278, 279, 124 S. Ct. 1769, 1777 (2004) (plurality opinion)) (noting that the Supreme Court of United States has "never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years"). By choosing to hold that partisan gerrymandering violates the North Carolina Constitution and by devising its own remedies, there appears to be no limit to this Court's power.

"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. Our state constitution is our foundational document for government; its text reflects the express will of the people. *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989). The will of the people is best served, and everyone's rights are best protected, when the

plain language of the constitution is followed. Recognizing special rights to one favored person or group invariably diminishes the rights of others.

Unlike the United States Constitution, the North Carolina Constitution "is in no matter a grant of power." *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) (quoting *Lassiter v. Northampton Cnty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958)). Rather, "[a]ll power which is not limited by the Constitution inheres in the people." *Id.* (quoting *Lassiter*, 248 N.C. at 112, 102 S.E.2d at 861). The people act through the General Assembly. *Preston*, 325 N.C. at 448, 385 S.E.2d at 478. Since the General Assembly serves as the "agent of the people for enacting laws," *id.*, a restriction on the General Assembly is in fact a restriction on the people themselves. Therefore, this Court presumes that legislation is constitutional, and a constitutional limitation upon the General Assembly must be *express and proven beyond a reasonable doubt. Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991).

"The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. "[A]s essentially a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710 (1962), a court should not review questions better suited for the political branches. This Court must refuse to resolve a dispute "(1) when the Constitution commits [the] issue . . . to one branch of government; or (2) when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue." *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599

S.E.2d 365, 391 (2004) (emphasis omitted) (citing *Baker*, 369 U.S. at 210, 82 S. Ct. at 706). The issue before us—partisan consideration in redistricting—is both constitutionally committed to another branch of government, the General Assembly, and lacking in satisfactory legal standards. Thus, a claim for partisan gerrymandering presents a nonjusticiable political question.

The North Carolina Constitution expressly acknowledges that the authority to redistrict belongs to the General Assembly. *See* N.C. Const. art. II, §§ 3, 5; U.S. Const. art. I, § 4, cl. 1. In a system based upon popular sovereignty, this structure makes sense because legislators, as opposed to judges, are in the best position to address the people's interests. *See Vieth*, 541 U.S. at 358, 124 S. Ct. at 1824 (Breyer, J., dissenting) ("It is precisely *because* politicians are best able to predict the effects of boundary changes that the districts they design usually make some political sense.").

The General Assembly's redistricting authority is checked by the people through express constitutional provisions as interpreted by this Court. Our constitution subjects redistricting by the General Assembly to only four express limitations. *See* N.C. Const. art. II, §§ 3, 5. Since these limitations say nothing about the permissibility of partisan gerrymandering, the issue has only two legitimate avenues for reform: a statute or a constitutional amendment that imposes a restraint for the Court to apply. As such, unless and until the people alter the law to either limit or prohibit the practice of partisan gerrymandering, this Court is without any satisfactory or manageable legal standard and thus must refuse to resolve such a claim.

A majority of this Court, however, tosses judicial restraint aside, seizing the opportunity to advance its agenda. There is no express provision of the constitution supporting the decision of the majority; there is no showing that the enacted redistricting plans are unconstitutional beyond a reasonable doubt. A summary pronouncement by the majority to the contrary does not make it so. In the majority's view, it is this Court, rather than the people, who hold the power to alter our constitution. Thus, the majority by judicial fiat amends the plain text of Article I, Sections 10, 12, 14, and 19, to empower courts to supervise the legislative power of redistricting arising from complaints of partisan gerrymandering. Such action constitutes a clear usurpation of the people's authority alone to amend their constitution. *See* N.C. Const. art. XIII, §§ 2, 3, 4.

In essence, the majority rules that the North Carolina Constitution now has a statewide proportionality requirement for redistricting. It seeks to support this view with various provisions of our Declaration of Rights that are designed to protect individual and personal rights. *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992). In doing so, it magically transforms the protection of individual rights into the creation of a protected class for members of a political party, subjecting a redistricting plan to strict scrutiny review. The majority presents various views about what constitutes unconstitutional partisan gerrymandering. *See* Order, ¶¶ 4–6 (providing a variety of observations about what the constitution requires). Absent from the order is any mention of "extreme partisan gerrymandering," which was the issue presented to the Court. Perhaps the sentence best characterizing the majority's

holding is that "[t]he General Assembly violates the North Carolina Constitution when it deprives a voter of his or her right to substantially equal voting power on the basis of partisan affiliation." Order, ¶ 5. The question of *how much* partisan consideration is unconstitutional remains a mystery, as does what is meant by "substantially equal voting power on the basis of partisan affiliation." Any discretionary decisions constitutionally committed to the General Assembly in the redistricting process have now been transferred to the Court.

In seeking to hide its partisan bias, the majority states that "redistricting plans shall adhere to traditional neutral districting criteria and not subordinate them to partisan criteria." Order, ¶ 8. Ironically, the majority claims the General Assembly should not subordinate traditional neutral districting criteria to partisan considerations, but its litmus test of constitutionality *requires* a satisfactory partisanship analysis. In fact, only a satisfactory partisanship analysis makes a plan constitutional. But, the Court provides no guidance as to what constitutes an acceptable partisanship analysis. The Court further says that the constitution requires the use of various political science techniques of voting analysis. In addition to the remedial maps, the Court requires the General Assembly to report "an explanation of what data they relied on to determine that their districting plan is constitutional, including what methods they employed in evaluating the partisan fairness of the plan." Order, ¶ 6. Glaringly, it fails to mention which data or methods are acceptable or what results would be satisfactory. Apparently, the majority alone

knows what would be constitutional. Further, the Court allows other groups to submit alternate plans but does not mandate the same disclosures.

In rejecting the notion that claims of partisan gerrymandering present a justiciable issue, the Supreme Court of the United States noted the unreliability of political science models:

> 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.

Rucho, 139 S. Ct. at 2503–04.

Nonetheless, the Court mandates a political-science-based approach without complying with the direct statutory requirements triggered when a redistricting plan is found unconstitutional. North Carolina law requires that

> [e]very order or judgment declaring unconstitutional or otherwise invalid, in whole or in part and for any reason, any act of the General Assembly that apportions or redistricts State legislative or congressional districts shall find with specificity all facts supporting that declaration, shall state separately and with specificity the court's conclusions of law on that declaration, and shall, with specific reference to those findings of fact and conclusions of law, identify every defect found by the court, both as to the plan as a whole and as to individual districts.

N.C.G.S. § 120-2.3 (2021). The majority's order today provides no specificity—only a vague and undefined ambition of "political fairness"—which ultimately only the majority can measure and determine if its desired result is accomplished.

In 2019 the trial court required the General Assembly to redraw the districts. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *135 (N.C. Super. Ct. Sept. 3, 2019). The 2020 election took place under these constitutionally compliant districts. The people have expressed their will by electing the current members of the General Assembly. The people were aware that the legislators elected in 2020 would be tasked with drawing new districts according to the census, *see* N.C. Const. art. II, §§ 3, 5, and by any standard, the process used by the General Assembly to follow the nonpartisan criteria meets the requirements of the 2019 trial court order. Thus, the General Assembly and any neutral observer would have to inquire what about our constitutional text has changed from 2019 to 2022 resulting in this newfound constitutional requirement.

The 2019 remedial order required that for a plan to be constitutional, "[p]artisan considerations and election results data *shall not be used* in the drawing of legislative districts." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *136 (N.C. Super. Ct. Sept. 3, 2019) (emphasis added). The order today contradicts this directive by requiring partisan data be used. Similarly, the court-approved constitutional districts drawn in 2019 provided that Voting Rights Act districts are not required anywhere in North Carolina. The majority today also

contradicts that finding. It should be noted that the trial court here also found that no Voting Rights Act districts are necessary in North Carolina.

Finally, the majority's managed timeline is arbitrary and seems designed only to ensure this Court's continued direct involvement in this proceeding. Instead of following our customary process of allowing the trial court to manage the details of a case on remand, the majority follows the Governor's lead in mandating a May primary. No reason is given, nor does one exist—except for perceived partisan advantage—for not allowing the trial court to manage the remand schedule, including, if necessary, further delaying the primary.

To avoid the "smothering of freedom beneath the robes of a judicial despotism," *Dilday v. Beaufort Cnty. Bd. of Educ.*, 267 N.C. 438, 455, 149 S.E.2d 345, 347 (1966) (Lake, J., concurring), this Court should respect the constitutional role of the General Assembly. Further, the Court must provide a manageable standard to determine when a proposed redistricting plan is constitutional. The Court has failed to do so. The majority's requirements are so vague as to only allow this Court to ultimately determine a plan's constitutionality. With this ruling, the majority moves beyond traditional judicial decision-making in favor of judicially amending the constitution. I respectfully dissent.

Dissenting opinion to follow.

Justices BERGER and BARRINGER join in this dissenting opinion.

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