

STATE OF NORTH CAROLINA

COUNTY OF WAKE

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

Plaintiffs,

vs.

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*

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21-CVS-015426

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 her 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,

Defendants.

STATE OF NORTH CAROLINA

COUNTY OF WAKE

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,

Plaintiffs,

vs.

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

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21-CVS-500085

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 her 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*,

Defendants.

**AMICUS CURIAE BRIEF OF PROFESSOR ASHER D. HILDEBRAND
IN SUPPORT OF PLAINTIFFS¹**

¹ No outside persons or entities wrote any part of this brief or contributed any money to support the brief's preparation. *See* N.C. R. App. P. 28(i)(2).

INTRODUCTION

The North Carolina Constitution prohibits extreme partisan gerrymandering. The North Carolina Supreme Court’s opinion in this case makes clear that the majority party cannot leverage its power to draw maps to systemically entrench itself, thereby diluting North Carolinians’ fundamental right to equal voting power. Because all three of the maps enacted by the General Assembly in 2021 violated this constitutional right, the Supreme Court rightly struck them down.

It now falls to this Court, and to its three appointed Special Masters, to implement the Supreme Court’s decision and adopt remedial maps. In doing so, the Court should be mindful of three key principles. First, the unconstitutional partisan gerrymanders that the Supreme Court just struck down should not be the benchmark for evaluating new maps. As this Court already made clear, the rejected maps were examples of “extreme” partisan gerrymanders. Fair maps will look much different (and operate much differently) than the invalidated maps—as they should. Vigorous protection of North Carolinians’ right to equal voting power demands nothing less.

Second, there is not a single “gold standard” for evaluating maps’ partisan fairness. Like leading scholars in the field, the Supreme Court’s decision recognized that there are many metrics that can inform whether a map is an extreme partisan gerrymander. This brief aims to assist the Court in its task by using four widely recognized metrics to evaluate the plans submitted. The remedial maps enacted by the General Assembly are a marked improvement over the previous maps; indeed, the State House map that resulted from bipartisan compromise scores well on all four partisan fairness criteria discussed below. But the remedial plans for the North Carolina Senate and U.S. House of Representatives continue to show significant and concerning partisan bias. This continuing bias calls for the Court’s careful scrutiny, and any remedial plans should seek to achieve the greatest degree of partisan fairness practicable.

Third, in its evaluation of the remedial plans the Court should seek to distinguish between the competitiveness of individual districts and the partisan fairness of the overall districting plan. Competitive districts are clearly good for democracy: they encourage voter turnout, increase the responsiveness of candidates and representatives to the electorate, promote local interests and, principally, advance North Carolina's commitment to popular sovereignty and self-governance. At the same time, however, the benefits of competitive districts must be weighed against the Supreme Court's concern for partisan fairness. Voters in "deep-blue" or "deep-red" areas of the state have a right to express their preferences just as surely as those in naturally competitive areas, and artificially imposing competitive districts in areas that are not naturally competitive can dilute this right. In a politically balanced state such as North Carolina, achieving partisan fairness likely requires districting plans that are competitive in the aggregate (i.e. that include enough competitive districts to ensure that clear majorities of votes will translate into majorities of seats). But seeking to maximize competitiveness *within* individual districts at the expense of other redistricting criteria is unnecessary to implement the Supreme Court's opinion and would likely run afoul of other constitutional standards.² Therefore, the Court should evaluate competitiveness of districting plans in totality when evaluating the remedial maps, promoting competition in politically heterogeneous areas while respecting voters' preferences in heavily partisan areas.

INTEREST OF AMICUS CURIAE

Amicus curiae Asher D. Hildebrand is an expert in the field of legislative redistricting with experience analyzing the appropriate standards to determine whether partisan bias has influenced a new redistricting plan. *Amicus* is an Associate Professor of the Practice of Public Policy at the

² See North Carolina's Whole County Provisions, N.C. CONST. art. II, §§ 3(3), 5(3).

Sanford School of Public Policy at Duke University.³ Prior to joining the Sanford faculty, Professor Hildebrand served nearly fifteen years in Congress and on political campaigns, giving him direct experience with, and a unique perspective on, the consequences of extreme partisan gerrymandering for democracy. Professor Hildebrand was the Chief of Staff to United States Representative David Price of North Carolina and has also worked for the International Foundation for Electoral Systems. He holds a Bachelor of Arts degree from the University of North Carolina at Chapel Hill and a Master’s in Public Affairs from Princeton University.

The central issue set forth before this Court is diagnosing the submission of remedial maps to ensure they do not contain unconstitutional partisan bias. As a leading researcher in the analysis of partisan gerrymanders, Professor Hildebrand has a strong interest in informing this Court of the widely accepted metrics to review prior to selecting any remedial maps. Understanding the overarching objective for selecting remedial maps and the appropriate measures to apply is important for the next decade of North Carolina elections. This brief explains the differences among widely accepted metrics that should be analyzed by both the Court and the Special Masters, while not losing sight of fundamental democratic principles.

ARGUMENT

When a districting plan “systematically makes it harder for individuals because of their party affiliation to elect a governing majority than individuals in a favored party of equal size,” it “unconstitutionally infringes” upon voters’ “fundamental rights to vote on equal terms and to substantially equal voting power.” *Harper v. Hall*, --- S.E.2d ---, No. 413PA21, 2022 WL 496215, at *35 (N.C. Feb. 14, 2022). While this standard does not require strict proportionality—for

³ Professor Hildebrand wishes to emphasize that this brief represents his personal views and is not a statement of policy or position by the Sanford School of Public Policy, Duke University, or any other entity.

example, that a party with 59 percent of voters must get 59 percent of seats—it does require that maps afford each vote “roughly the same weight.” *Id.* at *40. The General Assembly’s enacted redistricting plans each failed this test.

Now that it is clear that extreme partisan gerrymandering violates North Carolina voters’ constitutional rights, the Court should vigorously protect voters’ rights to equal voting power. The maps the Supreme Court rejected are historical anomalies; remedial maps that achieve partisan fairness will and should look and operate far differently. As the Supreme Court recognized, the same technology that makes “extreme gerrymanders possible likewise makes it possible to reliably evaluate” those plans. *Id.* at *1. This brief uses four widely accepted standards to evaluate the proposed maps: the efficiency gap, median-mean analysis, partisan symmetry, and declination. All four measures show that the remedial plans submitted by the Plaintiffs and Defendants continue to favor the Republican Party to varying degrees. Finally, insofar as this Court elects to draw its own remedial maps, this brief urges the Court to prioritize the competitiveness of the maps when viewed in their totality while allowing for variations in competitiveness among individual districts, consistent with the political geography of the state.

I. FAIR MAPS WILL (AND SHOULD) DIFFER MARKEDLY FROM THE GENERAL ASSEMBLY’S UNCONSTITUTIONAL PARTISAN GERRYMANDER.

The maps that the Supreme Court struck down were egregious partisan gerrymanders. The congressional map, as this Court found, was “an extreme outlier that is highly non-responsive to the changing opinion of the electorate”—and “more carefully crafted for Republican partisan advantage than at least 99.9999% of all possible maps in North Carolina” satisfying nonpartisan criteria. *Harper*, 2022 WL 496215, at *33, 41. Likewise, this Court determined that the enacted North Carolina House map showed “systemic bias toward the Republican Party” and was “the product of an intentional, pro-Republican partisan redistricting over a wide range of potential

election scenarios.” *Id.* at *33-34. The enacted North Carolina Senate map, too, was designed to guarantee Republican victory “by packing Democratic voters into a small number of Senate districts and then cracking the remaining Democrat voters by splitting them across other districts.” *Id.* at *12.

Unwinding this constitutional violation will require maps that look very different from the maps this Court considered before. A “systematic” effort to dilute voting power will not look like a map that respects voters’ rights to “vote on equal terms and to substantially equal voting power.” *Id.* at *35. When evaluating potential remedial maps, the Court should not simply settle for maps that are “less bad” than the previous unconstitutional gerrymanders. Given the severity of those gerrymanders, there are no doubt many maps that do not infringe voters’ rights *as much* but nonetheless fall short of constitutional standards.

Constitutional maps will mark a departure from a decade of tumultuous, hyper-partisan redistricting; they will mark a return to normalcy, to districts that more readily provide for—and can reflect—the will of the people. Throughout North Carolina history, “most redistricting plans actually have provided for partisan fairness instead of partisan advantage.” *Id.* at *38. The unconstitutional gerrymanders should be cast off as the anomalies that they are, not viewed as the yardsticks against which new plans are measured.

II. USING A COMBINATION OF GERRYMANDERING METRICS SHEDS LIGHT ON THE PARTISAN FAIRNESS OF THE PROPOSED PLANS.

This Court has the important task of creating a process to review and adopt remedial maps that will pass constitutional muster. The Supreme Court envisioned a review process that included partisan gerrymandering metrics but did not specify a preference among the various measures. Indeed, the Court rightly recognized that it would not be “prudent . . . to identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the

existence of an unconstitutional partisan gerrymander.” *Harper*, 2022 WL 496215, at *38. This rejection of a rigidly delimited set of tools is consistent with the views of leading scholars who analyze partisan gerrymandering. *See, e.g.*, Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 *Stan. L. Rev.* 1503, 1551 (2018) [hereinafter, *Measure of a Metric*] (“[T]here is no need for scholars or courts to embrace a single measure. In other areas of redistricting law, multiple metrics harmoniously coexist, and the same should be possible in this domain.”).

The best approach for remedial map review ought to include a combination of gerrymandering metrics to identify and constrain partisan bias. As the Supreme Court recognized, there are “multiple reliable ways” to assess partisan fairness. *Harper*, 2022 WL 496215, at *38. Rather than looking to just one preferred metric, the Court counseled using a “combination.” *Id.* This, too, accords with the scholarly consensus. *E.g.*, Stephanopoulos & McGhee, *Measure of a Metric, supra*, at 1553 (counseling against “rank[ing] metrics” or “endors[ing] one while rejecting all others”). By applying a combination of metrics, this Court can ensure a “districting plan that will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan.” *Harper*, 2022 WL 496215, at *38.

To assist the Court, this brief discusses four widely accepted measures of partisan fairness below used by PlanScore⁴ to evaluate maps: (i) mean-median difference; (ii) the efficiency gap;

⁴ PlanScore is non-partisan project of the Campaign Legal Center staffed by technology, statistical, and political science experts who have not been retained by any party in this case. *See* PlanScore, *What Is PlanScore*, <https://planscore.campaignlegal.org/about/> (last accessed Feb. 17, 2021). The tool is designed to “assist legislative staff when creating new plans,” to “help voters and journalists understand new plans,” and to “provide historical context for the partisan asymmetries of today’s plans.” *Id.* It is run in part by two experts whose work is discussed in this brief, Nicholas Stephanopoulos of Harvard Law School and Eric McGhee, a political scientist with a Ph.D. from the University of California, Berkley.

(iii) partisan bias (or symmetry); and (iv) declination. After expounding on the different measures, this brief discusses how they apply to the submitted remedial plans and the overarching constitutional analysis that the Court must now perform.

A. Four Accepted Measures of Partisan Fairness

1. Mean-Median Difference Analysis

The first gerrymandering metric recommended by the Supreme Court is mean-median difference analysis. *Harper*, 2022 WL 496215, at *39. The mean-median difference is the difference between a party’s mean vote share in a particular election and median vote share in that election across all of the districts included in the subject districting plan. *Common Cause v. Rucho*, 318 F.Supp.3d 777, 892 (M.D.N.C.), *vacated and remanded*, 138 S. Ct. 2679 (2018). “[W]hen the mean and the median diverge significantly, the distribution of district-level vote shares is skewed in favor of one party and against its opponent – consistent with the classic gerrymandering techniques of ‘packing’ partisans into a relatively small number of districting and/or ‘cracking’ partisans among a larger number of districts.” *Id.* at 892-93. The closer the mean-median difference is to zero, the less a plan is biased (invidiously or otherwise) towards one party or another. *Id.*

The mean-median difference analysis is an effective indicator of partisan bias. Historically, the average mean-median difference between 1972 and 2016 in North Carolina’s congressional redistricting plans was one percent. *See Common Cause v. Rucho*, 318 F.Supp.3d 777, 893 (M.D.N.C.), *vacated and remanded*, 139 S.Ct. 2484 (2019). Based on the historical data, the Supreme Court suggested that one percent or less should be the “threshold standard” when applying this gerrymandering metric. *Harper*, 2022 WL 496215, at *39. The mean-median results of the original redistricting plans subsequently deemed unconstitutional were as follows: (i) State

House districts (SL 2021-175) were 2.4% Republican; (ii) State Senate districts (SL 2021-173) were 2.9% Republican; and the U.S. House of Representatives districts (SL 2021-174) were 3.1% Republican.⁵

2. Efficiency Gap Analysis

The second metric recognized by the Supreme Court is the efficiency gap. *Harper*, 2022 WL 496215, at *39. The efficiency gap was first introduced by Nicholas Stephanopoulos and Eric McGhee in 2015. Stephanopoulos, Nicholas & McGhee, Eric, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 849-53 (2015). “The efficiency gap is rooted in the insight that partisan gerrymandering is always carried out in one of two ways: the *cracking* of a party’s supporters across many districts, in which their preferred candidates lose by relatively narrow margins, or the *packing* of a party’s backers into a few districts in which their preferred candidates win by overwhelming margins.” Stephanopoulos & McGhee, *Measure of a Metric*, *supra*, at 1506. Each of these techniques causes the disfavored party to “waste” votes. *Common Cause v. Rucho*, 318 F.Supp.3d 777, 885 (M.D.N.C.), *vacated and remanded*, 138 S. Ct. 2679, 201 L. Ed. 2d 1066 (2018); *accord Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *135 (N.C. Super. Ct. Sept. 3, 2019). In packed districts, the disfavored party wins by a landslide, wasting votes that could help the disfavored party win in a different district. Conversely, because the favored party has few voters in the district, those voters can contribute to victories in other districts. In cracked districts, district lines ensure that the disfavored party comes reasonably close to winning, without jeopardizing the favored party’s chances of victory. The efficiency gap is the

⁵ The mean-median difference scoring for the previously enacted plans can be found at PlanScore. See Redistricting Plans: North Carolina, PLANSCORE, https://planscore.campaignlegal.org/library/north_carolina/ (last visited Feb. 20, 2022).

difference between the parties' wasted votes, divided by the total number of votes in an election. *Rucho*, 318 F.Supp.3d at 886.

The Supreme Court has directed that efficiency-gap analysis does not require “strict proportional representation.” *Harper*, 2022 WL 496215, at *39 (citing *Rucho*, 318 F.Supp.3d at 889)). Instead, the panel should use the efficiency gap to ensure “the magnitude of the winner’s bonus should be approximately the same for both parties.” *Id.* The Court recognized the commonly accepted threshold of 7 percent. *See id.* (“[C]ourts 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.” (internal quotation marks omitted)). The North Carolina Supreme Court found this standard “entirely workable” to determine whether a redistricting plan was unconstitutionally gerrymandered. Thus, the efficiency gap metric should be applied in addition to the mean-median difference analysis.

3. Partisan Symmetry Analysis

Third, the North Carolina Supreme Court recommended partisan symmetry analysis for the remedial plan review process as an indicator for unconstitutional partisan gerrymandering. *Harper*, 2022 WL 496215, at *39. Partisan symmetry analysis was first introduced to the United States Supreme Court through an amicus brief in *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399 (2006). Grofman, Bernard & King, Gary, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v. Perry*, Elec. L. J. Vol. 6, No. 1, 6 n.28 (2007). (“[L]iterature on the fair translation of seats into votes can be traced back more than a century.”).

Partisan symmetry “requires that the electoral system treat similarly-situated parties equally, so that each receives the fraction of legislative seats for a particular vote percentage as the

other party would receive if it had received the same percentage.” *LULAC*, 548 U.S. at 466 (internal quotation makes and citation omitted). Under the partisan symmetry standard, “the measure of a map’s bias is the extent to which a majority party would fare better than the minority party, should their respective shares of the vote reverse.” *Id.* at 420. “This standard is widely accepted by scholars as providing a measure of partisan fairness in electoral systems.” *Id.* at 466. Partisan symmetry compliance is measured by extrapolating from a sample of known data. *Id.* at 467. The increase in technology “makes it possible to reliably evaluate the partisan asymmetry” of the remedial redistricting plans. *Harper*, 2022 WL 496215, at *1.

Partisan symmetry is a robust standard that garners universal support from social scientists. However, partisan symmetry, along with the other metrics, should not be viewed in isolation for the remedial map review. In fact, in *LULAC v. Perry*, the United States Supreme Court noted partisan symmetry was deemed “a helpful (though certainly not talismanic) tool” provided one recognizes that “asymmetry alone is not a reliable measure of unconstitutional partisanship.” 548 U.S. at 420, 468 n.9. Thus, the United States Supreme Court also supports an approach that considers partisan gerrymandering metrics holistically to evaluate the partisan bias of redistricting plans.

4. Declination

Lastly, declination is another widely recognized gerrymander metric that has been recently adopted and applied in PlanScore. This measure is not mentioned by the Supreme Court, but has been applied by scholars as an additional control on partisan gerrymandering. Declination is “a measure of asymmetry in the vote distribution that relies only on the fraction of seats each party wins in conjunction with the aggregate vote each party uses to win those seats.” Warrington, Gregory, *Quantifying Gerrymandering Using the Vote Distribution*, Elec. L. J. Vol. 17, No. 1

(2018). “For example, if the Democratic Party’s average vote share in districts it won is significantly higher than the Republican Party’s average vote share in the districts it won, the Democratic Party’s districts are considered to be packed.” *Adams v. DeWine*, --- N.E.2d ---, Nos. 2021-1449 & 2021-1449, 2022 WL 129092, at *14 (Ohio Jan. 14, 2022).

The declination measure is calculated by plotting a plan’s districts in order from lowest to highest vote share. Nicholas O. Stephanopoulos & Eric M. McGhee, *Measure of a Metric*, *supra*, at 1555. Thereafter, two lines are drawn, one between the median Democrat-won district and the 50% axis, and the other between the median Republican-won district and the 50% axis. *Id.* The angle between the two lines is the declination. *Id.* In North Carolina, under the 2016-2018 congressional plan, the Democratic mean vote share in districts they won was 12 percent higher than the Republican mean vote share in districts they won. 2016-2018 North Carolina Redistricting Plan, *PlanScore*, https://planscore.campaignlegal.org/north_carolina/#!2016-plan-house-d2 (last visited Feb. 18, 2021). This asymmetry is indicative of partisan gerrymandering.

* * *

The North Carolina Supreme Court made clear that no one metric is the “gold standard” for assessing partisan gerrymandering. The four metrics above should all be reviewed before approving a remedial redistricting plan. As discussed below, these metrics show that there remains good reason to carefully scrutinize the General Assembly’s plans, particularly the new North Carolina Senate and U.S. House of Representatives plans.

II. PLANS SUBMITTED BY THE PARTIES IN THIS CASE

The tables below provide the mean-median, efficiency gap, partisan symmetry, and declination metrics for the plans that the parties submitted to the Court, as calculated by

PlanScore.⁶ On each of these metrics, a lower number reflects more partisan fairness. Here, less is more.

First, there is no doubt that the General Assembly’s new plans are not as extreme on measures of partisan gerrymandering as those the Supreme Court struck down. But as explained above, that does not mean that the Court should rubber stamp the General Assembly’s work. The plans continue to show significant partisan bias that should draw careful scrutiny from the Court.

Indeed, the most striking feature of the data is that the two plans enacted on party-line votes—the North Carolina Senate and U.S. House of Representatives plans—continue to show significant partisan bias in favor of the Republican Party. Notably, despite the Supreme Court’s suggestion that a one-percent mean-median difference would be the upper limit for a plan to be considered “presumptively constitutional,” both plans exceed the one-percent threshold. *See Harper*, 2022 WL 496215, at *39. Specifically, the mean-median difference for the Senate plan is 2.2 (that is, twice the suggested threshold), and the Congressional plan is 1.1.⁷ These metrics suggest that the Court should demand persuasive reasons for the General Assembly’s choices. The Congressional plan’s efficiency gap of 6.4 percent also suggests a need for careful scrutiny of the General Assembly’s choices. While that figure, viewed in isolation, is just shy of the 7 percent

⁶ PlanScore allows users to upload Shapefile or other data at <https://planscore.campaignlegal.org/upload.html>. If it were inclined, the Court could test any other potential remedial plans by uploading them on PlanScore, as well.

⁷ As discussed, this brief uses PlanScore’s analysis to generate metrics. The NCLCV Plaintiffs’ experts estimate different levels of partisan skew than presented in this brief using a somewhat different methodology than PlanScore’s modeling methodology. As explained, there is not a necessarily a gold standard metric. The key point is that like the NCLCV Plaintiffs’ experts, PlanScore’s metrics show that State Senate and U.S. House of Representatives maps both show significant partisan bias that merits scrutiny. Detailed information on the PlanScore methodology is available at <https://planscore.campaignlegal.org/models/data/2021D/>.

threshold suggested by the Supreme Court, viewing it together with the above-threshold mean-median difference confirms a pattern of partisan bias in the Congressional plan.⁸

The Supreme Court’s opinion makes clear that the Constitution demands that “every vote must count equally.” *Harper*, 2022 WL 496215, at *1. This case will not only decide whether that promise is honored in the immediately upcoming elections; it will also set the standards for future maps and future challenges. Thus, despite the improvement over the extreme partisan gerrymanders that the Supreme Court struck down, the Court should carefully scrutinize the North Carolina Senate and U.S. House plans that the General Assembly has put forward and demand compelling explanations for the continued significant partisan bias.

State House Plans			
Partisan Metric	North Carolina State House Revised Plan HB980	Harper Plaintiffs⁹	NCLCV Plaintiffs
Mean-Median Difference Analysis	1.4% R	N/A	0.9% R
Efficiency Gap Analysis	3.0% R	N/A	1.6% R
Partisan Symmetry Analysis	2.9% R	N/A	2.2% R
Declination	0.16 R	N/A	0.1 R

⁸ Notably, the partisan bias of the new Congressional plan is greater than the 5.4 percent bias of the New York Congressional plan that has been criticized by Republicans and non-partisan redistricting experts as a “master class in how to draw an effective gerrymander.” Nicholas Fandos et al., “A ‘Master Class’ in Gerrymandering, This Time Led by N.Y. Democrats,” N.Y. TIMES, <https://nyti.ms/3LOP04I> (Feb. 2, 2022); PlanScore, N.Y. 2022 Proposed Congressional Plan, <https://bit.ly/3BA10Cs> (last accessed Feb. 21, 2022). New York Republicans have challenged that plan as an unconstitutional partisan gerrymander. *See Harkenrider v. Hochul*, No. E2022-0116CV (N.Y. Sup. Ct. Steuben Cty.).

⁹ The Harper Plaintiffs did not submit a proposed remedial plan for the North Carolina state house.

State Senate Plans			
Partisan Metric	North Carolina State Senate Revised Plan S744	Harper Plaintiffs	NCLCV Plaintiffs
Mean-Median Difference Analysis	2.2% R	0.8% R	0.9% R
Efficiency Gap Analysis	4.8% R	2.2% R	1.6% R
Partisan Symmetry Analysis	4.8% R	1.9% R	2.0% R
Declination	0.2 R	0.08 R	0.08 R

Congressional Plans			
Partisan Metric	SL 2022-3 Congress	Harper Plaintiffs	NCLCV Plaintiffs
Mean-Median Difference Analysis	1.1% R	0.5% R	0.2% R
Efficiency Gap Analysis	6.4% R	2.2% R	0.4% R
Partisan Symmetry Analysis	4.9% R	1.7% R	1.0% R
Declination	0.14 R	0.05 R	0.02 R

III. COMPETITIVE DISTRICTS, WHILE DESIRABLE FOR MANY REASONS, MAY NONETHELESS BE THE TOOLS OF A PARTISAN GERRYMANDER.

Absent other considerations, competitive districts are a good thing. They enhance engagement by parties, politicians, and voters and often lead to less extreme political and policy outcomes. But competition within districts must be balanced against other democratic principles that have been recognized as political rights by this and other courts. At bottom, the right that the Supreme Court has recognized is the *voters'* right to “substantially equal voting power.” *See Harper*, 2022 WL 496215, at *40. Just as packing voters into uncompetitive districts can serve partisan ends, cracking them into unnaturally competitive districts can have the same effect. In a fair map, competitive areas should have competitive districts, but deep-red and deep-blue areas should be able to elect candidates that align with their preferences, as well. Thus, swing districts make sense in mixed areas of the state (such as the Sandhills or the Wake County suburbs), but not in deep-red areas (such as Randolph County) or deep-blue areas (such as Durham County).¹⁰

¹⁰ Of course, a map of the 50 state senate seats will balance competitiveness differently than the 13 congressional districts.

Competitive districts produce numerous benefits that drive an effective democracy. Most apparent, competitive districts increase attention by candidates and elected officials to the needs of voters in the specific district. In turn, this will encourage voter turnout and increase the government's responsiveness to the electorate. *See Rucho*, 318 F.Supp.3d at 833 (noting additional “non-dilutionary injuries” of partisan gerrymandering, including “difficulty recruiting candidates due to the perceived lack of competitiveness of elections, difficulty raising money, and difficulty encouraging people to vote on account of widespread belief that electoral outcomes are foregone conclusions.”).

However, competition should be viewed across the totality of a districting plan, not only on a district-by-district basis. In a politically balanced state such as North Carolina, achieving partisan fairness likely requires districting plans that are competitive in the aggregate (i.e. that include enough competitive districts to ensure that clear majorities of votes will translate into majorities of seats). It does not follow, however, that the internal competitiveness of each and every district should be privileged over other redistricting criteria, or that the overall number of competitive districts should be the quintessential element for selecting remedial maps. An effective remedial map should seek to balance the benefits of competition *within* districts with the Court's concern for partisan fairness *across* the plan, producing a distribution of districts that reflects the distribution of partisan preferences across the state.

CONCLUSION

The North Carolina Supreme Court provided recommendations for this Court to adopt when analyzing the submission of remedial maps. The recommended partisan gerrymandering metrics should be applied in conjunction to promote the overall goal of promoting partisan fairness across districts. The concern for partisan fairness implies a concern for the competitiveness of the

plan in its totality, but such a concern may be achieved through a mix of competitive and more partisan individual districts. A remedial redistricting plan that balances these competing principles will best fulfill the constitutional rights of North Carolina voters as articulated by the Court.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion for Leave to File Amicus Curiae Brief of Professor Asher D. Hildebrand in Support of Plaintiffs and Amicus Curiae Brief of Professor Asher D. Hildebrand* were served upon each of the parties to this action by electronic mail at the e-mail addresses indicated below:

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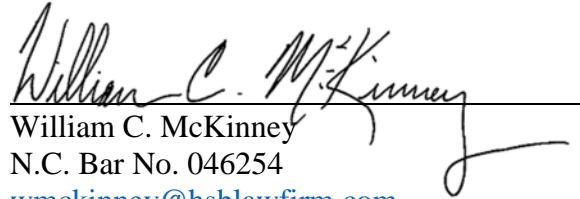
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This the 21st day of February, 2022.

HAYNSWORTH SINKLER BOYD, P.A.

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