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Supreme Court of North Carolina: 2023 Review and 2024 Preview

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The North Carolina Supreme Court had an eventful 2023. Its recent decisions reflect changes in the court's view of its own role, its relationship with the other branches of government, and its view of the state's constitution. Most prominently, the court reversed course in two of its high-profile 2022 cases: *Harper v. Hall* and *Holmes v. Moore*, addressing elections and voting rights.[1] Whereas the 2022 court stressed its duty to reject unconstitutional legislative incursions into democracy, the 2023 court was more deferential to the legislature. And there is more change ahead.

These shifts in jurisprudence correspond to shifts in the makeup of the court. North Carolina justices run in partisan elections, and the court began 2023 by seating two new justices—Justices Richard Dietz and Trey Allen—who flipped the partisan makeup of the court from a 4-3 Democratic majority to a 5-2 Republican majority.[2] The impact this flip has already had on North Carolina precedent demonstrates the significance of state judicial elections. The court's new balance of power is now expected to last for at least the next four years. An election this year, in which Justice Allison Riggs seeks to retain her seat after her appointment to replace retired Justice Michael R. Morgan, will determine whether the court could shift back to Democratic control in 2028.[3]

This Report recaps the North Carolina Supreme Court's major 2023 democracy decisions and previews significant cases that the court is likely to hear in 2024.

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[1] Emily Lau, *Supreme Court of North Carolina: 2022 Review and 2023 Preview*, State Democracy Research Initiative (Jan. 20, 2023), https://statedemocracy.law.wisc.edu/featured/2023/supreme-court-of-north-carolina-2022-review-and-2023-preview/.

[2] Dallas Woodhouse, *New state Supreme Court justices take oaths, flip control to Republicans*, The Carolina Journal (Jan. 1, 2023), https://www.carolinajournal.com/opinion/new-state-supreme-court-justices-take-oaths-flip-control-to-republicans/.

[3] Three justices—Chief Justice Paul Newby, who will retire at the end of May 2028 at the latest, and Justices Phil Berger Jr. and Tamara Barringer—have terms expiring in 2028. If a Democrat wins the 2024 election—Justice Allison Riggs is being challenge in the Democratic primary by Judge Lora Cubbage—Democrats would still need to win all three contested seats to take back the majority on the court.

The Court Showed Increased Deference to the Legislature in 2023

The court decided several cases related to democracy in 2023. A theme uniting the new majority's approach in these cases is its disinclination to strike down legislation. Whereas the 2022 majority asserted that the court is obligated to rein in other branches of government that breach their constitutional duties, the 2023 majority instead deferred to the legislature. As the court recently explained: "[U]sing a deferential standard to review legislation ensures that courts will perform their assigned role, stay within their lane of authority, and refrain from becoming policymakers."[4]

Harper v. Hall

The North Carolina Supreme Court's 2022 decisions in *Harper v. Hall* received national attention. The court heard *Harper v. Hall* twice in 2022 and, in one of its last opinions of that term, reiterated that partisan gerrymandering violated the North Carolina Constitution's Free Elections Clause.[5] This case also gave rise to *Moore v. Harper*, the widely watched U.S. Supreme Court case that rejected the strong form of the "independent state legislature theory," which would have precluded courts like North Carolina's from using their state constitutions to strike down congressional maps.[6]

In early 2023, the legislative defendants in *Harper v. Hall* filed a rehearing petition with the reconstituted North Carolina Supreme Court.[7] The court's new Republican majority granted rehearing "to address alleged errors of law"[8]; Justices Anita Earls and Morgan dissented, arguing that the 2022 ruling should "not be disturbed merely because of a change in the Court's composition."[9] Despite the potential complications arising from simultaneous state proceedings in *Harper v. Hall* and U.S. Supreme Court proceedings in *Moore v. Harper*, the North Carolina Supreme Court pressed ahead and issued a decision in April 2023, reversing its 2022 *Harper II* decision and holding that partisan gerrymandering is neither justiciable nor unconstitutional.[10]

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[4] Harper v. Hall, 886 S.E.2d 393, 399 (N.C. 2023) ("*Harper III*").
[5] Harper v. Hall, 881 S.E.2d 156 (N.C. 2022) ("*Harper II*").
[6] If the United State Supreme Court had adopted the independent state legislature theory, its ruling in *Moore v. Harper* could have precluded state courts from overturning congressional maps, the outcome in the *Harper I* and *Harper II* decisions. However, there would have been no effect on the rulings pertaining to state legislative maps. SCOTUS ultimately declined to adopt the independent state legislature theory. Moore v. Harper, 600 U.S. 1 (2023).
[7] Legislative Defendants' Petition for Rehearing, Harper v. Hall, No. 413PA21 at 20 n.2 (N.C. Jan. 20, 2023).
[8] Order, Harper v. Hall, 882 S.E.2d 548, 549 (N.C. 2023).
[9] *Id*. at 550 (Earls, J., dissenting).
[10] *Harper III*, 886 S.E.2d at 401.

Written by Justice Paul Newby, the court's new opinion tracked the earlier *Harper* dissents.[11] As the majority put it, "At its heart, this case is about recognizing the proper limits of judicial power."[12] Overturning the previous *Harper* decisions, the court held that the question of partisan gerrymandering is "beyond the reach of our courts."[13] Invoking the U.S. Supreme Court's decision in *Rucho v. Common Cause*, which found partisan gerrymandering claims nonjusticiable under the U.S. Constitution, the court reasoned that partisan gerrymandering is likewise a nonjusticiable, political question under the North Carolina Constitution.[14]

Arguably in some tension with its conclusion that partisan gerrymandering claims are nonjusticiable, the majority opinion then proceeded to hold that the North Carolina Constitution does not prohibit partisan gerrymandering. According to the majority, the state constitutional clauses relied upon by the plaintiffs—the North Carolina Constitution's Free Elections, Equal Protection, Free Speech and Freedom of Assembly Clauses—only set out "basic principles," not operative anti-gerrymandering commands.[15]

Justice Earls, joined by Justice Morgan, sharply dissented, asserting that the majority opinion "strips the people of" their "fundamental right to vote on equal terms."[16] The majority, she stated, "tells North Carolinians that the state constitution and the courts cannot protect their basic human right to self-governance and self-determination," "ignores the uncontested truths about the intentions behind partisan gerrymandering," and "erects an unconvincing façade that only parrots democratic values in an attempt to defend its decision."[17] Moreover, Justice Earls wrote, the majority opinion could serve as an invitation to gerrymander without repercussions.[18]

Following the court's ruling, legislators were given the opportunity to draw new maps—maps that are now themselves the subject of pending federal and state litigation, as discussed further below.

Holmes v. Moore

Holmes v. Moore is the latest in long-running litigation challenging voter ID laws in North Carolina.[19] In 2016, the U.S. Court of Appeals for the Fourth Circuit rejected the state's 2013 photo voter ID requirement, concluding that it (and other voting restrictions) was the result of intentional discrimination. *Holmes* involved a challenge to a 2018 voter ID law that retained the

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[11] *Harper II*, 881 S.E.2d at 181-209 (Newby, J., dissenting).
[12] *Harper III*, 886 S.E.2d at 399.
[13] *Id.* at 431.
[14] *Id.* at 431.
[15] *Id.* at 413.
[16] *Id.* at 450 (Earls, J., dissenting).
[17] *Id.*
[18] *Id.* at 452 (Earls, J., dissenting).
[19] NC NAACP v. McCrory, 831 F.3d 204 (4th Cir. 2016).

2013 law's government ID requirement[20] but added modest exceptions.[21] Near the end of 2022, the court issued its original decision in *Holmes*, invalidating the 2018 voter ID law.[22]

The 2022 majority relied in part on analysis that the 2013 law disproportionately burdened African American voters. These impacts, the court reasoned, were known to the legislature that passed the 2018 bill.[23] The court also considered the sequence of events that led to the 2018 law's passage: The outgoing gerrymandered legislature rushed to pass the new bill during a lame-duck session, over Governor Cooper's veto, before legislators elected under new maps could take office.[24] According to the court, this evidence supported a finding that the 2018 law was passed with discriminatory intent and would have a disparate impact.[25]

As in *Harper v. Hall*, however, the *Holmes* decision was issued at the end of 2022, allowing the legislative defendants to file a petition for rehearing after the two new justices took the bench.[26] On rehearing, the court reversed course and upheld the photo voter ID law, finding that there was insufficient evidence that the bill was passed with discriminatory intent or had a disparate impact.[27]

In particular, the court discredited evidence arising out of the challenge to the 2013 law. First, the court declined to give weight to the legislature's prior history of enacting voter ID laws with discriminatory intent or infer any bad faith from the legislature's lame-duck actions.[28] In the court's view, the trial court improperly considered historical evidence, and what little evidence it did properly find could not overcome the presumption of legislative good faith.[29] Second, the court held that there was insufficient evidence to find that the law would have a disparate impact. Because the 2018 law never went into effect, the trial court relied on statistical evidence and evidence of disparate impact under the 2013 law.[30] The court considered this

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[20] 2019 N.C. Sess. Laws 72 (requiring voters to present one of ten forms of acceptable photo ID); 2013 N.C. Sess. Laws 1505 (requiring voters to present one of eight forms of acceptable photo ID).
[21] 2019 N.C. Sess. Laws 72 (creating an exception for voters who sign an affidavit attesting to a reasonable impediment to acquiring an acceptable form of photo ID, allowing them to vote on provisional ballots that are to be found valid unless the county board of elections has some grounds to believe the affidavit is false).
[22] Holmes v. Moore, 881 S.E.2d 486, 510 (N.C. 2022) ("*Holmes I*").
[23] *Id.* at 495 ("Especially pertinent was evidence showing that African-American voters are approximately 39% more likely than white voters to lack forms of ID qualifying under S.B. 824.").
[24] *Id.* at 502-03.
[25] *Id.* at 510.
[26] Legislative Defendants' Petition for Rehearing, Holmes v. Moore, No. 342PA19-2 (N.C. Jan. 20, 2023).
[27] Holmes v. Moore, 886 S.E.2d 120, 142-43 (N.C. 2023) ("*Holmes II*").
[28] *Holmes II* at 136-38 (N.C. 2023).
[29] *Id.*
[30] *Id.* at 140-41.

mere "speculation" that did not meet the requirement that plaintiffs demonstrate that the law "actually produces disparate impact in reality, not hypothetical circumstances."[31]

The court's new approach shows an increased deference to the legislature's judgments and decisions, requiring greater evidence to overcome the "proper presumptions of both legislative good faith and constitutional compliance."[32] Whereas the old court found that "judicial deference [was] no longer justified" given the evidence of discrimination,[33] the new majority emphasized the "great deference" owed to the legislature and the laws it enacts as the "sacrosanct fulfillment of the people's will."[34]

Justice Morgan, joined by Justice Earls, dissented. The dissent criticized the majority's approach as an abdication of the court's "duty" to "protect the state constitutional rights of the citizens."[35] Instead, the dissent argued, "the majority . . . strives to protect the state legislature *from* the citizens."[36] In Justice Morgan's words, "Courts are not obliged to turn a blind eye to the historical circumstances that might inform present-day efforts to encumber, restrict, or otherwise discourage the exercise of the precious right to vote."[37]

Community Success Initiative v. Moore

Early in 2023, the North Carolina Supreme Court heard *Community Success Initiative v. Moore*. This case challenged a North Carolina statute that requires North Carolinians who have been convicted of a felony be "unconditionally discharged" from incarceration, probation, parole, or a suspended sentence before their voting rights are restored. [38] This case, unlike *Harper* and *Holmes*, was not a rehearing. Nonetheless, it asked the court to consider some of the same questions it considered in those two cases: What evidence is sufficient to prove discriminatory intent and disparate impact? What acts may violate the Free Elections Clause?

Plaintiffs argued that the requirement of unconditional discharge—which disenfranchises individuals who are otherwise eligible to vote but who are serving probation, parole, or a suspended sentence, or who cannot afford to pay court fees—violates the North Carolina Constitution's Equal Protection and Free Elections Clauses.[39] Evidence presented at trial showed that African Americans make up 21% of the state's voting-age population but represent over 42% of those disenfranchised because they are on felony probation, parole, or post-

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[31] *Id.* at 141.
[32] *Id.* at 143.
[33] *Holmes I*, 881 S.E.2d at 494.
[34] *Holmes II*, 886 S.E.2d at 124.
[35] *Id.* at 149 (Morgan, J., dissenting).
[36] *Id.*
[37] *Id.* at 147 (Morgan, J., dissenting).
[38] N.C. Gen. Stat. § 13-1.
[39] Complaint, Cmty. Success Initiative v. Moore, No. 19 CVS 15941 (N.C. Sup. Ct. Nov. 20, 2019).

release supervision due to a state court conviction.[40] By comparison, although 72% of the voting population is white, only 52% of the disenfranchised are white.[41] As the trial court observed, "[a]mong the 84 counties where there is sufficient data for comparison, African Americans are denied the franchise due to felony probation, parole, or post-release supervision at a higher rate than White people in every single county."[42]

The trial court ruled in favor of the plaintiffs, determining that the denial of franchise to individuals on probation, parole, or post-release supervision violates the state's Free Elections and Equal Protection Clauses.[43] The trial court determined that the law intentionally discriminated against African Americans and had "a demonstrably disproportionate and discriminatory effect."[44] Discussing the Free Elections Clause, the trial court emphasized the democratic foundations of the state's government: "As the Supreme Court of North Carolina explained 145 years ago,'[o]ur government is founded on the will of the people,' and '[t]heir will is expressed by the ballot.' A 'free' election, therefore, must reflect to the greatest extent possible the will of all people living in North Carolina communities."[45] The trial court found that the disparate disenfranchising effect of the unconditional discharge statute prevents elections from ascertaining the will of *all* people, "strik[ing] at the core of the Free Elections Clause."[46]

The North Carolina Supreme Court reversed the trial court's ruling. As in *Holmes*, the court held that the statistical evidence presented at trial was insufficient to find disproportionate impact or discriminatory intent and to overcome the presumption of legislative good faith.[47] Furthermore, the court held that felon disenfranchisement cannot violate the Free Elections Clause because, first, felon disenfranchisement is required by the North Carolina Constitution[48] and, second, "excluding felons whose rights have not been restored from the electoral process does not expose our elections to the sort of interference, intimidation, fraud, or infringements on conscience that the Free Exercise Clause exists to prevent."[49]

While the majority emphasized that the state constitution requires that those convicted of felonies be disenfranchised, the dissent highlighted that the same clause contemplates restoring the right to vote.[50] Justice Earls, writing in dissent, emphasized that the right to vote

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[40] Final Judgement and Order, Cmty. Success Initiative v. Moore, No. 19 CVS 15941 at 25 (N.C. Sup. Ct. Mar. 28, 2022).
[41] *Id.* at 25-26.
[42] *Id.* at 28.
[43] *Id.* at 64.
[44] *Id.* at 56-57.
[45] *Id.* at 8.
[46] *Id.* at 59.
[47] Cmty. Success Initiative v. Moore, 886 S.E.2d 16, 37, 43 (N.C. 2023).
[48] *Id.* at 49.
[49] *Id.*
[50] *Id.* at 50 (Earls, J., dissenting).

"recognizes the inherent humanity of every adult citizen."[51] Thus, to hold, as the majority did, that individuals convicted of felonies had no fundamental right to vote was to strip an entire class of their humanity.[52] The dissent also rebuked the majority's narrow reading of the Free Elections Clause, explaining that it "fails to recognize that elections can be manipulated in a number of ways," including by "bar[ring] a particular class of voters from exercising their right to vote because they are deemed less desirable than other members of society."[53]

As in *Harper* and *Holmes*, the court's two ideological sides disagreed on fundamental matters of evidence, deference, and the breadth of the rights afforded by the state constitution. These cases mark a new paradigm for the court's approach to cases related to the franchise.

More Big Rulings Are Expected in 2024

In 2024, the North Carolina Supreme Court will have more opportunities to revisit precedent. A series of pending cases again presents questions about the role of the court, separation of powers, constitutional rights, and democracy.

Hoke County Board of Education v. North Carolina

This month, the North Carolina Supreme Court hears argument in *Hoke County Board of Education v. North Carolina* ("*Leandro V*"),[54] the latest in a long line of education funding cases known as the *Leandro* cases. Preceded by four prior North Carolina Supreme Court decisions, this case will determine whether the remedy endorsed by the 2022 court—a transfer of funds necessary to bring the school funding levels into constitutional compliance[55]—will stand.

In 1994, five school districts—Hoke, Halifax, Robeson, Vance, and Cumberland—and families of children enrolled in those districts filed a lawsuit against the state arguing that their school districts did not have enough money to provide students with an equal education.[56] The North Carolina Supreme Court ruled that the legislature had failed to fulfill a constitutional obligation

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[51] *Id.*
[52] *Id.* at 50, 64-65 (Earls, J., dissenting).
[53] *Id.* at 69-70 (Earls, J., dissenting).
[54] Greg Childress, *North Carolina Supreme Court hearing scheduled for Leandro school funding case*, NC Newsline (Dec. 22, 2023). The numbering of the *Leandro* cases sometimes varies depending on whether the mooted 2013 challenge to the state's pre-kindergarten program is included as *Leandro III*. Hoke Cnty. Bd. of Educ. V. State,749 S.E.2d 451 (N.C. 2013) ("*Leandro III*"). This explainer includes the case for clarity; however, some of the documents cited refer to the 2022 case as *Hoke County III* or *Leandro III* rather than *Leandro IV*.
[55] Hoke Cnty. Bd. of Educ. V. State, 879 S.E.2d 193 (N.C. 2022) ("*Leandro IV*").
[56] Leandro v. State, 488 S.E.2d 249 (N.C. 1997) ("*Leandro I*").

to ensure that all children have access to a "sound basic education," first in 1997[57] and then in 2004.[58]

The 2022 court concluded that little had changed, with "far too many North Carolina schoolchildren, especially those historically marginalized," still denied their constitutional right to a sound basic education, and that "the State has proven—for an entire generation—either unable or unwilling to fulfill its constitutional duty."[59] The court's potent remedy—which it justified based on the quarter-century constitutional violation—was to direct the trial court to "order the applicable State officials to transfer [the funds necessary to implement the comprehensive remedial plan] as an appropriation under law."[60]

On remand, however, the state pushed back, and State Controller Nels Roseland obtained a reinstatement from the court of an earlier writ of prohibition[61] that barred the underlying trial court order challenged in *Leandro IV*.[62] The Controller argued that there remained unanswered constitutional questions that potentially exposed agency staff to criminal and civil liability.[63] Reinstating the writ of prohibition prevented the trial court from effectuating the North Carolina Supreme Court's directives in *Leandro IV*.

The legislature eventually filed a petition for discretionary review.[64] The legislature argues that, at a minimum, the trial court needs further guidance on how to calculate the amounts necessary to meet the comprehensive remedial plan.[65] However, the petition ultimately argues that *Leandro IV* should be overturned, characterizing it as "an unprecedented intrusion by the judiciary into [the] role of the legislative branch."[66]

The case before the North Carolina Supreme Court is not technically a rehearing of *Leandro IV*; nonetheless, in her dissents from the ruling to restore the writ of prohibition and grant of discretionary review, Justice Earls admonished the Controller and legislative-intervenors for attempting to obtain a "do over" in *Leandro IV* outside the time limits placed on petitions for

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[57] *Id.* at 255.
[58] Hoke Cnty. Bd. of Educ. V. State, 599 S.E.2d 365, 396 (N.C. 2004) ("*Leandro II*").
[59] *Leandro IV*, 879 S.E.2d at 198.
[60] *Id.* at 249. The court's decision in *Leandro IV* reinstated an earlier trial court order transferring the funds but directs the trial court to recalculate the appropriate distributions and order the transfer of these new amounts. *Id.*
[61] Order, Hoke Cnty. Bd. of Educ. v. State, 883 S.E.2d 480 (N.C. Mar. 3, 2023).
[62] Order, Hoke Cnty. Bd. of Educ. v. State, 95CVS1158 (N.C. Super. Ct. Nov. 10, 2021).
[63] Motion by the Controller of the State of North Carolina to Dissolve or Lift Stays Entered in this Matter Regarding the Writ of Prohibition Previously Entered by the Court of Appeals, Hoke Cnty. Bd. Of Educ. V. State, No. 425A21-1 (N.C. Feb. 8, 2023).
[64] Legislative Intervenors' Petition for Discretionary Review Prior to a Determination by the North Carolina Court of Appeals, Hoke Cnty. Bd. of Educ. V. State, No. 425A21-1 (N.C. Sept. 20, 2023).
[65] *Id.* at 3.
[66] *Id.*

rehearing.[67] Justice Earls criticized the majority, citing procedural irregularities and contrary statements made when the court granted rehearing in *Harper* as evidence that the majority has "elevate[d] political expedience over the even-handed application of the law."[68]

Argument in *Leandro V* is set for February 22, 2024,[69] and the court's ruling will likely resolve *Leandro* litigation for the foreseeable future. If the court now rules in the legislature's favor, its decision could take multiple paths, including potentially overturning *Leandro IV* and discarding the transfer remedy, or going even further back and overturning *Leandro I*. If the court only overturns the court's remedy in *Leandro IV*, questions may arise as to whether any other judicial remedy is available for the constitutional violation identified in *Leandro I.*

NC NAACP v. Moore

In 2022, the North Carolina Supreme Court held in *NC NAACP v. Moore* that there are limits on the powers of unconstitutionally gerrymandered legislatures.[70] These unlawfully elected legislators, the court held, can continue to exercise ordinary lawmaking authority under the de facto officer doctrine, which preserves the functioning of government.[71] But, under the court's ruling, unlawfully elected lawmakers cannot propose constitutional amendments that have the potential to uniquely "transform North Carolina's theory of government and restructure its political processes."[72] The court went on to devise a framework under which courts ascertain whether the unconstitutional gerrymander affected the decision to propose the amendment, and whether the amendment will restructure the state's political process.[73]

The court remanded the case to the trial court to apply this test and determine the validity of the two amendments at issue—a tax cap and the voter ID mandate.[74] The trial court has yet to rule on these questions. Once it does, the case could return to the North Carolina Supreme Court, potentially giving the court an opportunity to revisit *NC NAACP*.

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[67] Order, Hoke Cnty. Bd. of Educ. V. State, 883 S.E.2d 480, 482 (N.C. Mar. 3, 2023) (Earls, J., dissenting); Order, Hoke Cnty. Bd. of Educ v. State, 892 S.E.2d 594, 596 (N.C. Oct. 18, 2023) (Earls, J., dissenting).

[68] Order, Hoke Cnty. Bd. of Educ. v. State, 892 S.E.2d 594, 598 (N.C. Oct. 18, 2023) (Earls, J., dissenting).

[69] *Leandro school funding dispute returns to state Supreme Court in February*, The Carolina Journal (Dec. 19, 2023), https://www.carolinajournal.com/leandro-school-funding-dispute-returns-to-state-supreme-court-in-february/.

[70] NC NAACP v. Moore, 876 S.E.2d 513 (N.C. 2022) ("*NC NAACP*").

[71] *Id.* at 534.

[72] *Id.* at 535.

[73] *Id.* at 537-39.

[74] The case currently remains at the trial court level, where parties are disputing whether the case may be heard by a single judge or is properly before a three-judge panel.

Cooper v. Berger

The North Carolina Supreme Court may hear two separation of powers cases captioned *Cooper v. Berger* this year—a case name common in North Carolina as Governor Cooper has clashed with legislative leadership. In both cases, Governor Cooper challenges statutory changes to how members of state boards and commissions are appointed. The first lawsuit sweeps in multiple boards, commissions, and committees,[75] while the second focuses on the state Board of Elections.[76] Both cases raise a long-running question under the North Carolina Constitution: How much power must the governor have over executive agencies?[77]

This issue traces back to the state supreme court's 1982 decision in *Wallace v. Bone*, which invalidated a statute allowing legislative leaders to appoint other legislators to a body performing executive rulemaking functions, even if those appointees make up a minority of the body's membership.[78] *Wallace* was followed by *McCrory v. Berger*, which held that the legislature also cannot appoint a *majority* of the members of executive bodies even if those appointees are not themselves legislators, because that would interfere with the governor's duty to ensure that laws are faithfully executed.[79] The court reaffirmed that principle in *Cooper v. Berger* (2018), which rejected lame-duck legislation that would have limited the governor's appointment power to and control of the State Board of Elections and Ethics Enforcement, including by requiring him to select half of the Board's members from a list provided by the opposing political party. [80] According to the court, this arrangement unconstitutionally impeded the governor's ability to implement the laws based on his policy preferences.[81]

If the two new cases reach the North Carolina Supreme Court, litigants may urge the court to revisit its prior precedents on appointments along the lines suggested by the dissents and concurrences in those cases. Dissenting in the 2018 iteration of *Cooper*, now-Chief Justice

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[75] Complaint, Cooper v. Berger, 23CV028505-910 (N.C. Super. Ct. Oct. 10, 2023). The changes challenged in the first lawsuit impact the Economic Investment Committee, Environmental Management Commission, Commission for Public Health, Coastal Resources Commission, Wildlife Resources Commission, Board of Transportation, North Carolina Railroad Board of Directors, UNC Health Care Board of Directors, Utilities Commission, UNC Board of Governors, and UNC Chapel Hill and NC State University boards of trustees. *Id.* at 51. The changes made differ by body. For example, changes to the Environmental Management Commission (EMC) shifted two of the Governor's nine appointments to the elected Commissioner of Agriculture. *Id.* at 52.

[76] Complaint, Cooper v. Berger, 23CV029308-910 (N.C. Super. Ct. Oct. 17, 2023).

[77] N.C. Const. art. I, § 6.

[78] Wallace v. Bone, 286 S.E.2d 79 (N.C. 1982).

[79] McCrory v. Berger, 781 S.E.2d 248 (N.C. 2016); *see also* Cooper v. Berger, 781 S.E.2d 248 (N.C. 2016) (holding that the governor need not have exclusive authority to appoint members of administrative agencies, but the General Assembly may not appoint a majority of voting members).

[80] Cooper v. Berger, 809 S.E.2d 98, 114 (N.C. 2018).

[81] *See id*.

Newby offered one possible alternative: treating legislative decisions regarding government organization as nonjusticiable political questions.[82]

Bard v. North Carolina State Board of Elections

Following the court's 2023 decision in the *Harper* rehearing, the North Carolina legislature drew new state legislative and congressional maps.[83] These maps were almost immediately challenged by voters in three separate lawsuits filed in federal court, bringing claims under Section 2 of the Voting Rights Act and the U.S. Constitution, alleging that the maps were the result of unconstitutional racial gerrymandering.[84] Although the decision in *Harper v. Hall* might seem to have foreclosed challenges to the maps in state court on partisan gerrymandering grounds, a challenge to the new maps was brought in a state trial court early in 2024.[85]

Observers have described the three new Republican-drawn maps as "an aggressive gerrymander," likely to flip both congressional and state legislative seats in 2024.[86] Analysis done by a nonpartisan research group at Duke University found that the 2023 maps are "more gerrymandered and less responsive than maps struck down in 2021."[87] For example, even when the statewide Democratic vote share exceeds 50%, Republicans would still be expected to win a supermajority in the state Senate under these new maps.[88]

Plaintiffs, represented by former North Carolina Supreme Court Justice Robert F. Orr, argue that the North Carolina Constitution contains an unenumerated right to "fair" elections. The North Carolina Constitution's Declaration of Rights states that "[f]or redress of grievances and for amending and strengthening the laws, elections shall be often held,"[89] and "[a]ll elections shall be free."[90] Plaintiffs argue that these two provisions imply a right to *fair* elections,

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[82] *Cooper*, 809 S.E.2d at 120 (Newby, J., dissenting).
[83] *Legislative and Congressional Redistricting*, North Carolina General Assembly (last visited Feb. 1, 2023), https://www.ncleg.gov/Redistricting.
[84] Complaint, NC NAACP v. Berger, No. 23-CV-1104 (N.C. Super. Ct. Dec. 19, 2023); Complaint, Pierce v. North Carolina State Board of Elections, No. 23-CV-193 (N.C. Super. Ct. Nov. 20, 2023); Complaint, Williams v. Hall, No. 23-CV-1057 (N.C. Super. Ct. Dec. 4, 2023).
[85] Complaint, Bard v. N.C. State Bd. of Elections, No. 24CV003534-910 (N.C. Super. Ct. Jan. 31, 2024).
[86] Zach Montellaro and Ally Mutnick, *North Carolina's new GOP gerrymander could flip 4 House seats*, Politico (Oct. 25, 2023), https://www.politico.com/news/2023/10/25/north-carolina-congressional-map-gop-gerrymander-00123574.
[87] Jonathan Mattingly, *Newly Proposed NC Maps are more gerrymandered and less responsive than maps struck down in 2021*, Quantifying Gerrymandering (Oct. 20, 2023), https://sites.duke.edu/quantifyinggerrymandering/2023/10/20/newly-proposed-nc-maps-are-more-gerrymandered-and-less-responsive-than-maps-struck-down-in-2021/.
[88] *Id*.
[89] N.C. Const. art. I, § 9.
[90] N.C. Const. art. I, § 10.

reasoning that the purposes of free and frequent elections—accountability and discerning the will of the electorate—are subverted if elections are not fair.[91]

These arguments appear to run headlong into the North Carolina Supreme Court's 2023 *Harper* ruling. Although the court has previously written that the founders of the state intended to protect "unenumerated, but inalienable, rights,"[92] in its recent *Harper* decision, the court maintained that, "[b]ecause of their abstractness, many provisions of the Declaration of Rights do not give rise to justiciable rights."[93] If this case does make its way to the North Carolina Supreme Court, it could give the court an opportunity to reaffirm *Harper III*.

Conclusion

In 2023, the North Carolina Supreme Court charted a new path. While the 2022 court emphasized that deference to the legislature had limits,[94] the 2023 court asserted that those limits had not yet been reached. The court will likely maintain this posture for years to come—at least until 2028, the next year in which North Carolina voters may have the opportunity to tip the court's balance of power once again.

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[91] Complaint, Bard at 2 ("After all, what good are 'frequent' elections if those elections are not 'fair?' Likewise, what good are 'free' elections if those elections are not 'fair?'").
[92] State v. Williams, 61 S.E. 61, 63 (N.C. 1908).
[93] *Harper III*, 886 S.E.2d at 431-32 (internal quotation marks mitted).
[94] *Leandro IV*, 879 S.E.2d at 198 ("[T]he State may not indefinitely violate the constitutional rights of North Carolina schoolchildren without consequence. . . . Today, that deference expires. If this Court is to fulfill its own constitutional obligations, it can no longer patiently wait for the day, year, or decade when the State gets around to acting on its constitutional duty . . . . Further deference on our part would constitute complicity in the violation, which this Court cannot accept.").