No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC. et al. COMMON CAUSE, v. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.	)	From Wake County
REBECCA HARPER, et al. v. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.	)	

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MOTION OF COMMON CAUSE TO DISMISS FRIVOLOUS PETITION

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rule 34 of the North Carolina Rules of Appellate Procedure, Common Cause, by and through their undersigned counsel, respectfully moves this Court to dismiss Legislative Defendants' Petition for Rehearing.

Legislative Defendants are seeking reversal of two decisions they disagree with, *Harper I*[1] and *Harper II,*[2] based on one factor alone: their perception that a change in composition of this Court might allow for a different result. By Legislative Defendant Moore's own admission, rehearing is needed because "[t]he people of North Carolina sent a message election day" rejecting the decisions of the "outgoing majority."[3] But the interpretation of our state's constitution does not and should not oscillate with the changing composition of the Court. The Petition is therefore motivated by improper purpose and grossly lacking in the requirements of propriety.

The Petition also lacks any foundation in fact or law. The request to essentially rehear the February 2022 decision *Harper I*—couched as a request to "overrule" the decision—is plainly untimely and procedurally improper. Legislative Defendants have also failed to identify any point of fact or law overlooked or misapprehended by this Court in its prior decisions. This is evidenced on the face of the Petition, in which

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1 *Harper v. Hall*, 380 N.C. 317, 868 S.E.2d 499 (2022), *cert. granted*, *Moore v. Harper*, 142 S. Ct. 2901 (2022)

2 *Harper v. Hall*, ___ N.C. ___, ___ S.E.2d ___, 2022 N.C. LEXIS 1100 (Dec. 16, 2022).

3 Speaker Tim Moore, New Court Filings in NC Voter ID, Redistricting Lawsuits (Jan. 20, 2023), http://speakermoore.com/new-court-filings-nc-voter-id-redistricting-lawsuits/.

Legislative Defendants fail to cite any fact from the underlying record that was not duly considered by this Court already. Likewise, the 23 citations to the dissenting opinions only substantiate that the points of law on which Legislative Defendants' rest their petition were fully briefed, considered, and decided by this Court in December.

A difference of opinion on matters fully considered is no ground for rehearing where, as here, all facts and legal arguments are accounted for. *Compare, e.g., Ivey v. Rollins*, 251 N.C. 345, 111 S.E.2d 194 (1959) (dismissing petition where the issue raised was "argued by counsel for the appellant and fully considered by the Court on the former hearing"), *and Montgomery v. Blades*, 223 N.C. 331, 26 S.E.2d 567 (1943) (dismissing petition because "the grounds of error assigned in the petition are substantially the same as those argued and passed upon on the former hearing, and no new facts were made to appear, no new authorities were cited and no new positions were assumed"), *with Branch Banking & Tr. Co. v. Gill*, 286 N.C. 342, 211 S.E.2d 327 (1975), *on reconsideration*, 293 N.C. 164, 180, 237 S.E.2d 21, 37 (1977) (granting rehearing and reversing where "[i]n the trial below, and in all their briefs submitted to this Court, the parties, overlook[ed]" a statute that the Court "did not consider this section in our first opinion"). The Petition is therefore frivolous as well.

At base, Legislative Defendants have petitioned this Court for rehearing to achieve a singular objective: to remove any limitation on their ability to enact extreme partisan gerrymanders that discriminate and retaliate against North Carolina voters based on partisan affiliation. Legislative Defendants have argued that they alone are

vested with the power to redistrict without constitutional limitations on partisan gerrymandering because they are "more accountable to the people through elections every two years."[4] And yet they pursue every avenue possible, even a frivolous one such as this Petition, to divorce themselves entirely from this accountability and entrench themselves in power.

The bipartisan three-judge panel below unanimously found that the 2021 Enacted Plans were "extreme outliers" intentionally designed to be "highly non-responsive to the changing opinion of the electorate," (R pp 3564–65), in a manner that would "resiliently safeguard electoral advantage for Republicans" and ensure Republican majorities even "when voters clearly prefer the other party." (R pp 3577, 3579–80) In other words, instead of convincing North Carolina's electorate to vote for their party in numbers sufficient to maintain the majority or supermajority they desire, Legislative Defendants want free rein to draw anyone that might disagree with them out of the process entirely. It begs the question of what other avenues will be pursued by an electorate that cannot achieve changes in policy or redress of grievances through the ballot box. In a government where "[a]ll political power is vested in and derived from the people" and "founded upon their will only," N.C. Const. art. I § 2, Legislative Defendants strive to substitute their own will as supreme. Elections held under these conditions are anything but free, and this Court rightly held as much in *Harper I* and *Harper II*.

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[4] Legislative Defendants'-Appellees' Br. (Jan. 28, 2022), at 43.

Rule 34 of the North Carolina Rules of Appellate Procedure outlines the appropriate remedy where, as here, an appeal is frivolous, taken for an improper purpose, and grossly lacking the requirement of propriety: the Petition should be dismissed.

PROCEDURAL HISTORY

This matter was filed in November 2021 following the North Carolina General Assembly's enactment of new state legislative and Congressional maps. Following a four-day bench trial in January 2022, the three-judge panel determined the 2021 Enacted Plans "resiliently safeguard electoral advantage for Republican[s]" and ensure that Republicans retain majorities in North Carolina's congressional delegation and the General Assembly even "when voters clearly prefer the other party." (R pp 3577, 3579–80) Nonetheless, the panel entered judgment for Defendants, holding that partisan gerrymandering claims are not justiciable under the North Carolina Constitution. (R pp 3753, 3769)

All Plaintiffs appealed, and this Court reversed by holding that the 2021 Enacted Plans were unconstitutional partisan gerrymanders in violation of the North Carolina Constitution's Free Elections Clause, Equal Protection Clause, and Free Speech and Assembly Clauses. *Harper I.* Consistent with its duty under North Carolina law, and in accordance with N.C. Gen. Stat. §§ 120-2.3 and 120-2.4, this Court's Order and Opinion identified the defects in the 2021 Enacted Plans and directed the three-judge panel to conduct remedial proceedings. *Harper I,* ¶¶ 27–72, 178–216. The mandate for this decision issued 24 February 2022.

On 17 February 2022, the General Assembly enacted new congressional, House, and Senate plans. (R pp 4185, 4868) The parties submitted comments to the three-judge panel, along with expert reports, addressing whether the proposed remedial plans complied with the standard set forth by this Court in its liability-phase ruling. (R pp 4618–54, 4678–857)

On 23 February 2022, the panel issued its remedial order, accompanied by the report and recommendation of three Special Masters appointed by the Court to assist in evaluating the remedial submissions. The remedial order approved the Remedial House and Senate Plans but found that the Remedial Congressional Plan did not comply with the standard this Court had set. (App. 59–60, FOF 34–35; App. 69–70, COL 3–8)[5] For the 2022 election, the Court ordered a congressional plan that was modified from the General Assembly's Remedial Congressional Plan "to bring it into compliance with the Supreme Court's order." (R p 4887) All parties appealed, and on 16 December 2022 this Court issued an Opinion on the Remedial Order upholding the trial court's approval of the Remedial House Plan and order of the modified Remedial Congressional Plan for the 2022 election but reversing the trial court's approval of the Remedial Senate Plan. *Harper II*. The Court ordered further remedial proceedings to bring the Remedial Senate Plan into constitutional compliance. *Id.* The mandate for this Opinion issued on 5 January 2023, and Petitioners filed their Petition for Rehearing on 20 January 2023.

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[5] Citations to "App." refer to the Appendix of materials filed with the Joint Brief of Plaintiffs-Appellees on 6 September 2022.

LEGAL STANDARD

Rule 31(a) of the North Carolina Rules of Appellate Procedure requires that any petition for rehearing be filed "within fifteen days after the mandate of the court has been issued," and "shall state with particularity the points of fact or law that, in the opinion of the petitioner, the court has overlooked or misapprehended[.]" "Courts may not extend the time for . . . filing . . . a petition for rehearing." N.C. R. App. P. 27(c).

Rule 34 of the North Carolina Rules of Appellate Procedure provides that:

> (a) "A court of the appellate division may, on its own initiative of motion of a party, impose a sanction against a party or attorney or both when the court determines that an appeal or any proceeding in an appeal was frivolous because of one or more of the following:
>
> > (1) the appeal was not well-grounded in fact and was not warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
> >
> > (2) the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> >
> > (3) a petition, motion, brief, record, or other item filed in the appeal was grossly lacking in the requirements of propriety, grossly violated appellate court rules, or grossly disregarded the requirements of a fair presentation of the issues to the appellate court.

As remedy for a Rule 34 violation, a court may impose sanctions that include "dismissal of the appeal," "monetary damages including . . . reasonable expenses, including reasonable attorney fees, incurred because of the frivolous appeal or proceeding," as well as "any other sanction deemed just and proper." N.C. R. App. P. 34(b).

ARGUMENT

I. Legislative Defendants' Request for This Court to Rehear *Harper I* Violates Rule 31's Plain Language.

Legislative Defendants' request that this Court rehear the February 2022 decision in *Harper I*—couched as a request to "overrule" the decision—is plainly untimely and procedurally improper. Rule 31 requires any petition for rehearing to be filed "within fifteen days after the mandate of the court has been issued." N.C. R. App. P. 31(a). Courts may not extend the time for filing a petition for rehearing, N.C. R. App. P. 27(c), and Petitioners have failed to request a suspension of that rule much less show it would be warranted here. The mandate for *Harper I* was issued 24 February 2022, and Petitioners failed to file a petition within 15 days as required. The Petition's 315-day delay in seeking rehearing of *Harper I* is thus grossly in violation of applicable appellate court rules and should be dismissed on these grounds. *See* N.C. R. App. P. 34(a)(3).

II. The Petition is Neither Well-Grounded in Fact nor Warranted by Existing Law.

The Petition is neither well-grounded in fact nor warranted by existing law because it fails to state with particularity any points of fact or law that the Court has overlooked or misapprehended in its prior opinions. To the contrary, every point of fact and law forming the basis of the Petition was considered by this Court in its February 2022 and December 2022 Opinions.

The Court need look no further than the Petition to see this. As to points of fact, the petition cites only to those findings contained within this court's prior Opinions. *See, e.g.,* Petition at 8 (citing 17 paragraphs from findings of fact in *Harper*

I). At no point in the Petition do Legislative Defendants identify some fact from the underlying trial record that the Court failed to account for. Moreover, where Legislative Defendants do make vague allusions to the "trial record" (contending it contains "no contrary direct evidence of partisan intent," Petition at 2) they seem to have suffered an amnesia of what was adduced at trial. Mountains of evidence came to light that Legislative Defendants' used undisclosed and destroyed "concept maps" during the drafting process,[6] and worked with a team of partisan assistants who they admit were free to use partisan data while advising them during the map-drawing process to execute map-drawing strategies that ensured extreme partisan skew.[7] None of this testimony was discredited by the trial court, and one can only assume it was not directly cited as evidence of intentional, pro-Republican discrimination because the expert testimony regarding the maps themselves was already determinative of this finding.[8]

Likewise, every point of law raised in the Petition was fully briefed and considered by this Court. This is apparent by the 23 citations to the dissenting

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6 *See* T3 pp 780:13-781:15, 783:22–785:17 (Hall).

7 *See, e.g.,* T2 p 344:19–352:21) (Daye); Doc. Ex. 6098–6109 (PX1460 Map Drawing Sequences).

8 *See, e.g.,* R pp 3574–75, 3577 (Judgment, Findings of Fact in which the panel found the 2021 Enacted Plans were among the most "extreme" gerrymanders possible and were more "carefully crafted for Republican advantage" than 99.9999% of possible congressional maps, 99.9% of possible Senate maps, and 99.9999% of possible House maps).

opinions of the Court within the Petition itself, as well as the extensive briefing and hundreds of pages of Opinion in this matter, as indicated in the table below:

Point of Law	*Petitioners' prior briefing*	*Opinion*
Justiciability of partisan gerrymandering claims based upon a manageable standard	28 Jan. Appellees' Br. § I.A.2[9]	*Harper I,* ¶¶ 163–69 *Harper II*, § II.B
Justiciability of partisan gerrymandering claims based on political question doctrine	28 Jan. Appellees' Br. § I.A[10]	*Harper I,* §§ II.B, II.C
Level of deference to the General Assembly's partisan-fairness calculations	1 Aug. Appellants' Br. § I.C[11]	*Harper I,* ¶ 7, § II.C *Harper II*, ¶ 102
The constitutionality of using partisan considerations in redistricting at all	28 Jan. Appellees' Br. § I.A.1.[12]	*Harper I,* ¶¶ 114–16.
U.S. Constitution's Elections Clause	28 Jan. Appellees' Br. § V.[13]	*Harper I,* ¶¶ 175–77

It is well established that rehearing is plainly without any grounds in fact or law where, as here, all matters raised in the Petition were already considered by the Court in its prior Opinion. *See Ivey v. Rollins*, 251 N.C. 345, 346, 111 S.E.2d 194, 195 (1959) (dismissing petition where the issue raised was "argued by counsel for the appellant and fully considered by the Court on the former hearing")*; Montgomery v.*

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9 "There Are No Judicially Manageable Standards, Rooted in the Constitution, To Govern Plaintiffs-Appellants' Claims."

10 "The Political Claims Present Non-Justiciable Political Questions."

11 "The superior court erred in failing to defer to the General Assembly's methods for achieving this Court's partisan metric standards."

12 "[T]he Court [in *Stephenson I*] acknowledged that partisan redistricting is permissible so long as these textually demonstrable rules are satisfied."

13 "The Federal Constitution Bars Plaintiffs'-Appellants' Claims Against the Congressional Plan."

Blades, 223 N.C. 331, 331, 26 S.E.2d 567, 567 (1943) (dismissing petition because "the grounds of error assigned in the petition are substantially the same as those argued and passed upon on the former hearing, and no new facts were made to appear, no new authorities were cited and no new positions were assumed"); *State ex rel Transp. Advisory Comm'r v. Canady,* 203 N.C. 195, 165 S.E. 927 (1932) (denying petition for rehearing); *Weston v. John L. Roper Lumber Co.*, 168 N.C. 98, 98, 83 S.E. 693, 693 (1914) (dismissing petition for rehearing where "[t]he grounds of error assigned in the petition are substantially the same as those argued and passed upon in the former hearing."); *Weathers v. Borders,* 124 N. C. 610, 611, 32 S.E. 881, 881 (1899) ("This Court has repeatedly held that no case should be reheard upon a petition to rehear unless it was decided hastily and some material point had been overlooked or some direct authority was not called to the attention of the Court.") (internal citations omitted).[14]

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[14] The cases relied upon by Defendants to contend otherwise (*see* Petition at 4) are easily distinguished. In *Bailey v. Meadows Co.,* the Court granted rehearing where the Court's "attention has been called" to evidence "more specifically pointed out" and not properly considered by the lower court. 154 N.C. 71, 71, 69 S.E. 746, 747 (1910). In *Clary v. Alexander County Board of Education,* the Court reheard the matter based on a technical error by the trial court; the Court found the issue should have gone to a jury instead of a directed verdict at the lower court. 286 N.C. 525, 533, 212 S.E.2d 160, 165 (1975). In *Branch Banking and Trust, Co. v. Gill*, the Court granted rehearing because "[i]n the trial below, and in all their briefs submitted to this Court, the parties, overlook[ed]" an operative statute that the court "did not consider" in its opinion. 293 N.C. 164, 180, 237 S.E.2d 21, 36–37 (1977). In *Alford v. Shaw*, the first opinion of the Court had failed to account for jurisprudence and statutory language relevant to the operation of the business judgment rule in North Carolina that the Court found determinative upon rehearing. 320 N.C. 465, 468–74, 358 S.E.2d 323, 325–28 (1987). Petitioners here have failed to identify any overlooked facts or jurisprudence the Court has failed to consider.

What Petitioners also further fail to appreciate is that *Harper I* and *Harper II* are not the final words this Court will have, or was intended to have, regarding the standard for unconstitutional partisan gerrymandering. The analogous federal one-person, one-vote jurisprudence took years and several cases to develop, a fact this Court specifically forecasted. *See Harper I* at ¶ 163 (citing *Reynolds v. Sims*, 377 U.S. 533, 578 (1964)). In other words, Legislative Defendants have plainly sought rehearing when the appropriate, and anticipated, avenue would be the development of future case law under new facts, should that be necessary.

Motions for rehearing are strictly limited to calling an appellate court's attention to something the court has overlooked or misapprehended. They are not a vehicle for counsel to reargue its case or continue its attempts at advocacy. Because petitioners have failed to identify any points of fact or law that the court overlooked or misapprehended, the Petition should be dismissed. *C.f. Bowen v. N.C. HHS*, 135 N.C. App. 122, 124, 519 S.E.2d 60, 61 (1999) (dismissing appeal pursuant to Rule 34(b)(1) for failure to properly state assignment of error).

III. The Petition Was Taken for an Improper Purpose.

Under Rule 34, dismissal is also warranted for frivolous appeals "taken or continued for an improper purpose." N.C. R. App. P. 34(a)(2).

Given the clear baselessness of the Petition, it is no surprise that Legislative Defendants are motivated by something other than a genuine desire for this Court to correct prior misapprehensions of law or fact. For that motivation, this Court need look no further than the public statement of Legislative Defendant Moore announcing the Petition for rehearing in this and another matter: "The people of North Carolina

sent a message on election day. They clearly rejected the judicial activism of the outgoing majority."[15] This statement betrays the stated grounds for the Petition, revealing Legislative Defendants' true desire—that a change in the composition of this Court could translate into a change in the law. In other words, the true motivation behind this Petition is not based in law, but in politics.

This cynical ploy should not be entertained. As several of the members of this Court have recently noted, such "partisan biases . . . have no place in a judiciary dedicated to the impartial administration of justice and the rule of law." Order Granting Motion to Expedite and Setting Oral Argument (July 28, 2022) (Barringer, J., dissenting); *see also Holmes v. Moore*, No. 342PA19-2, 2022 N.C. LEXIS 1098, at *25 n.3 (Dec. 16, 2022) (Newby, C.J., dissenting) (internal quotations omitted) (agreeing with Justice Earls that the final outcome of this case should not be "wholly dependent on what year a party brings its case or when the majority decided to hear this matter") (internal citation omitted). The Court should not capitulate to Legislative Defendants' transparent attempt to forum shop.

Legislative Defendants' improper purpose is also substantiated by their request that the Court overturn (and essentially rehear) the *Harper I* decision. Not only is this request untimely as explained above, but it also amounts to a "collateral attack" on a prior decision that independently warrants sanctions pursuant to Rule 34. *See ACC Constr. v. SunTrust Mortg., Inc.*, 239 N.C. App. 252, 271, 769 S.E.2d 200,

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[15] Speaker Tim Moore, New Court Filings in NC Voter ID, Redistricting Lawsuits (Jan. 20, 2023), http://speakermoore.com/new-court-filings-nc-voter-id-redistricting-lawsuits/.

213 (2015) ("[Given] . . . the fact that ACC's current lawsuit basically amounts to a collateral attack on the summary judgment order that resolved *ACC I*, we conclude that the trial court did not err in imposing sanctions based on its conclusion that ACC brought this action for an improper purpose.").

Likewise, the request for relief set forth in Section III of the Petition is unhinged. Defendants ask the Court to undo every legislative and court action from November 2021 onward, and thereby wipe clean 13 months of legislative and judicial record. They provide zero basis in law for such a sweeping request—no petition for rehearing was even filed in the only case cited by Defendants as a basis for relief. *See* Petition at 21 (citing *Nowell v. Neal*, 249 N.C. 516, 521, 107 S.E. 2d 107, 111 (1959)). Legislative Defendants tacitly acknowledge that their requested relief is plainly prohibited by the restrictions on mid-decade redistricting set forth in Article II, Sections 3(4) and 5(4) of North Carolina's Constitution. *See* Petition at 22. The baselessness and plain unconstitutionality of their requests only supports that their Petition was filed for improper purpose and without any grounding in fact or law and must be dismissed pursuant to Rule 34.

CONCLUSION

Legislative Defendants' disregard for the requirements of Rule 31 in any petition for rehearing cannot go unchecked. As Chief Justice Clark stated over a century ago when addressing the increasing number of appeals at that time, it is "necessary to have rules of procedure and to adhere to them, and if we relax them in favor of one, we might as well abolish them." *Bradshaw v. Stansberry*, 164 N.C. 356,

356, 79 S.E. 302, 302 (1913). The sanctions available under Rule 34 provide a mechanism for enforcing adherence to the Rules of Appellate Procedure. Here, dismissal is warranted for Legislative Defendants' failure to adhere to the substantive and timing requirements of Rule 31, as well as for their transparently improper purpose in filing the Petition.

Such a dismissal would not end Legislative Defendants' recourse in achieving their ultimate objectives. If they truly believe partisan gerrymandering should be permitted in North Carolina, they have a clear avenue for making it so: a constitutional amendment. It stands to reason they do not see this is a viable option after the overwhelming public sentiment during the 2021 redistricting process, expressed by voters across the political spectrum, was a call for an end to gerrymandering in North Carolina. But the unlikelihood of a political means to Legislative Defendants' ends is of no concern to this Court. Their unprecedented request that this Court essentially rehear two prior decisions based solely upon the change in composition of this Court is, however. As this petition lacks foundation in fact or law, and was taken for improper purpose, it should be duly dismissed.

Respectfully submitted, this the 30th day of January, 2023.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed to the electronic-filing site at https://www.ncappellatecourts.org and served upon all parties by electronic mail and, if requested, by United States Mail, addressed to the following:

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This the 30th day of January, 2023.

By: /s/ Hilary H. Klein
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