To: Jonathan Cervas, Ph.D. & Bernard Grofman, Ph.D.

From: Scott Matsuda

Date: 9/28/2022

Case Briefing **[NORTH CAROLINA]**

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| **Citation** | * *Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022). |
| **Judicial Breakdown / Partisan or Nonpartisan** | * Hudson, J. (D), issued the 4-3 opinion; joined by Justices Morgan (D), Ervin (D), and Earls (D).[[1]](#footnote-1)   + Justice Morgan, filed a concurring in opinion, joined by Justice Earls.   + Chief Justice Newby (R), filed a dissenting opinion, joined by Justices Berger (R) and Barringer (R). |
| **Procedural History** | * On 11/16/2021, the plaintiffs, North Carolina League of Conservation Voters, Inc. et al. (NCLCV), filed a motion for preliminary injunction, alleging that the 2021 districting plans violated the North Carolina Constitution by:   + Establishing severe partisan gerrymanders in violation of the Free Elections Clause, art. I, § 10, the Equal Protection Clause, art. I, § 19, and the Freedom of Speech and Assembly Clauses, art. I, §§ 12 and 14; and   + By engaging in racial vote dilution in violation of the Free Elections Clause, Art. I, § 10, and the Equal Protection Clause, art. I, § 19; and by violating the Whole County Provisions, art. II, §§ 3(3) and 5(3). * On 11/18/2021, separate plaintiffs, Harper et al., filed a similar motion alleging that the maps violated the N.C. Const. art. I, §§ 10, 12, 14, and 19. * On 11/19 and 11/22/2021, respectively, the two actions were assigned to a three-judge panel, and, on 12/3/2021, the Superior Court, Wake County, denied the two motions for preliminary injunction. * The plaintiffs filed an appeal with the N.C. Court of Appeals, which denied their request for a temporary stay. * Plaintiffs subsequently filed several petitions with the N.C. Supreme Court, which, on 12/8/2021, granted the preliminary injunction and temporary stayed the candidate filing period until a judgment on the merits was reached—a ruling was ordered to be issued by 1/11/2022.   + (On 12/13/2021, the Common Cause plaintiffs moved to intervene, were granted their motion on 12/16, and filed their complaint on 12/16, alleging similar claims as the NCLCV and Harper plaintiffs.) * On 12/17/2021, the Legislative Defendants—along with the remaining defendants—filed their answer, asserting numerous defenses.[[2]](#footnote-2) * The trial court made extensive factual findings based on the evidence presented at trial; the factual findings confirmed plaintiffs' assertions that each of the three enacted maps were "extreme partisan outliers" and the product of "intentional, pro-Republican partisan redistricting."   + The extensive factual findings of the expert testimonies are detailed at *Harper*, 868, S.E.2d at 518–23. * Notwithstanding, despite the trial court’s findings of partisan gerrymandering, the trial court concluded, as a matter of law, that “claims of extreme partisan gerrymandering present purely political questions that are nonjusticiable under the North Carolina Constitution” and “that the enacted maps are not unconstitutional as a result of partisan gerrymandering.”   + Thus, the trial court denied the plaintiffs’ motions. * On 1/11 and 1/12/2022, all plaintiffs filed a notice of appeal to the N.C. Supreme Court from the trial court’s final judgment. |
| **Disposition** | * Reversed and remanded; court to oversee the redrawing of the maps by the General Assembly or, if necessary, by the court. |
| **Facts** | * On 2/24/2021, N.C. State Board of Elections Executive Director Karen Brinson Bell recommended to the House Elections Law and Campaign Finance Reform Committee that the 2022 primary elections be delayed to provide more time for redistricting, due to the announced delay in the release of full census data by the U.S. Census Bureau.   + The Committee, however, rejected the recommendation. * On 8/5/2021, the General Assembly's Senate Committee on Redistricting and Elections and House Redistricting Committee met to begin discussing the redistricting process. * On 8/9/2021, the chairs of the Joint Redistricting Committee (JRC) released its proposed criteria by which to redistrict.   + The JRC rejected public comment from citizens and legislators to “change the criteria, which mandated a ‘race-blind’ approach, to allow for the consideration of racial data in order to ensure compliance with the Voting Rights Act (VRA).”[[3]](#footnote-3)   + The JRC adopted its final criteria on 8/12/2021. * On 10/5/2021, after 13 public hearings across the state, the House and Senate Redistricting Committees began the redistricting process. * On 10/6/2021, computer stations were set up for legislators to draw their maps.   + The stations would be open during business hours, and both the rooms and the screens of the station computers would be live-streamed and available for public viewing while the stations were open.   + In an effort to show transparency, Legislative Defendants "requir[ed] legislators to draw and submit maps using software on computer terminals in the redistricting committee hearing rooms” and Senate Committees would only consider maps drawn and submitted on the software."     - However, the House and Senate Committees did not actively prevent legislators and their staff from relying on pre-drawn maps created using political data, or even direct consultation of political data." * Proposed versions of the maps were filed on 10/28 and 10/29/2021, and final maps were adopted on 11/3 and 11/4/2021; on 11/4/2021, the maps were ratified into law, passed along strict party-line votes in each chamber. |
| **Issue(s) or**  **Question(s)**  **Presented** | * (1) Whether plaintiffs' claims are justiciable under the North Carolina Constitution and, if so, * (2) Whether Legislative Defendants' enacted plans for congressional and state legislative districts violate the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of the N.C. constitution. |
| **The Rule(s)** | * Declaration of Rights, N.C. Const. art. I.   + § 10, Free Elections     - "All elections shall be free" means that every vote must count equally.   + § 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. . . .”   + § 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.   + § 19, Law of the Land; Equal Protection of the Laws     - “No person shall be denied the equal protection of the laws.” * Political Question Criterion in N.C.:   + (1) Whether there is "a textually demonstrable constitutional commitment of the issue" to the "sole discretion" of a "coordinate political department[,]" and   + (2) Whether those questions can be resolved only by making "policy choices and value determinations." * Strict Scrutiny Basis of Review for Violations of Fundamental Rights   + A plan is presumptively unconstitutional unless the General Assembly can demonstrate that the plan is "narrowly tailored to advance a compelling governmental interest." |
| **Holding(s)** | * (1) Court held that the plaintiffs' claims are justiciable under the North Carolina Constitution; and * (2) Court held that the Legislative Defendants' enacted plans for congressional and state legislative districts violated the free elections clause, equal protection clause, free speech clause, and freedom of assembly clause of the N.C. constitution, beyond a reasonable doubt. |
| **Rationale** | * **STANDING** - Court rejected the trial court’s ruling that there was no “deprivation of a constitutionally guaranteed personal right”—and thus no standing—because "the federal injury-in-fact requirement has no place in the text or history of [the N.C.] Constitution." *Committee to Elect Dan Forest v. Employees Political Action Committee*, 853 S.E.2d 698 (N.C. 2021).   + In the case of direct constitutional challenges to statutes or other acts of government, the court requires only the requisite "concrete adverseness.”     - Alleging a violation of a legal right which belongs to a person, even if widely shared with others and even if they are not entitled to relief under their theory of the legal right, is sufficient to show the requisite "concrete adverseness" in N.C. courts which the court, for purely pragmatic reasons (i.e., not a limitation on judicial power), requires in the resolution of constitutional questions.   + Therefore, the trial court contravened the concrete adverseness rationale for the direct injury requirement by concluding that plaintiffs lacked standing because their partisan gerrymandering claims were not cognizable. * **POLITICAL QUESTION JUSTICIABILITY[[4]](#footnote-4)** – In a case of first impression, the court rejected Legislative Defendants’ claim that partisan gerrymandering claims present a nonjusticiable "purely political question,” because while the Supreme Court has concluded that partisan gerrymandering claims are nonjusticiable in federal courts, “it does not follow that they are nonjusticiable in North Carolina courts.”   + The trial court and Legislative Defendants rely in part on *Rucho* and other federal cases—which may be instructive, but they are certainly not controlling.     - "While 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."   + In contrast to the three considerations used in *Rucho* to find nonjusticiability (lack of a “judicially determinable” standard; absence of a standard that was “clear, manageable[,] and politically neutral”; and the role of federal courts in the constitutional system), here:     - (1) the N.C. Constitution is "is more detailed and specific than the federal Constitution in the protection of the rights of its citizens."     - (2) N.C. state law provides more specific neutral criteria against which to evaluate alleged partisan gerrymanders, and those criteria would not require the court system to consider 50 separate sets of criteria, as would federal court involvement.     - (3) *Rucho* was substantially concerned with the role of federal courts in policing partisan gerrymandering, while recognizing the independent capacity of state courts to review such claims under state constitutions as a justification for judicial abnegation at the federal level.   + Gerrymandering claims are justiciable because reapportionment is *not* committed to the sole discretion of the General Assembly—to find otherwise would be “flatly inconsistent with [the court’s] precedent interpreting and applying constitutional limitations on the General Assembly's redistricting authority.”     - The mere fact that responsibility for reapportionment is committed to the General Assembly does not mean that the General Assembly's decisions in carrying out its responsibility are fully immunized from any judicial review.       * If "members of the General Assembly" could violate some constitutional rights, "they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, [but] from thence transmit the dignity and authority of legislation down to their heirs male forever."   + Partisan Gerrymandering claims are justiciable because partisan gerrymandering violates the Declaration of Rights in the N.C. Constitution.     - The **principle of equality** ("all persons are created equal") and the **principle of popular sovereignty** ("political power" of the people is channeled through the proper functioning of the democratic processes of the constitutional system to the people's representatives in government) are the two most fundamental principles of the Declaration of Rights.       * While these are two separate fundamental principles under the present constitutional system, one cannot exist without the other.       * If through state action the ruling party chokes off the channels of political change on an unequal basis, then government ceases to "derive[ ]" its power from the people or to be "founded upon their will only," and the principle of political equality that is fundamental to the Declaration of Rights and the democratic constitutional system is violated.     - (1) The free elections clause reflects the principle of the Glorious Revolution that those in power shall not attain "electoral advantage" through the dilution of votes and that representative bodies . . . must be "free and lawful."       * Historical sources indicate that the founders did not hold the limited view that the only requirement for an election to be a "free" election was that those qualified had access to the ballot box . . . rather, they adhered to the broad principles of the Glorious Revolution—that all attempts to manipulate the electoral process, especially through vote dilution on a partisan basis, as in the "rotten boroughs" of England, would be prohibited.       * When the legislature denies to certain voters this substantially equal voting power, including when the denial is on the basis of voters' partisan affiliation, elections are not free and do not serve to effectively ascertain the will of the people.     - (2) Partisan gerrymandering claims are cognizable under the equal protection clause of the Declaration of Rights because "the fundamental right to vote on equal terms” includes the right to "substantially equal voting power and substantially equal legislative representation."       * When on the basis of partisanship the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority—that is, when a districting plan systematically makes it harder for one group of voters to elect a governing majority than another group of voters of equal size—the General Assembly unconstitutionally infringes upon that voter's fundamental rights to vote on equal terms and to substantially equal voting power.     - (3) Partisan gerrymandering violates the freedoms of speech and association and undermines their role in our democratic system.       * When legislators apportion district lines in a way that dilutes the influence of certain voters based on their prior political expression—their partisan affiliation and their voting history—it imposes a burden on a right or benefit, here the fundamental right to equal voting power on the basis of their views.       * When the General Assembly systematically diminishes or dilutes the power of votes on the basis of party affiliation, it intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny.     - Lastly, Partisan gerrymandering claims do not require the making of "policy choices and value determinations."       * Such claims are discernable under the N.C. Constitution and precedent and there are several manageable standards for evaluating the extent to which districting plans dilute votes on the basis of partisan affiliation (e.g., mean-median, efficiency gap, close-votes/close-seats, and partisan symmetry analyses, etc.). * **ELECTIONS CLAUSE ARGUMENT (i.e., Independent State Legislature Theory)[[5]](#footnote-5)** – Court rejected the Legislative Defendants’ argument, which was not presented at trial, as “inconsistent with nearly a century of precedent of the Supreme Court of the United States affirmed as recently as 2015” and “repugnant to the sovereignty of states, the authority of state constitutions, and the independence of state courts,” nothing that it “would produce absurd and dangerous consequences.”   + This theory contradicts the holding of *Rucho*, where the U.S. Supreme Court said that "[p]rovisions in . . . state constitutions can provide standards and guidance for state courts to apply" in a case addressing the justiciability of partisan gerrymandering claims in congressional plans.   + A long line of decisions by the Supreme Court of the United States confirm the view that state courts may review state laws governing federal elections to determine whether they comply with the state constitution. * **PARTISAN GERRYMANDERING** – Court held that each of the 2021 plans violated the Declaration of Rights as partisan gerrymanders.   + (1) Congressional Map     - Based on Dr. Mattingly's ensemble analysis, the trial court found "that the Congressional Map is the product of intentional, pro-Republican partisan redistricting.”     - In addition, the court considered various "mean-median difference,” "efficiency gap,” "the lopsided margins test,” and "partisan symmetry" analyses provided, and found "that the 2021 Congressional Plan is a partisan outlier intentionally and carefully designed to maximize Republican advantage in North Carolina's Congressional delegation."     - Defendants also had not shown that the 2021 congressional map was narrowly tailored to a compelling governmental interest, and therefore the map failed strict scrutiny; partisan advantage is neither a compelling nor a legitimate governmental interest.   + Court made similar determinations for both the State House Map and the State Senate Map, *see* *Harper*, 868 S.E.2d at 555–58. * **FAILURE TO COMPLY WITH *STEPHENSON*[[6]](#footnote-6)REQUIREMENTS** – Court found that the General Assembly was required to conduct a racially polarized voting analysis prior to drawing district lines, yet failed to do so. |
| **Concurring: Morgan, J., joined by Earls, J.** | * “While I fully join my learned colleagues in my agreement with the majority opinion in this case, in my view the dispositive strength of the Free Elections Clause warrants additional observations in light of the manner in which it has been postured and addressed.”   + To the extent that the word "free" in art. I, § 10 has been construed here by Legislative Defendants, they conflate the right to a free election with the right to be free to participate in the election process.     - “In my view, a free election is uninhibited and unconstrained in its ability to have the prevailing candidate to be chosen in a legislative contest without the stain of the outcome's predetermination.” |
| **Dissenting: Newby, C.J., joined by Berger, J., and Barringer, J.** | * “With this decision, unguided by the constitutional text, four members of this Court become policymakers. They wade into the political waters by mandating their approach to redistricting.”   + “They lament that the people have not placed a provision in our constitution for a ‘citizen referendum’ and use the absence of such a provision to justify their judicial activism to amend our constitution.” * Because the General Assembly serves as "the agent of the people for enacting laws," the General Assembly has plenary power, and a restriction on the General Assembly is in fact a restriction on the people themselves.   + The Court presumes that legislation is constitutional, and a constitutional limitation upon the General Assembly must be (1) express and (2) proved beyond a reasonable doubt. * When this Court looks for constitutional limitations on the General Assembly's authority, it looks to the plain text of the constitution.   + Like the Federal Constitution, there is no provision in the N.C. state constitution remotely comparable to the express provision in the Florida Constitution (i.e., an explicit prohibition against partisan gerrymandering).[[7]](#footnote-7)   + Instead, the majority “inexplicably” takes the Supreme Court's statement in *Rucho* that the "[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply," as an unrestricted license to judicially amend the constitution.   + The N.C. Constitution could have a provision like the Florida Constitution—but, to do so properly requires the amendment process authorized in the constitution itself, allowing the people to determine the wisdom of this new policy. * The majority fails to recognize that its political science-based approach (requiring proportionality and the use of various political science tests) necessarily involves policy decisions and that these are the same policy determinations about which the Supreme Court warned in *Rucho*.   + The majority inserts a requirement of "partisan fairness" into the constitution; under the majority's newly created policy, any redistricting that diminishes or dilutes an individual's vote on the basis of partisanship is unconstitutional.     - This vague notion of fairness does not answer how to measure whether groups of voters are of equal size or how to predict the results an election would produce. * The majority also bases its reasoning on several false assumptions.   + (1) plaintiffs' experts and now the majority appear to assume that voters will vote along party lines in future elections.   + (2) in equating partisan affiliation to an immutable characteristic and then elevating its protection to strict scrutiny, the majority also fails to consider that party affiliation can change at any point or be absent altogether.   + (3) the majority's policy decision erroneously assumes that a voter's interests can never be adequately represented by someone from a different party.   + In sum, there is no judicially discernible manageable standard. As thoroughly discussed in *Rucho*, the majority's approach is replete with policy determinations . . . [and] [t]hus, the case is nonjusticiable. * The issue is also textually committed to the General Assembly, and is therefore nonjusticiable.   + Both the Federal Constitution and the N.C. Constitution textually assign redistricting authority to the legislature.   + The role of the judiciary through judicial review is [solely] to decide challenges regarding whether a redistricting plan violates the objective limitations in art. II, §§ 3 and 5 of the constitution or a provision of federal law. * As to the *Stephenson* requirements, “the Court in *Stephenson* was not forcing the legislative defendants to conduct a VRA analysis. Rather, the Court was merely stating that if Section 2 requires VRA districts, those districts must be drawn first so that the remaining non-VRA districts can be drawn in compliance with the Whole County Provisions.”   + Here, the trial court found that there was no showing that race was the predominant factor in drawing the districts, and thus a VRA analysis was not required. * None of the clauses in the Declaration of Rights have been interpreted as a restriction on partisan considerations in redistricting—even after hundreds of years of apportionments and decades of redistricting litigation—until today.   + Finding no explicit constitutional provision prohibiting partisan gerrymandering, the majority creatively attempts to mine the Declaration of Rights to find or create some protection for a political group's right to their preferred form of representation and a "fair" share of the "voting power."     - Moreover, the Declaration of Rights protects the individual's rights, not a political group's rights.   + The individual right to participate in a "free election" does not include the right to have one's preferred candidate elected or a political group's right to proportional representation.     - Giving the provision its plain meaning, "free" means "free from interference or intimidation."     - The free elections clause was not meant to restrict the General Assembly's presumptively constitutional ability to engage in partisan gerrymandering.   + As to the right to vote on equal terms, an effort to gerrymander districts to favor a political party does not alter voting power so long as voters are permitted to (1) vote for the same number of representatives as voters in other districts and (2) vote as part of a constituency that is similar in size to that of the other districts.     - Therefore, because partisan gerrymandering does not infringe upon a fundamental right, rational basis review applies (instead of strict scrutiny).   + Partisan gerrymandering plainly does not place any restriction upon the espousal of a particular viewpoint.     - Opponents of a redistricting plan are free to voice their opposition.     - Moreover, partisan gerrymandering—and public disdain for the practice—has been ubiquitous throughout the state's history. * The people expressed their will in the 2020 election, which utilized constitutionally compliant maps. Knowing that the 2021 General Assembly would be tasked with redistricting, the people elected them. |
| **Notes/**  **Reactions** | * N/a. |

1. The political party designations of the judges were obtained via Google desktop searches, which may not be entirely accurate. [↑](#footnote-ref-1)
2. Argued that: (1) granting the requested relief will violate the VRA and the U.S. Constitution; (2) granting the requested relief will violate the rights of Legislative Defendants, Republican voters, and Republican candidates under the U.S. and N.C. Constitutions; (3) the court cannot lawfully prevent the General Assembly from considering partisan advantage and incumbency protection; (4) plaintiffs seek to require districts where Democratic candidates are elected where such candidates are not currently elected; (5) plaintiffs' claims are barred by the doctrine of laches; (6) plaintiffs have failed to state claims upon which relief can be granted; (7) plaintiffs seek a theory of liability that will act to impose a judicial amendment to the N.C. Constitution; (8) the only limitations on redistricting legislation are found in art. II, §§ 2, 3, 4, and 5 of the N.C. Constitution; (9) plaintiffs' request for a court-designed redistricting plan violates the separation of powers doctrine; (10) plaintiffs' claims are nonjusticiable and fail to provide judicially manageable standards; (11) plaintiffs lack standing; and (12) plaintiffs have unclean hands and therefore are not entitled to equitable relief. [↑](#footnote-ref-2)
3. “**Racial Data.** Data identifying the race of individuals or voters *shall not* be used in the construction or

   consideration of districts in the 2021 Congressional, House, and Senate plans.” *Harper*, 868 S.E.2d at 512. [↑](#footnote-ref-3)
4. Purely political questions are those questions which have been wholly committed to the "sole discretion" of a coordinate branch of government, and those questions which can be resolved only by making "policy choices and value determinations." *Bacon v. Lee*, 549 S.E.2d 840 (N.C. 2001). When presented with a purely political question, the judiciary is neither constitutionally empowered nor institutionally competent to furnish an answer. [↑](#footnote-ref-4)
5. For more information, *see* Ethan Herenstein & Thomas Wolf, *The ‘Independent State Legislature Theory,’ Explained*, Brennan Ctr. for Justice (Jun. 30, 2022), <https://www.brennancenter.org/our-work/research-reports/independent-state-legislature-theory-explained>. Notably, the Supreme Court has agreed to decide whether the North Carolina Supreme Court has the power to strike down the legislature’s illegally gerrymandered congressional map for violating the North Carolina Constitution under this theory in *Moore v. Harper*. Oral argument will be heard sometime during the October 2022–23 term. *See Moore v. Harper*, Ballotpedia (last visited Sept. 29, 2022), <https://ballotpedia.org/Moore_v._Harper>. [↑](#footnote-ref-5)
6. *See Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002) (holding that the General Assembly is required to conduct racially polarized voting analysis within their decennial redistricting process in order to assess whether any steps must be taken to avoid the dilution of minority voting strength, in accordance with N.C. Const. art I, §§ 3 & 5, and art. II, §§ 3 & 5). [↑](#footnote-ref-6)
7. “In establishing congressional district boundaries: (a) No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.” Fla. Const. art. III, § 20. [↑](#footnote-ref-7)