No. _____ TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

Petitioners,

v.

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

From Wake County
No. 21 CVS 015426

JEFF CARMON III, in his official capacity as Member of the North Carolina State Board of Elections; STACY EGGERS IV, in his official capacity as Member of the North Carolina State Board of Elections; TOMMY TUCKER, in his official capacity as Member of the North Carolina State Board of Elections; and KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina State Board of Elections,

Respondents.

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., ET AL.'S PETITION FOR DISCRETIONARY REVIEW PRIOR TO DETERMINATION BY THE COURT OF APPEALS, ALTERNATIVE PETITION FOR WRIT OF CERTIORARI, MOTION TO SUSPEND APPELLATE RULES AND EXPEDITE SCHEDULE, AND PETITION FOR WRIT OF SUPERSEDEAS OR PROHIBITION

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

This case presents the question whether the North Carolina State Constitution provides any check on the General Assembly's power to destroy majority rule in our state. Those who lead the General Assembly maintain that there is no constitutional check on its power. A three-judge panel agreed—thereby contradicting the holding of a different three-judge panel two years ago that the Constitution prohibits extreme

partisan gerrymandering like the General Assembly undertook here. This Court is therefore called upon to act with all due haste to protect the most fundamental of all rights for the people of North Carolina—the right to vote.

In 2017, the General Assembly drew redistricting maps for Congress, the state Senate, and the state House that it frankly acknowledged "would be a political gerrymander." *Harper v. Lewis*, No. 19-CVS-012667, 2019 N.C. Super. LEXIS 122, at *17–18 (N.C. Super. Ct. Oct. 28, 2019) (three-judge panel) (unpublished). It also proclaimed that, under our state's law, the majority party is "'perfectly free' to engage in constitutional partisan gerrymandering." *Common Cause v. Lewis*, No. 18-CVS-014001, 2019 WL 4569584, at *4 (N.C. Super. Ct. Sept. 3, 2019) (three-judge panel) (unpublished). In 2019, a three-judge panel (composed of Judges Ridgeway, Crosswhite, and Hinton) issued a unanimous 357-page opinion that exhaustively canvassed North Carolina law to reject that remarkable claim. The panel held that the state Constitution prohibits "extreme partisan gerrymanders" and that courts must enforce this prohibition. The General Assembly did not appeal.

In November 2021, however, the General Assembly enacted new plans that effect nearly identical gerrymanders in the maps for Congress, the state Senate, and the state House (the "Enacted Plans"). The plans guarantee one political party majorities in the congressional delegation and both chambers of the General Assembly even when its candidates lose statewide by up to ***seven percentage points***, thereby all but ensuring counter-majoritarian rule. Undisputed evidence shows that even when Democratic candidates outpoll their opponents across North

Carolina by significant margins, Republicans nonetheless will likely take 10 of the state's 14 congressional seats and majorities in the Senate and House. Elections thus become meaningless formalities—an untenable outcome for democracy in our evenly divided and highly competitive state.

Petitioners sought relief from these extreme partisan gerrymanders in the Superior Court. A coalition encompassing the North Carolina League of Conservation Voters, Inc. ("NCLCV"), civil-rights leaders, individual voters, and professors of mathematics, statistics, and computer science (collectively, "NCLCV Petitioners") moved for a preliminary injunction against the use of the Enacted Plans in the 2022 primary election (in which the first primary is scheduled for 8 March 2022, months before other states' primaries). The NCLCV Petitioners explained that the plans violated the North Carolina State Constitution in the ***exact*** same way as did the maps at issue just two years ago in *Common Cause* and *Harper*. The NCLCV Petitioners also sought ancillary relief—including an injunction delaying the candidate-filing period that was scheduled to begin at noon today (6 December 2021). But the three-judge panel appointed to hear the case, composed of Judges Shirley, Poovey, and Layton, rejected the core holding of *Common Cause* and *Harper* and held that North Carolina's Constitution ***does not*** prohibit even extreme partisan gerrymanders. The panel thus denied the motion for a preliminary injunction.

Given the importance of the issues and the relatively short time before the March 8 primaries, the NCLCV Petitioners ask that this Court take discretionary

review prior to determination by the Court of Appeals (or issue a writ of certiorari) and set an expedited briefing schedule for this appeal.

This morning, the NCLCV Petitioners also filed a petition in the North Carolina Court of Appeals seeking a writ of supersedeas or prohibition to stay the filing period for all candidates pending the resolution of the NCLCV Petitioners' appeal, along with a motion for a temporary stay. The Court of Appeals quickly granted the temporary stay in part and stayed the "opening of the candidate-filing period for the 2022 primary elections for Congress, the North Carolina Senate, and the North Carolina House of Representatives" pending its ruling on the petition. Shortly after, the Legislative Defendants asked the Court of Appeals to grant *en banc* rehearing and vacate the temporary stay (and to grant an initial *en banc* hearing of the underlying appeal). Now, Petitioners also request that this Court issue a writ of supersedeas or prohibition, in the event that the Court of Appeals does not grant the NCLCV Petitioners' petition for writ of supersedeas or prohibition filed in that court, or in the event that this Court deems it appropriate to act in advance of a decision on that petition by the Court of Appeals.

Unless this Court grants the petition for expedited review and enjoins the Enacted Plans, millions of North Carolinians will be forced to vote under redistricting plans that drain their votes of meaning.

BACKGROUND

I. The Law Governing Redistricting in North Carolina

After every federal decennial census, the General Assembly must draw new legislative districts. N.C. Const. art. II, §§ 3, 5. Our state Constitution imposes

several limits on that authority, including that (1) each Senator and Representative "shall represent, as nearly as may be, an equal number of inhabitants"; (2) each district "shall at all times consist of contiguous territory"; (3) "[n]o county shall be divided in the formation of a senate district … [or] a representative district" (the "Whole County Provisions"); and (4) "[w]hen established, the senate [and representative] districts and the apportionment of [legislators] shall remain unaltered until the return of another decennial census." *Id.*

Redistricting also must comply with other constitutional requirements, including North Carolina's Free Elections Clause, Equal Protection Clause, Free Speech Clause, and Free Assembly Clause. *Common Cause*, 2019 WL 4569584, at *108–24; *Harper*, 2019 N.C. Super. LEXIS 122, at *7–14. Federal law—including the one-person, one-vote requirement and the Voting Rights Act of 1965—imposes additional requirements.

In a line of cases beginning with *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), this Court set forth a mandatory, nine-step framework that explains how to apply certain aspects of North Carolina redistricting law governing state legislative maps—in particular, the Whole County Provisions—consistent with federal law. *See id.*; *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*); *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014) (*Dickson I*); *Dickson v. Rucho*, 368 N.C. 481, 781 S.E.2d 404 (2015) (*Dickson II*).

II. *Common Cause* and *Harper*

The General Assembly, however, frequently has ignored the neutral principles articulated by this Court and gerrymandered based on party, race, or both. *See*

generally J. MICHAEL BITZER, REDISTRICTING AND GERRYMANDERING IN NORTH CAROLINA (2021). On that score, neither party's hands are clean—though recently, control of the General Assembly has rested with the Republican Party. In the 2011 redistricting cycle, the controlling party instructed its mapmaker to "ensure Republican majorities," based on claims that the majority was "'perfectly free' to engage in constitutional partisan gerrymandering." *Common Cause*, 2019 WL 4569584, at *4. In 2016, federal courts invalidated the 2011 congressional and legislative plans as racial gerrymanders.[1] But when the General Assembly redrew those maps, it created instead "[e]xtreme partisan gerrymander[s]." *Id.* at *125, *135; *see Harper*, 2019 N.C. Super. LEXIS 122, at *16–18. Indeed, one legislative leader "acknowledge[d] freely that" the congressional map "would be a political gerrymander." *Harper*, 2019 N.C. Super. LEXIS 122, at *17.

In 2019, the three-judge panel of Judges Ridgeway, Crosswhite, and Hinton unanimously rejected the argument that incumbent officeholders are "perfectly free" to gerrymander. *Common Cause*, 2019 WL 4569584, at *4. The panel's exhaustive opinion concluded that, under "extreme partisan gerrymander[s]," elections do not "fairly ascertain[]" the "free will of the People"; rather, "the carefully crafted will of the map drawer … predominates." *Id.* at *3. That result "violate[s] multiple fundamental rights guaranteed by the North Carolina Constitution." *Harper*, 2019

[1] *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016) (congressional plan), *aff'd sub nom. Cooper v. Harris*, 137 S. Ct. 1455 (2017); *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016) (legislative plans), *summarily aff'd*, 137 S. Ct. 2211 (2017).

N.C. Super. LEXIS 122, at *18. Those include the fundamental rights protected by North Carolina's Free Elections Clause, as well as the Equal Protection, Free Speech, and Free Assembly Clauses.

That conclusion, the panel emphasized, "reflect[ed] the unanimous and best efforts of the … judges—each hailing from different geographic regions and each with differing ideological and political outlooks—to apply core constitutional principles to [a] complex and divisive topic." *Common Cause*, 2019 WL 4569584, at *1.

That conclusion also accorded with the guidance of the United States Supreme Court. *Id.* at *2. In 2004, all nine Justices agreed that "an excessive injection of politics" in redistricting is "unlawful." *Vieth v. Jubelirer*, 541 U.S. 267, 292–93 (2004) (plurality op. of Scalia, J.); *see id.* at 316 (Kennedy, J., concurring) (noting the plurality's agreement that severe partisan gerrymandering is unlawful). And in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), all nine Justices again agreed that partisan gerrymanders are "incompatible with democratic principles." *Id.* at 2506; *see also id.* at 2512 (Kagan, J., dissenting) (detailing unanimous rejection by all Members of the Court of extreme partisan gerrymandering). While the United States Supreme Court ultimately found that partisan gerrymandering claims are nonjusticiable in federal court, Chief Justice Roberts emphasized that the Court's opinion did not "condemn complaints" about "excessive partisan gerrymandering" to "echo into a void." *Id.* at 2507 (majority op.). Instead, state courts can find prohibitions on such gerrymandering in "state constitutions." *Id.*

III. The 2021 Redistricting Process

When the time came to redistrict following the 2020 census, rather than conform its conduct to the constitutional prohibitions articulated in *Common Cause* and *Harper*, the General Assembly attempted to circumvent them. Instead of drawing North Carolina's districts to fairly reflect North Carolinians' preferences, the General Assembly structured its processes to conceal its aims to effect extreme partisan gerrymanders and, if possible, to shield its gerrymandered maps from scrutiny.

The General Assembly did so, first, in the criteria and methods adopted by the committees overseeing the redistricting process. The Senate Committee on Redistricting and Elections (chaired by Defendants Hise, Daniel, and Newton) and the House Committee on Redistricting (chaired by Defendant Hall) issued proposed redistricting criteria on 9 August 2021, and, three days later, adopted them with minimal amendments. Verified Compl. ¶¶ 61–63 (App. 155). The adopted criteria stated that "[p]artisan considerations and election results data ***shall not*** be used in the drawing of districts in the 2021 Congressional, House, and Senate plans." *Id.* ¶ 69 (App. 157).

This statement was clearly intended to avoid the frank admissions of partisan gerrymandering that plagued the General Assembly in *Common Cause* and *Harper*. But the statement had little substance: It meant only that the Committees' computer terminals did not contain electoral data. *Id.* ¶ 70 (App. 157). Members could freely draw maps elsewhere, using whatever data they liked, and redraw them on the public terminals. *Id.* Indeed, "legislators were free to bring materials into and out of the

hearing rooms," *id.* ¶ 75 (App. 159), and Defendant Hall admitted that he had no intention of blocking members from relying on electoral data outside the committee chambers. *Id.* ¶ 70 (App. 157); Liberman Aff. ¶ 2 (App. 249–52).

Meanwhile, the General Assembly established a calendar that discouraged judicial review of its maps. Redistricting depends on census data, but the pandemic delayed the release of that data until August 2021. Verified Compl. ¶ 60 (App. 154–55); Feldman Aff. Ex. J at 1 (App. 357). The Executive Director of the State Board of Elections advised the General Assembly to delay the 2022 congressional and legislative primary by eight weeks—from the original date, March 8, to May 3—with second primaries on July 12. Verified Compl. ¶ 184 (App. 205); Feldman Aff. Ex. L at 14 (App. 379). The General Assembly allowed municipalities to delay their municipal elections but refused to reschedule congressional and legislative primaries. Verified Compl. ¶ 185 (App. 205).

As a result, North Carolina is an outlier. Forty-eight states have 2022 primaries scheduled in May or later. *Id.* ¶ 183 (App. 204–05). Nineteen states have scheduled 2022 primaries for August or later. *Id.* Only North Carolina and Texas are contemplating a primary as early as March—and Texas's primary may be postponed based on pending litigation. *Id.*

North Carolina's artificially compressed redistricting schedule became a tool to limit public and expert scrutiny. During September, the Committees held 13 public hearings—but because no maps had been proposed, those hearings did not give the public or experts a meaningful opportunity to provide input. *Id.* ¶ 72 (App. 158). On

October 6, Committee members began drawing proposed maps in the hearing rooms. *Id.* ¶ 75 (App. 159). On October 21, with little notice, the Committees announced that public hearings would be held on October 25 and 26. *Id.* ¶ 76 (App. 160). The Committees did not specify which of the many maps that had been posted online were final contenders, leaving the public and experts unable to identify the maps that were the Committee leaders' focus. *Id.*

On October 28, the Committees announced legislative hearings on November 1 and 2 to consider proposed congressional and legislative plans. *Id.* ¶ 77 (App. 160). After cursory hearings, the Committees passed proposed plans for Congress, the state Senate, and the state House. On November 4, the General Assembly adopted the Enacted Plans into law, each with no or few amendments and all on party-line votes. *Id.* ¶¶ 78–81 (App. 160–61). This Petition refers to those plans as the Enacted Congressional Plan, the Enacted Senate Plan, and the Enacted House Plan.

IV. This Suit and the Motion for a Preliminary Injunction

The NCLCV Petitioners filed this case just 12 days after the General Assembly enacted its maps. The Verified Complaint (App. 132–223) alleges that the Enacted Plans are unconstitutional partisan gerrymanders that violate North Carolina's Free Elections Clause (Count I), Equal Protection Clause (Count II), and Free Speech and Free Assembly Clauses (Count III). It also alleges that the Enacted Plans unlawfully dilute the voting strength of North Carolina's Black voters in violation of North Carolina's Free Elections Clause (Count IV) and Equal Protection Clause (Count V),

as well as violate the Whole County Provisions as implemented in the *Stephenson*/*Dickson* framework (Count VI).

The NCLCV Petitioners include the NCLCV, which sues on its own behalf and on behalf of thousands of its members who are registered to vote in North Carolina and reside in every congressional, state Senate, and state House district. The NCLCV Petitioners also include civil-rights legend Mickey Michaux, himself a former member of the General Assembly, as well as Democratic and Black voters who reside across the state. And the NCLCV Petitioners include noted professors of mathematics, statistics, and computer science.

Simultaneously, the NCLCV Petitioners moved for a preliminary injunction on their political gerrymandering claims in Counts I–III. (App. 528–32). The motion sought to enjoin Defendants—who include officials from the State Board of Elections—from preparing for, administering, or conducting the 8 March 2022 primary election and any subsequent election for Congress, the state Senate, or the state House using the Enacted Plans. The motion also sought—as necessary, and among other things—an injunction delaying the candidate-filing period that was originally scheduled to commence at noon today (6 December 2021). Pltfs' Mot. for Prelim. Inj. ¶ 7(b) (App. 531). The NCLCV Petitioners supported their motion with detailed evidence.

In particular, the NCLCV Petitioners submitted an affidavit from Professor Moon Duchin, a mathematician specializing in metric geometry and one of the Nation's leading experts on computational redistricting—a field that applies

principles of mathematics, high-performance computing, and spatial demography to the redistricting process. Dr. Duchin's affidavit used standard techniques in the field to show that the Enacted Plans are extreme, unjustified partisan gerrymanders: She examined voting data from 52 statewide partisan elections in 2012, 2014, 2016, 2018, and 2020 and analyzed how the Enacted Plans would translate those votes into seats. Duchin Aff. 8, 13–14 (App. 232, 237–38).

The results were striking: In all 38 elections decided by seven percentage points or fewer, the Enacted Plans ensure that the Republican Party will retain majorities in Congress, the state Senate, and the state House. *Id.*

Dr. Duchin also addressed the counterargument—namely, that skewed results reflect the inevitable effects of North Carolina's political geography or traditional districting principles. *Id.* at 7–8 (App. 231–32). She did so by analyzing alternative maps that the NCLCV Petitioners had drawn by harnessing the power of computational redistricting (identified in the Verified Complaint as the "Optimized Maps"). The Optimized Maps, Dr. Duchin concluded, perform ***better*** than the Enacted Plans on North Carolina's traditional districting criteria: They are more compact, better respect county lines, and split municipalities less, all while avoiding the severe partisan bias that afflicts the Enacted Plans. *Id.* at 6 (App. 230).

On 22 November 2021, Chief Justice Newby appointed a three-judge panel pursuant to N.C.G.S. § 1-267.1. The panel set a preliminary-injunction hearing for 3 December 2021. The panel also set a preliminary-injunction hearing, that same day,

in *Harper v. Hall*, No. 21-CVS-500085, which likewise sought to enjoin the Enacted Congressional Plan as a partisan gerrymander.

On 1 December 2021, Defendants served an affidavit from Sean Trende, a commentator for "RealClearPolitics" and a Ph.D. candidate in political science. (App. 656–82). Mr. Trende did not address Dr. Duchin's showing that the Enacted Plans are extreme partisan gerrymanders. Nor did he counter Dr. Duchin's showing that North Carolina's political geography does not compel the Enacted Plans' partisan bias. Instead, he opined only that most of North Carolina's counties tend to vote Republican—ignoring the vast population differences among the counties. Thus, Mr. Trende appears to believe that the results in Mecklenburg County (population 1.11 million) should be weighted exactly the same as the results in Tyrell County (population 3,245).

V. The Superior Court's Decision

After the December 3 hearing, the panel acknowledged that partisan gerrymandering "results in an ill that has affected this country and state since Colonial days." Tr. 112:15–17 (App. 126). It held, however, that North Carolina law does not permit any remedy for even "extreme partisan gerrymanders." Order on Pltfs' Mot. for Prelim. Inj. at 11 ("December 3 Order") (App. 11). Barely mentioning the 357-page opinion issued by the prior three-judge panel in 2019 that painstakingly detailed how extreme partisan gerrymandering violates the North Carolina State Constitution, the panel held that the NCLCV Petitioners were unlikely to succeed on

the merits because their claims presented political questions that were "not justiciable." *Id.* at 7 (App. 7).

The panel also held that the NCLCV Petitioners were unlikely to prove that they had standing to bring their claims—even though, during the hearing, the panel did not ask a single question about standing. The panel incorrectly stated that the NCLCV Petitioners "reside in only 6 of the congressional districts, 8 of the Senate districts, and 9 of the House districts." *Id.* at 8 (App. 8). In fact, as is established by the Verified Complaint, the ***individual petitioners*** in this suit reside in enacted Congressional Districts 2, 4, 6, 11, 12, 13; enacted Senate Districts 2, 4, 12, 20, 23, 27, 32, 37; and enacted House Districts 6, 10, 27, 29, 56, 58, 61, 72, 98. Verified Compl. ¶¶ 14–28 (App. 138–44). But in addition to these individuals, NCLCV "has members who are registered Democratic voters in all 14 districts under the Enacted Congressional Plan, all 50 districts under the Enacted Senate Plan, and all 120 districts under the Enacted House Plan." *Id.* ¶ 11 n.4 (App. 137).

The panel also held that the NCLCV Petitioners had not shown a likelihood of success on the merits, stating that "some evidence of intent is required to prove … extreme partisan gerrymandering" and "the evidence presented shows that the General Assembly did not use any partisan data in the creation of these congressional and state legislative districts, suggesting a lack of intent." December 3 Order at 11 (App. 11).

The panel therefore denied the motion for a preliminary injunction (as well as the motion in *Harper*). The panel certified its ruling for immediate appeal, stating

that "[t]o the extent necessary, this Court determines that there is no just reason for delay and certifies this order for immediate appeal pursuant to Rule 54 of the North Carolina Rules of Civil Procedure." *Id.* at 13 (App. 13).

The NCLCV Petitioners filed their Notice of Appeal on the same day as the panel's order.

VI. The Impending Election Process

As explained above, the primary election for congressional and legislative candidates is currently scheduled for March 8, with runoff primary elections, if needed, to be held on April 26 or May 17. Bell Aff. ¶ 3 (App. 687–88). In-person early voting is set to begin on February 17, *id.* ¶ 12 (App. 691), and the candidate-filing period was scheduled to open today (December 6) at noon, *see* N.C.G.S. § 163-106.2. The State Board of Elections has represented that it must begin sending out vote-by-mail ballots on or about 14 January 2022, to comply with federal and state law. Bell Aff. ¶ 10 (App. 690–91).

Before the three-judge panel, the State Board took "no position on the merits of the NCLCV Petitioners' claims." State Board Defs' Resp. at 1 (App. 672). It explained that, while the NCLCV Petitioners' requested relief would impose some "burden," that relief would not create any "insurmountable" issues so long as the State Board's "administrative considerations and concerns" were taken into account. *Id.*

In particular, the State Board made two points relevant here. First, some pre-election processes can occur "concurrently"—including, as relevant here, "geocoding"

the map data and candidate filing. Bell Aff. ¶¶ 8, 9, 14 (App. 689–92).[2] As a result, a delay in the candidate-filing period does not require an immediate delay in the primary election. Second, the primary could feasibly be delayed until 17 May 2022—similar to what has occurred in prior redistricting cycles, *infra* p. 55—so long as the State Board received new districting plans by the week of February 14. Bell Aff. ¶ 23 (App. 695).

VII. The NCLCV Petitioners' Petition in the North Carolina Court of Appeals.

This morning, the NCLCV Petitioners filed a petition for a writ of supersedeas or prohibition and a motion for a temporary stay in the Court of Appeals asking the Court to stay the candidate-filing period, which otherwise would have opened at noon on 6 December 2021. The Court of Appeals granted the temporary stay in part and stayed the "opening of the candidate-filing period for the 2022 primary elections for Congress, the North Carolina Senate, and the North Carolina House of Representatives" pending its ruling on the petition. Stay Order (App. 698). The Court of Appeals allowed Defendants to respond by noon on 9 December 2021. *Id.*

Shortly after, the Legislative Defendants asked the Court of Appeals to grant *en banc* rehearing and vacate the temporary stay. *See* Defendant-Appellees' Motion for En Banc Rehearing at 2, *NCLCV v. Hall*, No. P21-525 (N.C. Ct. App. Dec. 6, 2021).

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[2] In particular, to prepare ballots, the State Board must first assign voters to voting districts (a process called "geocoding"), hold a period for candidate filing (which can proceed simultaneously with geocoding), and then prepare and proof ballots. Bell Aff. ¶¶ 4–8 (App. 688–90). The "total time required for geocoding and ballot preparation is likely between 38 and 42 days (including holidays and weekends)." *Id.* ¶ 9 (App. 690).

They also moved for initial *en banc* hearing of the underlying appeal. *See* Defendant-Appellees' Motion for Initial En Banc Hearing at 2, *NCLCV v. Hall*, No. P21-525 (N.C. Ct. App. Dec. 6, 2021).

PETITION FOR DISCRETIONARY REVIEW

Pursuant to N.C.G.S. § 7A-31(b) and Rules 2 and 15(a) of the North Carolina Rules of Appellate Procedure, the NCLCV Petitioners respectfully petition this Court to exercise its authority to grant discretionary review, prior to determination by the Court of Appeals, of the December 3 Order denying them preliminary injunctive relief.

Discretionary review is warranted here. There is no time for two levels of appellate review given that the current date for primary elections is 8 March 2022, and given that the State Board of Elections has represented that it must begin sending out vote-by-mail ballots for the primary on or about 14 January 2022, to comply with federal and state law. Bell Aff. ¶ 10. Thus, the need to expedite any appeal justifies granting discretionary review prior to determination by the Court of Appeals. Moreover, as set forth in more detail below, this case satisfies ***all five*** of the statutory criteria for certification prior to determination by the Court of Appeals in N.C.G.S. § 7A-31(b), any ***one*** of which is sufficient to justify discretionary review. Accordingly, in support of this Petition, the NCLCV Petitioners incorporate the background and arguments above and below, and show the Court the following:

REASONS WHY CERTIFICATION SHOULD ISSUE PRIOR TO DETERMINATION BY THE COURT OF APPEALS

I. The Subject Matter of the Appeal Has Significant Public Interest.

There could hardly be a case with more significant public interest. The outcome here will determine whether the 2022 elections genuinely seek to ascertain the will of the people or instead become a mere formality. If the current district lines are allowed to remain in place, millions of North Carolina voters, including the NCLCV Petitioners, will be disenfranchised by being forced to vote in districts in which the outcome has been preordained by extreme partisan gerrymandering. The current district lines guarantee that one political party will retain majorities in the state's congressional delegation, the state Senate, and the state House, even if North Carolina voters reject that party's candidates by significant margins statewide. Given the high stakes, this matter has garnered significant public interest, including numerous newspaper articles, television and radio broadcasts, and social media postings. The hearings in this matter have been reported on by the media in real time. There can be no dispute that the subject matter of the appeal has significant public interest. *See* N.C.G.S. § 7A-31(b)(1).

II. The Cause Involves Legal Principles of Major Significance to the Jurisprudence of the State.

There is also no question that this litigation meets the second factor under Section 7A-31(b), which asks whether the cause involves legal principles of major significance to the jurisprudence of the state. The central question presented by this case is whether there is any constitutional constraint at all on a political party's ability to entrench itself in power and impose counter-majoritarian rule. The NCLCV

Petitioners have argued that the Enacted Plans violate the Free Elections Clause, the Equal Protection Clause, the Free Speech Clause, and the Free Assembly Clause of the North Carolina State Constitution. The three-judge panel held that the NCLCV Petitioners' constitutional claims are entirely non-justiciable, despite the holding of another three-judge panel just two years ago that such claims are justiciable and that extreme partisan gerrymandering violates the same constitutional provisions that the NCLCV Petitioners invoke in this case. To call the legal principles at issue here of major significance is an understatement.

III. Delay in the Final Adjudication is Likely to Cause Substantial Harm.

The third statutory justification for discretionary review offers an independent basis for this Court's immediate and direct review: Delay in the final adjudication of this case could cause significant and irreparable harm. *See* N.C.G.S. § 7A-31(b)(3). Absent a timely resolution from this Court enjoining the use of the Enacted Plans in the 2022 elections, disenfranchisement will result. Thus, a failure to certify the case for review risks substantial harm to the extent that it would deprive this Court of sufficient time to resolve the issues before the elections get underway.

IV. Given the Court of Appeals' Workload, the Expeditious Administration of Justice Requires Certification.

In the unusual circumstances of this case, the workload of the appellate courts also supports the conclusion that certification is necessary. *See* N.C.G.S. § 7A-31(b)(4). There is simply no time for two levels of appellate review here. Given that only one appellate court could possibly handle any appellate proceedings in the time remaining before ballots must be mailed, it should be this Court, which is charged

with the constitutional responsibility of standing as a "final check" on the legislature through the exercise of "judicial review, the implied constitutional authority of the court to decide if a law violates the constitution." *State ex rel. McCrory v. Berger*, 368 N.C. 633, 653, 781 S.E.2d 248, 261 (2016) (citing *Bayard v. Singleton*, 1 N.C. 5, 6–7 (1787)).

V. The Subject Matter of the Appeal Is Important in Overseeing the Jurisdiction and Integrity of the Court System.

This Court has the authority to immediately review decisions of lower courts when they are important to the jurisdiction and integrity of the court system. N.C.G.S. § 7A-31(b)(5). The Legislative Defendants continued to assert that North Carolina courts do not lack the power to decide whether their actions violate the Free Elections Clause, the Equal Protection Clause, the Free Speech Clause, and the Free Assembly Clause and that they thus are unconstrained by the North Carolina Constitution in imposing counter-majoritarian rule in North Carolina. Accepting this limitation on the authority of the Judicial Branch would leave the Legislative Branch free to entrench itself in power with no check. This represents a significant risk to the Court's jurisdiction to determine constitutional questions.

WHEREFORE, the NCLCV Petitioners respectfully request that this Court allow discretionary review of the December 3 Order before determination by the Court of Appeals.

ALTERNATIVE PETITION FOR WRIT OF CERTIORARI

The December 3 Order is immediately appealable. A trial court's ruling on a motion for preliminary injunction is interlocutory. "For appellate review to be proper,

the trial court's order must: (1) certify the case for appeal pursuant to N.C. R. Civ. P. 54(b); or (2) have deprived the appellant of a substantial right that will be lost absent review before final disposition of the case." *Bessemer City Exp., Inc. v. City of Kings Mountain*, 155 N.C. App. 637, 639, 573 S.E.2d 712, 714 (2002).

Here, both of these qualifications are met. First, the three-judge panel certified the order for immediate appeal under Rule 54(b). Second, substantial rights are at stake. *See Holmes v. Moore*, 270 N.C. App. 7, 13, 840 S.E.2d 244, 252 (2020) ("A party may appeal an interlocutory order if it 'deprives the appellant of a substantial right which he would lose absent a review prior to final determination." (quoting *A.E.P. Indus. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983)). Absent interlocutory review, the 2022 primary election will occur under the Enacted Plans—and the NCLCV Petitioners will lose forever their fundamental rights to vote, speak, and associate in connection with that election. *See id.* at 13, 840 S.E.2d at 253. As such, the December 3 Order is the proper subject of a petition for discretionary review prior to determination by the Court of Appeals.

In the alternative, however, the NCLCV Petitioners request that this Court issue a writ of certiorari to review the December 3 Order. *See* N.C. R. App. P. 21(a)(1); *see also* N.C. Const. art. IV, §§ 1, 12(1); N.C.G.S. § 7A-32(b). Certiorari is warranted because, for the reasons explained above, the matters at issue are singular in both importance and urgency. Indeed, immediate review is needed to prevent irreparable harm to every voter in North Carolina. *See, e.g.*, *Fisher v. Flue-Cured Tobacco Coop Stabilization Corp.*, 369 N.C. 202, 208, 794 S.E.2d 699, 705 (2016) (invoking this

Court's supervisory authority to review a non-appealable order given the vast number of people and entities affected). To the extent necessary to review the December 3 Order, therefore, the Court should issue a writ of certiorari.

ISSUE FOR WHICH REVIEW IS SOUGHT

The NCLCV Petitioners respectfully request that the Court allow discretionary review, or alternatively issue a writ of certiorari, on the following issue:

> Whether the three-judge panel improperly refused to issue a preliminary injunction to prevent Respondents from preparing for, administering, or conducting any election (including the 2022 primary and general elections) under the Enacted Congressional Plan, the Enacted Senate Plan, or the Enacted House Plan, or any other congressional or legislative redistricting plan that violates the North Carolina State Constitution.

MOTION TO SUSPEND APPELLATE RULES AND EXPEDITE BRIEFING

Pursuant to Rules 2 and 37(a) of the North Carolina Rules of Appellate Procedure, the NCLCV Petitioners respectfully move that the Court consider the above petitions at this time, although (a) a record has not yet been docketed in the Court of Appeals as would generally be required under Appellate Rule 15(a), (b); (b) the NCLCV Petitioners have not sought a writ of certiorari from the Court of Appeals before seeking that writ from this Court, as would generally be required under Appellate Rule 21(b); and (c) the Court of Appeals has not yet ruled on the NCLCV Petitioners' petition for a writ of supersedeas or prohibition filed this morning seeking to stay the candidate-filing period.

Due to the exigencies of this case, time does not permit adherence to these appellate rules. Expediting the treatment of the petitions would therefore serve the public interest as provided under Appellate Rule 2. This case presents exactly the

sort of unusual, context-specific situation in which suspending the Appellate Rules to expedite decision in the public interest, and to prevent manifest injustice, is warranted. Given the State Board of Elections' representation that it intends to begin mailing out vote-by-mail ballots for the primary by approximately 14 January 2022, if this Court grants the NCLCV Petitioners' petition for discretionary review or alternative petition for a writ of certiorari, the NCLCV Petitioners respectfully request that the Court enter the following expedited briefing schedule:

Opening Brief & Record on Appeal:	Noon on 10 December 2021
Response Brief:	Noon on 17 December 2021
Reply Brief:	Noon on 21 December 2021
Argument:	As soon as possible, at the Court's discretion

PETITION FOR WRIT OF SUPERSEDEAS OR PROHIBITION

In the event that the Court of Appeals does not grant the NCLCV Petitioners' petition for writ of supersedeas or prohibition filed in that court, or in the event that this Court deems it appropriate to act in advance of a decision on that petition by the Court of Appeals, then the NCLCV Petitioners respectfully petition this Court—pursuant to Article IV, §§ 1 and 12(1) of the North Carolina Constitution, N.C.G.S. § 7A-32(b), and Rules 2, 8, 22, and 23 of the North Carolina Rules of Appellate Procedure—to stay the candidate-filing period for the primary election that was originally scheduled to open on 6 December 2021 at noon pending appellate review of the December 3 Order.

REASONS WHY THE WRIT SHOULD ISSUE

If the Court of Appeals ultimately does not grant the relief that the NCLCV Petitioners have sought and the candidate-filing period opens before this Court reviews the December 3 Order, then candidates will begin declaring their candidacies across North Carolina, for both congressional and state legislative offices under maps that the three-judge panel in this case acknowledged very well may have been extreme partisan gerrymanders. An order is warranted to stay the candidate-filing period pending review of legal issues that affect the fundamental rights of millions of North Carolina citizens.

"Through its inherent power [protected by Article IV, § 1] the court has authority to do all things that are reasonably necessary for the proper administration of justice." *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987). In particular, the writ of supersedeas allows this Court to preserve the status quo while an appeal is pending. *E.g.*, *Craver v. Craver*, 298 N.C. 231, 237–38, 258 S.E.2d 357, 362 (1979). Here, such relief is necessary—either from the Court of Appeals or this Court—to stop the State Board from conducting a candidate-filing period that will require candidates to begin declaring their candidacies on the basis of unlawful maps and avoid the needless burdens that will result from beginning the filing period. Thus, pursuant to Sections 1 and 12(1) of Article IV, of the North Carolina State Constitution, Section 7A-32(b) of the North Carolina General Statutes, and Rules 2,

8, 22, and 23 of the North Carolina Rules of Appellate Procedure, this Court should suspend the candidate-filing period pending review of the December 3 Order.[3]

It would have been futile for the NCLCV Petitioners to seek from the Superior Court panel an injunction against the candidate-filing period pending appeal: They had already sought and been denied a stay of the candidate-filing period in their motion for a preliminary injunction. In substance, the NCLCV Petitioners thus had already asked the panel for the relief they seek here—and the request was denied. Moreover, the panel agreed that the appropriate place to seek relief is now in the appellate courts, as demonstrated by its decision to certify its order for immediate appeal pursuant to Rule 54(b). And the imminent start of the candidate-filing period—which, but for the Court of Appeals' action, would have opened at noon today, 6 December 2021—fully justified the NCLCV Petitioners' decision to seek relief from the appellate courts instead.

I. The NCLCV Petitioners Are Likely to Succeed on the Merits

Although the NCLCV Petitioners in this Petition seek only modest relief aimed at preserving the status quo pending review, the NCLCV Petitioners are also likely to succeed on the ultimate merits of their claims. *Common Cause* and *Harper* correctly hold that North Carolina's Constitution prohibits extreme partisan gerrymandering. The Enacted Plans are nearly identical to the extreme gerrymanders those cases enjoined. And the panel's contrary conclusions are wrong.

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[3] Although the NCLCV Petitioners believe this relief is properly sought via supersedeas, they have included an alternative request for prohibition under Rule 22, to the extent the Court deems that avenue appropriate.

A. The North Carolina State Constitution Prohibits Partisan Gerrymandering.

Free Elections Clause. North Carolina's prohibition on partisan gerrymandering flows, first, from its Free Elections Clause—as *Common Cause* correctly held, based on a scholarly analysis of text and history. 2019 WL 4569584, at *2. That clause declares that "[a]ll elections shall be free." N.C. Const. art. I, § 10. It derives from the 1689 English Bill of Rights and is "one of the clauses that makes the North Carolina Constitution more detailed and specific than the federal Constitution." *Common Cause*, 2019 WL 4569584, at *109 (citing *Corum v. Univ. of N.C.*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992)). As *Common Cause* explained, the Free Elections Clause protects the "fundamental role of the will of the people in our democratic government." *Id.* In particular, it protects the ability of a *majority* of the people to translate votes into governing power: Because "this is a government of the people, … the will of the people—the majority—legally expressed, must govern." *Id.* (quoting *Quinn*, 120 N.C. at 428, 26 S.E. at 638). Hence, "the object of all elections" must be "to ascertain, fairly and truthfully, the will of the people—the qualified voters." *Id.* (quoting *Hill v. Skinner*, 169 N.C. 405, 415, 86 S.E. 351, 356 (1915)).

Partisan gerrymandering thwarts this command. Elections under gerrymandered maps do not "ascertain, fairly and truthfully, the will of the people." *Hill*, 169 N.C. at 415, 86 S.E. at 356. Rather, the government has "interfere[d]" with that will. *Common Cause*, 2019 WL 4569584, at *111 (quoting JOHN V. ORTH & PAUL M. NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 55–57 (2d ed. 2013)). It "is the will of the map drawers," not the voters, "that prevails." *Id.* at *110. And that

result violates the "core principle of republican government"—namely, "that the voters should choose their representatives, not the other way around." *Id.* (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015)).

Gerrymandering works, and has always worked, by manipulating district lines for partisan gain. In 17th-century England, the King undertook "to manipulate parliamentary elections, including by changing the electorate in different areas to achieve 'electoral advantage.'" *Id.* at *111 (quoting J.R. JONES, THE REVOLUTION OF 1688 IN ENGLAND 148 (1972)). Those abuses "led to a revolution" and, thereafter, a provision in the 1689 English Bill of Rights specifying that "election of members of parliament ought to be free." *Id.* (quoting Bill of Rights 1689, 1 W. & M. c. 2 (Eng.)). That clause aimed, directly, at the King's gerrymandering. *Id.* At the Founding, several states adopted free-elections clauses modeled on the 1689 English Bill of Rights, and the framers of the North Carolina Declaration of Rights drew inspiration from these states, including Pennsylvania. *Id.* These states have understood their free-elections clauses to prohibit partisan gerrymandering by protecting each citizen's right to "an equally effective power to select the representative of his or her choice" and "bar[ring] the dilution of the people's power to do so" via gerrymandering. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018).

North Carolina has only strengthened that protection. Its original 1776 constitution closely paralleled the English Bill of Rights and provided that "elections ***ought*** to be free." *Common Cause*, 2019 WL 4569584, at *111 (emphasis added). In

1971, North Carolina amended the clause to specify that "'[a]ll elections ***shall*** be free.'" *Id.* (emphasis added by the panel). This "ma[d]e [it] clear" that the Free Elections Clause is a "command[] and not mere admonition[]." *N.C. State Bar v. DuMont*, 304 N.C. 627, 635, 639, 286 S.E. 2d 89, 94, 97 (1982). *Common Cause* properly enforced this command and held that partisan gerrymandering is "contrary to the fundamental right[s] of North Carolina citizens" under the Free Elections Clause. 2019 WL 4569584, at *110.

In rejecting *Common Cause*, the Superior Court panel believed that this Court had ***approved*** partisan gerrymandering in *Stephenson I*. That reading, however, turns *Stephenson I* nearly on its head. First, the panel quoted *Stephenson I's* statement that the General Assembly "may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions," December 3 Order at 14 (App. 14), but omitted the caveat that follows—that the General Assembly "must do so in conformity with the State Constitution," *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 390. There is a world of difference between considering partisan advantage and gerrymandering districts across the State "to systematically prevent [one party] from obtaining a majority." *Common Cause*, 2019 WL 4569584, at *116. And the Free Elections Clause (as well as the Equal Protection, Free Speech, and Free Assembly Clauses, *infra* pp. 28–31) are among the "State Constitution" provisions that *Stephenson I* emphasized redistricting must follow. Second, the panel overlooked the case that *Stephenson I* cited to support its statement that redistricters may account for partisanship—*Gaffney v. Cummings*, 412 U.S. 735

(1973). *Gaffney* held that states can take politics into account to achieve "politically fair" maps." *Id.* at 753. *Stephenson I* could not have intended, by citing *Gaffney*, to condone gerrymandering to ***thwart*** the popular will.

Equal Protection Clause. *Common Cause* also held, correctly, that the North Carolina State Constitution's Equal Protection Clause proscribes partisan gerrymandering. As this Court has explained, "[t]he right to vote is one of the most cherished rights in our system of government." *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009). The Superior Court panel nonetheless averred that partisan gerrymandering "do[es] not impinge on the fundamental right to vote" because it "do[es] not deny the opportunity to vote nor … result in the unequal weighing of votes." December 3 Order at 11 (App. 11). The panel, however, simply failed to address the *Common Cause* Court's careful explanation of how partisan gerrymandering does just that.

In particular, this Court has held that the Equal Protection Clause protects "[t]he right to vote ***on equal terms*** in representative elections," *Blankenship*, 363 N.C. at 522, 681 S.E.2d at 762 (emphasis added), and the right to "substantially equal voting power," *Stephenson I*, 355 N.C. at 379, 562 S.E.2d at 394. And as *Common Cause* correctly recognized, partisan gerrymandering denies individuals "the equal protection of the laws," N.C. Const. art. I, § 19, as to one of their most cherished rights. It does so "by seeking to diminish the electoral power of supporters of a disfavored party." *Common Cause*, 2019 WL 4569584, at *113. It thereby "treats individuals who support candidates of one political party less favorably than

individuals who support candidates of another" and deprives them of "equal" voting power. *Id.* As *Common Cause* emphasized, there "is nothing 'equal' about the 'voting power' of Democratic voters when they have a vastly less realistic chance of winning a majority." *Id.* at *116.

Free Speech and Assembly Clauses. Finally, partisan gerrymanders violate North Carolina's Free Speech and Free Assembly Clauses. *Id.* at *118–24. First, partisan gerrymanders violate the Free Speech Clause by targeting speech based on viewpoint. The Free Speech Clause provides that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained." N.C. Const. art. I, § 14. And "[v]oting … constitutes a form of protected speech." *Common Cause*, 2019 WL 4569584, at *119. Indeed, there "is no right more basic in our democracy than the right to participate in electing our political leaders." *Id.* (quoting *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 191 (2014) (plurality op. of Roberts, C.J.)).

The Superior Court panel nonetheless averred that partisan gerrymandering does not violate the Free Speech Clause because it does not "place … restraints on speech." December 3 Order at 11 (App. 11). But again, the panel overlooked *Common Cause*'s careful analysis. Applying decades of North Carolina law, *Common Cause* recognized that a law violates the Free Speech Clause when "it renders disfavored speech ***less effective***, even if it does not ban such speech outright"—because the "government may not restrict a citizen's 'ability to ***effectively*** exercise' their free speech rights." *Common Cause*, 2019 WL 4569584, at *121 (emphasis added)

(quoting *Heritage Vill. Church & Missionary Fellowship, Inc. v. State*, 40 N.C. App. 429, 451, 253 S.E.2d 473, 486 (1979), *aff'd*, 299 N.C. 399, 263 S.E.2d 726 (1980)).[4] And partisan gerrymandering does just that by making some votes—votes for the disfavored party—less effective based on viewpoint. It "is 'axiomatic' that the government may not infringe on protected activity based on … viewpoint." *Common Cause*, 2019 WL 4569584, at *120 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995)).

Partisan gerrymandering also prevents voters and supporters of the disfavored party from effectively associating. The Free Assembly Clause specifies that the "people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances." N.C. Const. art. I, § 12. This guarantee encompasses a "right to freedom of association." *Feltman v. City of Wilson*, 238 N.C. App. 246, 253, 767 S.E.2d 615, 620 (2014). In particular, *Common Cause* explained that "[j]ust as voting is a form of protected expression, banding together with likeminded citizens in a political party is a form of protected association." 2019 WL 4569584, at *120. That is because individuals form parties to "express their political beliefs and to assist others in casting votes in alignment with those beliefs." *Libertarian Party*, 365 N.C. at 49, 707

[4] *See McCullen v. Coakley*, 573 U.S. 464, 489–90 (2014) (state law violated First Amendment rights of pro-life protestors, even though "petitioners [could] still be 'seen and heard,'" because the law "effectively stifled [their] message"); *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 736 (2008) (restrictions on self-financed candidates violated the First Amendment by "diminish[ing] the effectiveness" of speech); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 747 (2011) (scheme violated the First Amendment by rendering "speech … less effective").

S.E.2d at 204. Indeed, for "elections to express the popular will, the right to assemble and consult for the common good must be guaranteed." *Common Cause*, 2019 WL 4569584, at *120 (quoting JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION 48 (1995)).

The Superior Court panel found that partisan gerrymandering does not burden "associational rights," December 3 Order at 11 (App. 11)—but again, it did not account for *Common Cause*'s careful analysis of how partisan gerrymandering does so. 2019 WL 4569584, at *122. Individuals and associations like NCLCV build political associations *in order to* "obtain … majorities" in the legislature and further their views. *Id.* at *76. When partisan gerrymandering "diminishes the effectiveness" of those efforts, by targeting individuals based on the party with which they seek to associate, gerrymandering severely burdens associational rights. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 736 (2008); *see Bennett*, 564 U.S. at 736; *accord Common Cause*, 2019 WL 4569584, at *122 (partisan gerrymandering "violate[s] … associational rights by" weakening the ability of political associations to "carry out [their] core functions and purposes." *Common Cause*, 2019 WL 4569584, at *122 (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1939 (2018) (Kagan, J., concurring)).

B. The NCLCV Petitioners Are Likely to Succeed in Showing that the Enacted Plans Constitute Extreme Partisan Gerrymanders.

The NCLCV Petitioners are likely to succeed in showing that the Enacted Plans constitute exactly the type of extreme partisan gerrymander that *Common Cause* and *Harper* correctly condemned and so violate the constitutional provisions just described. As those cases hold, maps constitute extreme partisan gerrymanders

if they "are drawn to systematically prevent [one party] from obtaining a majority" of seats. *Common Cause*, 2019 WL 4569584, at *116. When plans have that feature, they violate the core democratic principle that "the will of the people—the majority—legally expressed, must govern." *Id.* at *109 (quoting *Quinn*, 120 N.C. at 428, 26 S.E. at 638). And to determine whether plans have that feature, *Common Cause* analyzed how maps performed in elections where partisan gerrymanders are most pernicious—"electoral environments where Democrats could win a majority of … seats under a nonpartisan map," including elections (like the 2018 election) where "Republican candidates won a minority … of the two-party statewide vote." *Id.* at *22, *74. The panel found that even in those environments, where fair maps would give Democratic candidates a realistic possibility of winning a majority, the maps were "designed specifically to ensure that Democrats would not" do so. *Id.* at *22.

In the Superior Court, the NCLCV Petitioners showed—via Dr. Duchin's analysis—that the Enacted Plans have that same feature. In "[***e***]***very single*** … close statewide contest," they award the favored Republican Party "an outright … majority" of seats. Duchin Aff. 15 (App. 239). And even if Republican candidates ***lose*** the statewide vote by seven percentage points, they ***still*** receive a majority of seats. *Id.* at 14 (App. 238); Verified Compl. ¶¶ 129–131 (App. 182–83). In particular, in close elections, the Enacted Plans guarantee Republican candidates a 6-seat advantage in Congress, a 6-seat advantage in the Senate, and a 16-seat advantage in the House. Duchin Aff. 14 (App. 238). Even when Democratic candidates win the statewide vote by significant margins, the Enacted Plans guarantee Republican

candidates at least 9 seats (of 14) in Congress, 26 Senate seats (of 50), and 62 House seats (of 120). *Id.* Dr. Duchin also showed, by analyzing the NCLCV Petitioners' Optimized Maps, that nothing in North Carolina's political geography or traditional districting principles compels those results—and that to the contrary, fair maps can ***do better*** on compactness, avoiding county splits, respecting municipalities, and so on. *Id.* Below, the NCLCV Petitioners address each Enacted Plan in turn.

1. The Enacted Congressional Plan Is an Extreme Partisan Gerrymander.

The Enacted Congressional Plan is designed to prevent Democrats from winning a majority of North Carolina's 14 seats in all likely electoral scenarios. In ***any*** election decided within a seven-point margin, it effectively guarantees the Republican Party an overwhelming advantage, even if voters prefer Democratic candidates statewide.

In close elections, the Enacted Congressional Plan guarantees Republicans a supermajority. Table 1 illustrates that point using five recent close elections:

Table 1: Outcomes in 5 Close Elections in Enacted & Optimized Congressional Maps

Election (margin)	Enacted Congressional Plan	Optimized Congressional Map
2016 Governor (0.2-pt. D win)	10 R, 4 D	7 R, 7 D
2016 Atty General (0.5-pt. D win)	10 R, 4 D	7 R, 7 D
2016 Super. Pub. Instr. (1.2-pt. R win)	10 R, 4 D	8 R, 6 D
2020 President (1.4 pt.-R win)	10 R, 4 D	6 R, 8 D
2020 Chief Justice (0.0-pt. R win)	10 R, 4 D	6 R, 8 D

Note: Data derived from Duchin Aff., Table 6 (App. 238).

The same holds true even where Democratic candidates prevail by significant margins. If Democratic candidates prevail statewide by anything less than 7 percentage points, Republican candidates ***still*** carry 9 or 10 (of the 14) congressional districts. *Id.* And again, this result cannot be blamed on geography. As Table 2 shows, a fair and neutral map translates Democratic statewide victories into majorities.

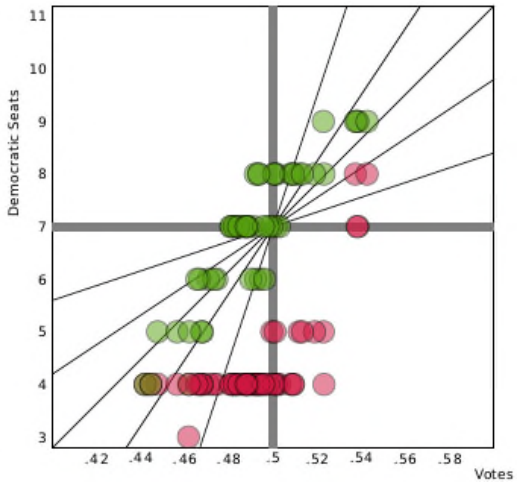
Table 2: Outcomes in 3 Democratic Elections in Enacted & Optimized Congressional Maps

Election (margin)	Enacted Congressional Plan	Optimized Congressional Map
2020 Governor (4.6-pt. D win)	10 R, 4 D	6 R, 8 D
2020 Sec'y of State (2.3-pt. D win)	9 R, 5 D	6 R, 8 D
2020 Auditor (1.8-pt D win)	10 R, 4 D	6 R, 8 D

Note: Data derived from Duchin Aff., Table 6 (App. 238).

Figure 1 powerfully demonstrates the bias the Enacted Congressional Plan bakes in. It compares Democratic vote share (on the x-axis) with Democratic seat share (on the y-axis) across the same 52 elections. A map that responds to voters' preferences would roughly track one of the diagonal lines crossing at the "(50, 50)" point, where a 50% vote share generates a 50% seat share. Along those lines, as either party wins more votes, it wins more seats. And if either party wins a majority of votes, it wins a majority of seats. But as Figure 1 shows, the Enacted Congressional Plan (red dots) does not come near the diagonal lines or pass through the (50, 50) point.

Figure 1: Vote Shares and Seat Shares in Enacted & Optimized Congressional Maps

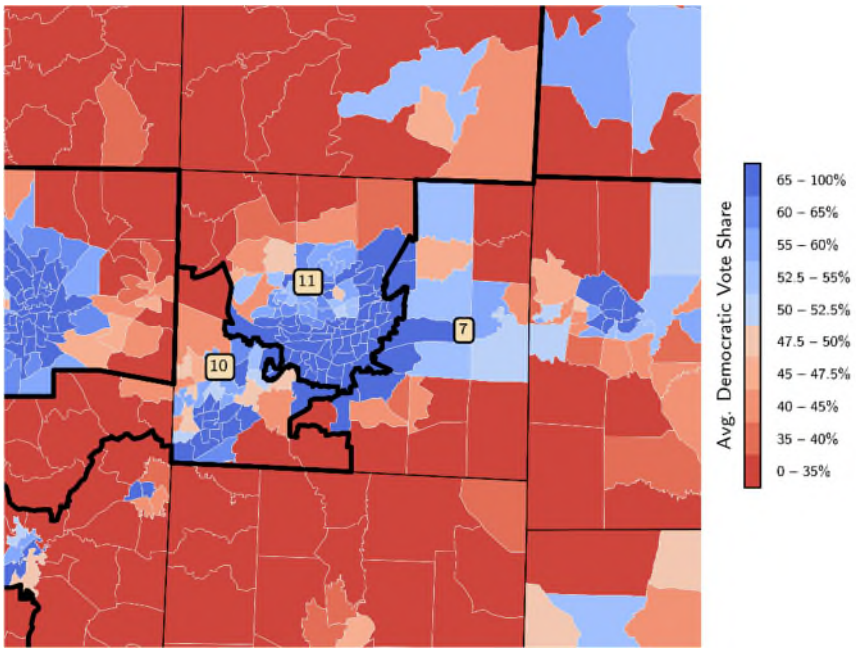


Note: Data derived from 52 recent general-election contests. Red dots denote results under the Enacted Congressional Plan. Green dots denote results under the Optimized Congressional Map in the same 52 elections.

Figure 1 shows that, under the Enacted Congressional Plan, more Democratic votes usually ***do not*** mean more Democratic seats, reflected in the flat red line near the bottom of the figure. Indeed, the bulk of the red dots are stuck on that line, where Democrats carry only 4 of 14 districts. And in each of the 12 statewide contests where the Democratic candidate won by less than seven percentage points, the winner carried only 4 or 5 of the 14 districts (these are the red dots in the lower-right quadrant, where more than half the votes generated less than half the seats for Democratic candidates). So a clear majority of Democratic votes does not translate into a majority of seats. By contrast, the Optimized Congressional Map (see the green dots in Figure 1) treats both parties fairly, with seat shares following the diagonal lines, passing right through the (50, 50) point, and almost invariably (with only 4 exceptions out of 52 elections) falling in the upper-right and lower-left quadrants, where a majority of votes (for either party) generates a majority of seats (or a tie).

Classic gerrymandering tactics yield the Enacted Congressional Plan's result: The General Assembly "packed" Democrats into some districts, while "cracking" them elsewhere. Strikingly, it trisected the Democratic strongholds of Mecklenburg, Wake, and Guilford Counties—and ***only those counties***—to minimize Democratic voting strength. Figure 2 depicts Guilford County. Before, the county sat within one Democratic-leaning district. It is now split into three, all guaranteed to elect Republicans. That is cracking.

Figure 2: Cracking in Guilford County[5]



This is just one example of many—and these examples foreclose any claim that political geography is responsible for the Enacted Congressional Plan's severe

[5] The color maps in this brief were presented to the Superior Court and are based solely on newly enacted 2021 district lines (described in the block assignment and shape files available at https://ncleg.gov/BillLookUp/2021/S740; https://ncleg.gov/BillLookUp/2021/S739; and https://ncleg.gov/BillLookUp/2021/H976); geographic and demographic data from the U.S. Census Bureau's 2020 Census (Public Law 94-171) "Redistricting Data Summary Files" and "TIGER/Line Shapefiles" (available at

partisan bias. Indeed, that plan *subordinates* traditional, neutral redistricting principles, including compactness and respect for political subdivisions. *Harris v. McCrory*, 159 F. Supp. 3d 600, 614 (M.D.N.C. 2016). Compared with the Optimized Congressional Map, the Enacted Congressional Plan's districts are significantly less compact and split municipalities more often than necessary. Duchin Aff. 5 (App. 229).

2. The Enacted Senate Plan Is an Extreme Partisan Gerrymander.

The Enacted Senate Plan is also gerrymandered to entrench Republican political power. In close elections, the Enacted Senate Plan again guarantees Republicans a substantial majority of seats, even when they lose the vote statewide—as Table 3 shows. Duchin Aff. 10, 14 (App. 234, 238). Indeed, with a voting pattern like the 2016 gubernatorial election or attorney-general election, the plan could produce a veto-proof Republican supermajority even when ***Democrats*** win statewide.

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https://www.census.gov/data/datasets/2020/dec/2020-census-redistricting-summary-file-dataset.html; and https://www.census.gov/geographies/mapping-files/time-series/geo/tiger-line-file.html) and 2020 electoral data from the North Carolina State Board of Elections (available at https://www.ncsbe.gov/results-data/election-results/historical-election-results-data ("Precinct Sorted Results"); and https://www.ncsbe.gov/results-data/voter-history-data ("Historical Voter History Stats"))—all of which are judicially noticeable under North Carolina law. N.C.G.S. § 8c-1, Rule 201; *see Anderson Creek Partners, L.P. v. County of Harnett*, 275 N.C. App. 423, 429, 854 S.E.2d 1, 6 (2020) (documents subject to judicial notice include, *inter alia*, "important public documents"); *see generally Hinkle v. Hartsell*, 131 N.C. App. 833, 836, 509 S.E.2d 455, 457–58 (1998).

Table 3: Outcomes in 5 Close Elections in Enacted & Optimized Senate Maps

Election (margin)	Enacted Senate Plan	Optimized Senate Map
2016 Governor (0.2-pt. D win)	30 R, 20 D	23 R, 27 D
2016 Att'y General (0.5-pt. D win)	30 R, 20 D	27 R, 23 D
2016 Super. Pub. Instr. (1.2-pt. R win)	28 R, 22 D	27 R, 23 D
2020 President (1.4-pt. R win)	30 R, 20 D	25 R, 25 D
2020 Chief Justice (0.0-pt. R win)	28 R, 22 D	23 R, 27 D

Note: Data derived from Duchin Aff., Table 6 (App. 238).

Even when Democratic candidates win statewide by significant margins, the Enacted Senate Plan again locks in Republican majorities. Under any plausible scenario—including significant Democratic victories like the 2020 gubernatorial election—Table 4 shows that the Enacted Senate Plan awards Republicans at least 26 of 50 Senate seats, and sometimes more. *Id.*

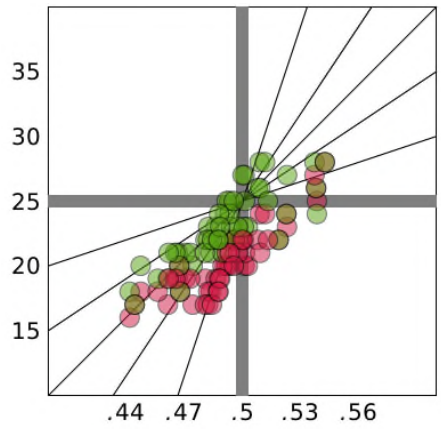
Table 4: Outcomes in 3 Democratic Elections in Enacted & Optimized Senate Maps

Election (margin)	Enacted Senate Plan	Optimized Senate Map
2020 Governor (4.6-pt. D win)	27 R, 23 D	23 R, 27 D
2020 Sec'y of State (2.3-pt. D win)	26 R, 24 D	22 R, 28 D
2020 Auditor (1.8-pt D win)	26 R, 24 D	22 R, 28 D

Note: Data derived from Duchin Aff., Table 6 (App. 238).

Indeed, for every vote share across 52 recent general elections, the Enacted Senate Plan manufactures a pro-Republican bias, as Figure 3 shows.

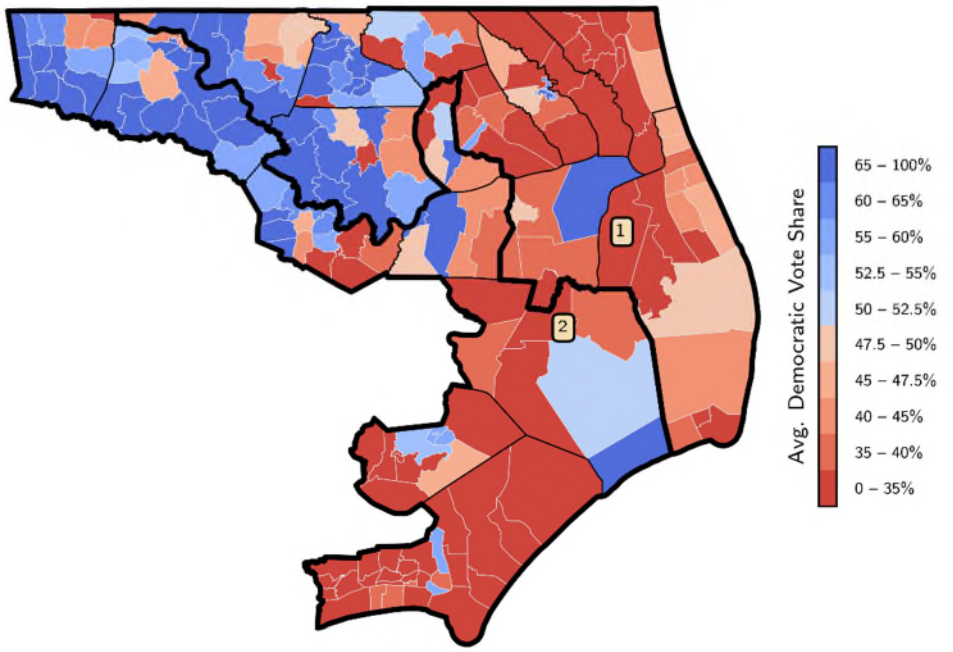
Figure 3: Vote Shares and Seat Shares in Enacted & Optimized Senate Maps



Note: Data derived from 52 recent general-election contests. Red dots denote results under the Enacted Senate Plan. Green dots denote results under the Optimized Senate Map in the same 52 elections.

Again, the Enacted Senate Plan achieves these skewed results by cracking and packing. As just one example, Figure 4 depicts northeastern North Carolina, which is home to large Democratic-voting populations that form substantial majorities in Bertie, Halifax, Hertford, Northampton, and Warren Counties. These counties could have been placed in the same district, creating one district where Democrats have an opportunity to elect candidates to the Senate, and another district that Republicans will win. There was every reason to do so: It would have reduced the number of county traversals and improved compactness, consistent with the *Stephenson/Dickson* framework. *See Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397; Verified Compl. ¶ 104(b) (App. 172). Instead, the Enacted Senate Plan splits these majority-Democratic counties between two districts to crack Democratic voters. The result is two Senate seats that will reliably vote Republican, at the cost of violating the *Stephenson/Dickson* framework. Verified Compl. ¶ 104(c) (App. 172).

Figure 4: Cracking in Northeastern North Carolina



This is only one of many ways the General Assembly subordinated traditional districting principles. The *Stephenson*/*Dickson* framework emphasizes minimizing county traversals. *See Dickson II*, 368 N.C. at 490, 781 S.E.2d at 413. The Enacted Senate Plan, however, traverses county lines 97 times—eight more traversals than in the Optimized Senate Map. Duchin Aff. 6 (App. 230). North Carolina law also requires pursuing compact districts—as set forth in each of steps four, five, seven, and nine of the *Stephenson*/*Dickson* framework. *Dickson II*, 368 N.C. at 490–91, 781 S.E.2d at 413. The Enacted Senate Plan, however, is less compact than the Optimized Senate Map. Duchin Aff. 5 (App. 229). Finally, North Carolina law favors keeping municipalities intact. *See Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 397. Yet the Enacted Senate Plan splits more municipalities, into more parts, than the Optimized Senate Map. Duchin Aff. 6 (App. 230); Verified Compl. ¶ 171 (App. 201).

3. The Enacted House Plan Is an Extreme Partisan Gerrymander.

The Enacted House Plan is also engineered to entrench Republican power. In close elections, the Enacted House Plan creates a "firewall" that guarantees a safe majority of at least 16 seats (a 68-to-52 majority). *Common Cause*, 2019 WL 4569584, at *32; Duchin Aff. 10, 14 (App. 234, 238).

Table 5: Outcomes in 5 Close Elections in Enacted & Optimized House Maps

Election (margin)	Enacted House Plan	Optimized House Map
2016 Governor (0.2-pt. D win)	70 R, 50 D	62 R, 58 D
2016 Atty General (0.5-pt. D win)	70 R, 50 D	63 R, 57 D
2016 Super. Pub. Instr. (1.2-pt. R win)	71 R, 49 D	63 R, 57 D
2020 President (1.4-pt. R win)	70 R, 50 D	60 R, 60 D
2020 Chief Justice (0.0-pt. R win)	68 R, 52 D	60 R, 60 D

Note: Data derived from Duchin Aff., Table 6 (App. 238).

Again, even when Democratic candidates win by significant margins, the Enacted House Plan guarantees a Republican majority. As Dr. Duchin's analysis shows, under ***any*** plausible scenario—so long as the margin is within seven points—the map awards Republicans at least 62 House seats, and typically at least 66. Duchin Aff. 14 (App. 238).

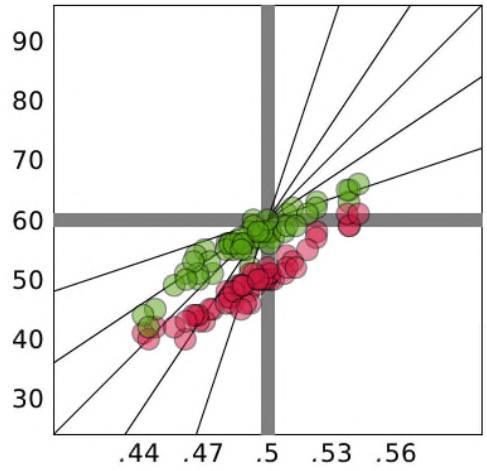
Table 6: Outcomes in 3 Democratic Elections in Enacted & Optimized House Maps

Election (margin)	Enacted House Plan	Optimized House Map
2020 Governor (4.6-pt. D win)	62 R, 58 D	57 R, 63 D
2020 Sec'y of State (2.3-pt. D win)	67 R, 53 D	58 R, 62 D
2020 Auditor (1.8-pt D win)	66 R, 54 D	59 R, 61 D

Note: Data derived from Duchin Aff., Table 6 (App. 238).

Indeed, for every vote share across 52 recent general elections, the Enacted House Plan manufactures a pro-Republican bias, as Figure 5 underscores.

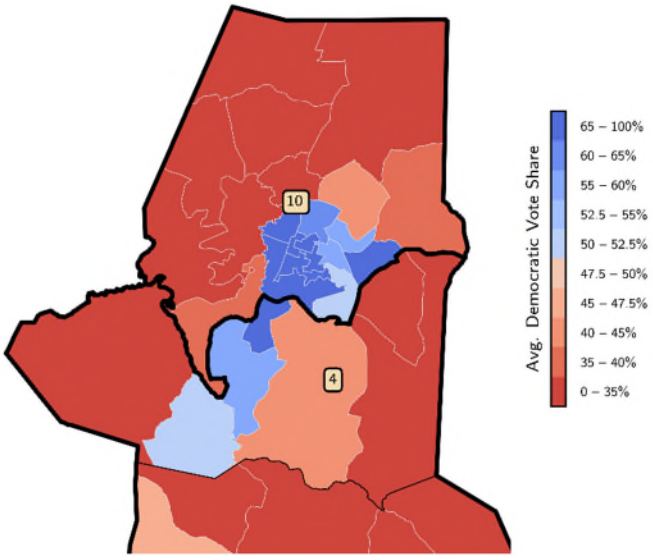
Figure 5: Vote Shares and Seat Shares in Enacted & Optimized House Maps



Note: Data derived from 52 recent general-election contests. Red dots denote results under the Enacted House Plan. Green dots denote results under the Optimized House Map in the same 52 elections.

As before, the skewed results again reflect the General Assembly's cracking and packing. Wayne County provides just one example. It contains many Democratic voters in Goldsboro and the community of Brogden just to the south. Verified Compl. ¶ 121 (App. 179–80). But instead of keeping them together, the Enacted House Plan cracks Wayne County's Democrats between House Districts 4 and 10 to create two reliably Republican districts. *Id.*

Figure 6: Cracking in Wayne County



Across the plan, the General Assembly subordinated traditional districting principles in pursuit of partisan gain. It traverses county lines 69 times (three more than the 66 traversals in the Optimized House Map), is less compact than the Optimized House Map, and breaks more municipalities into more parts. Duchin Aff. 6 (App. 230); Verified Compl. ¶ 179 (App. 204).

4. The NCLCV Petitioners Are Likely to Succeed in Showing that the Enacted Plans' Partisan Gerrymanders Violate the North Carolina State Constitution.

The NCLCV Petitioners are likely to succeed in showing that this partisan gerrymandering violates of each of the provisions discussed above.

Free Elections Clause. The Enacted Plans do the same thing as the maps that *Common Cause* invalidated as violating the Free Elections Clause. They were "designed, specifically and systematically, to maintain Republican majorities" in Congress and the General Assembly. *Common Cause*, 2019 WL 4569584, at *112. Without disputing that point, the panel averred that the Enacted Plans could not

have violated the Free Elections Clause because "evidence of intent is required" and the "evidence presented" supposedly "show[ed] that the General Assembly did not use any partisan data … suggesting a lack of intent." December 3 Order at 11 (App. 11).

But to begin, this Court has held that when laws undermine free elections, "it is the effect of the act, and not the intention of the Legislature, which renders it void." *Van Bokkelen*, 73 N.C. at 225–26. That makes sense: If the General Assembly violates the bedrock command that "elections shall be free," it is no answer to insist that the General Assembly did not mean to prevent the "will of the people" from governing. *Common Cause*, 2019 WL 4569584, at *112.

Moreover, the panel erred when it said that the "evidence" suggested that the General Assembly did not use partisan data. True, the General Assembly adopted a redistricting criterion stating that "[p]artisan considerations and election results data shall not be used." But the General Assembly adopted this criterion only to avoid the frank ***admission*** of partisan intent that doomed it in *Common Cause* and *Harper*. As explained above, this criterion meant only that the redistricting committees' computer terminals did not contain electoral data. Verified Compl. ¶ 70 (App. 157). Members were free to draw maps outside the hearing rooms, using whatever data they liked, and then redraw them on the public terminals—and indeed, the House committee chairman admitted that he had no intention of blocking such maneuvers. *Id.*; Liberman Aff. ¶ 2 (App. 249–52).

In reality, evidence of intent abounds. Intent "may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more

heavily on one [group] than another." *Holmes*, 270 N.C. App. at 17, 840 S.E.2d at 255 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). In particular, the U.S. Supreme Court has emphasized that so "long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Davis v. Bandemer*, 478 U.S. 109, 128 (1986). That is so for a commonsense reason: "[T]hose responsible for the legislation will know the likely political composition of the new districts." *Id.* Indeed, it "is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended." *Gaffney*, 412 U.S. at 753. In fact, the Legislative Defendants admitted in the Superior Court that "legislative leadership did not say to all the Republicans … before you sit down in front of that computer terminal, you have to go have a lobotomy and take out all your political knowledge" and that "[n]obody expected them to do that." Tr. 45:3–6 (App. 59).

Particularly given that admission, the assertion that the General Assembly did not intend to gerrymander does not withstand scrutiny. Accepting that assertion would require believing all of the following:

1. That the General Assembly drew a congressional map that yields 10 Republican and 4 Democratic seats, even in close elections in which Democrats win a majority of the statewide vote—*by accident*.

2. That the General Assembly baked in a 6-seat Republican Senate majority and a 16-seat House majority, even when Democratic candidates win a majority of the statewide vote—*without realizing it*.

3. That the General Assembly prevented Democratic candidates from winning majorities in the congressional delegation, the state Senate, or the state

House unless they perform the rare feat of winning the statewide vote by more than 7 points—*by happenstance.*

4. That when, to take just one example, the General Assembly's congressional plan split the three counties with the largest numbers of Democratic voters in the state—and only those three counties—three ways each, it was *coincidence*.

5. That even though the General Assembly adopted the Enacted Plans after being repeatedly told that the maps constituted partisan gerrymanders, *see* Verified Compl. ¶ 89 & n.27 (App. 163–64); Liberman Aff. ¶¶ 3–4 (App. 252–53); Feldman Aff. Exs. AA–AB (App. 478–87), Defendants did not *mean* to gerrymander.

6. That after *Common Cause* and *Harper* in 2019 found that the General Assembly engaged in "intentional … and systematic gerrymandering," *Common Cause*, 2019 WL 4569584, at *129, the General Assembly in 2021 just *stumbled upon* equally skewed maps.

7. That when the General Assembly did not act after being told that its paper ban on "[p]artisan considerations and election results" was sure to be violated, Verified Compl. ¶ 70 (App. 157); Liberman Aff. ¶ 2 (App. 249–52), that had *nothing to do* with the General Assembly's understanding that its mapmakers would rely on partisan considerations outside the hearing rooms.

8. That even though the General Assembly was warned by legislators in both chambers that the maps were unconstitutional partisan gerrymanders, it had *no idea* that the maps it enacted would have this effect. Verified Compl. ¶¶ 89, 98 (App. 163–64, 169); Liberman Aff. ¶ 3 (App. 252–53).

9. That when the General Assembly adopted a rushed process that limited public and expert scrutiny of its proposed maps before their enactment, that choice again had *nothing to do* with the gerrymandered results the General Assembly knew such scrutiny would spotlight.

The reality is that the General Assembly enacted extreme partisan gerrymanders because it wanted to do so. And it declined to enact fair maps like the Optimized Maps because it did not want fair maps.

Equal Protection Clause. The NCLCV Petitioners are also likely to succeed in showing that the Enacted Plans violate the Equal Protection Clause. As *Common*

Cause held, a partisan gerrymander violates that clause when (1) a "'predominant purpose'" of the map drawers was to "'entrench [their party] in power'"; and (2) the maps "have the intended effect" and "'substantially' dilute [the disfavored party's] votes." *Common Cause*, 2019 WL 4569584, at *114 (quoting *Ariz. State Legis.*, 135 S. Ct. at 2658). The Enacted Plans do both those things, for reasons already explained.

Free Speech and Free Assembly Clauses. The Enacted Plans also violate the Free Speech and Free Assembly Clauses. First, the Enacted Plans constitute "viewpoint discrimination" (as well as retaliation) against certain voters and dilute their votes, based on the viewpoints they express—namely, that they favor the Democratic Party, which the Enacted Plans seek to exclude from power. *Common Cause*, 2019 WL 4569584, at *121, *123. Second, the Enacted Plans violate associational rights in all the ways explained above. They prevent "Democratic voters who live in cracked districts [from] instruct[ing] their representatives or obtain[ing] redress from their representatives"; they make it harder for the disfavored parties and for politically oriented associations to "carry out [their] core functions and purposes"; and they force these organizations "to drain and divert resources … merely to avoid being relegated to a superminority." *Id.* at *122–23.

C. The Panel's Non-Merits Holdings Contravene Established Law.

The panel also offered several non-merits reasons why the NCLCV Petitioners could not obtain relief even though the Enacted Plans constitute extreme partisan gerrymanders. These holdings contravene established law.

Political Question Doctrine. First, the panel held that North Carolina courts lack the power to decide partisan gerrymandering claims. December 3 Order at 7 (App. 7). According to the panel, the Constitution delegates redistricting solely to the General Assembly. *Id.*

Common Cause explained why this view is misplaced. Partisan gerrymandering claims do not involve, as the political question doctrine requires, "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001). Indeed, "North Carolina courts have adjudicated claims that redistricting plans violated the Whole County Provision, the mid-decade redistricting bar, the Equal Protection Clause, and other provisions of the North Carolina Constitution." *Common Cause*, 2019 WL 4569584, at *124 (citing cases). The panel's opinion does not address these points or this explanation in *Common Cause*.

Standing. The panel also concluded that the NCLCV Petitioners had not shown a likelihood of standing. December 3 Order at 8. That conclusion, however, failed to grapple with the NCLCV Petitioners' principal arguments and evidence. "[B]ecause North Carolina courts are not constrained by the 'case or controversy' requirement of Article III of the United States Constitution, our State's standing jurisprudence is broader than federal law." *Davis v. New Zion Baptist Church*, 258 N.C. App. 223, 225, 811 S.E.2d 725, 727 (2018). Hence, the NCLCV Petitioners need show only "(1) the presence of a legally cognizable injury; and (2) a means by which the courts can remedy that injury." *Id.* In *Common Cause*, the court found that the

North Carolina Democratic Party had standing because its members included "registered Democratic voters located in every state House and state Senate District across our State." 2019 WL 4569584, at *107.

The same is true here. NCLCV "has members who are registered Democratic voters in all 14 districts under the Enacted Congressional Plan, all 50 districts under the Enacted Senate Plan, and all 120 districts under the Enacted House Plan." Verified Compl. ¶ 11 n.4 (App. 137). And an associational plaintiff, like the North Carolina Democratic Party or NCLCV, has standing "to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members." *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990).

Here, NCLCV meets each requirement. Not only does NCLCV have members in every district under every plan, but the interests NCLCV seeks to vindicate here are "germane to [its] purpose." *Id.* NCLCV seeks to "elect legislators and statewide candidates who share its values," to "build a pro-environment majority across … North Carolina," and to "hold elected officials accountable for their votes and actions." Verified Compl. ¶ 11 (App. 136–37). Challenging the Enacted Plans' partisan gerrymanders—which will thwart this pro-environment majority and make it impossible to hold officials to account—is "germane" to these purposes. Finally, just as in *Common Cause*, the "declaratory and injunctive relief" sought here does not

"require[] the participation of individual … members in this lawsuit." 2019 WL 4569584, at *107.[6]

Status Quo. Finally, the panel wrote that the NCLCV Petitioners could not obtain a preliminary injunction because the relief they seek would "alter[] the status quo." December 3 Order at 10. If the panel's theory were the law, North Carolina courts could ***never*** issue preliminary injunctions against redistricting plans, no matter how flagrantly unconstitutional.

Fortunately, that theory is not the law. First, an injunction against using the Enacted Plans in the 2022 primary would preserve the status quo: the NCLCV Petitioners have never been forced to vote under these unlawful maps, and the NCLCV Petitioners seek to preserve that status quo. Second, in any event, although the "general rule" is that preliminary injunctions maintain the status quo, *Roberts v. Madison Cnty. Realtors' Ass'n*, 344 N.C. 394, 474 S.E.2d 783, 788 (1996), that is not a categorical requirement, as the panel incorrectly believed. Instead, North Carolina courts have broad and flexible equitable powers. *Kinlaw v. Harris*, 364 N.C. 528, 532, 702 S.E.2d 294, 297 (2010).

Election-law cases often call on courts to use those powers. The 2022 elections must proceed under ***some*** maps, and the maps used before 2021—which constitute the "status quo" before the General Assembly passed the Enacted Plans—no longer comply with the Federal Constitution's equal-population requirements. That means

[6] This standing theory is only one of several that the NCLCV Petitioners pressed before the Superior Court and intend to press on appeal.

remedial maps are needed (and the NCLCV Petitioners have proposed their Optimized Maps for that purpose). None of that, however, changes the fact that the NCLCV Petitioners' preliminary injunction seeks to maintain the status quo, properly understood. *Cf.* N.C.G.S. § 120-2.4(a) (statute laying out remedial process when maps found unlawful).[7]

II. Preservation of the Status Quo Is Necessary to Avoid the Waste and Inconvenience that Would Result from the Candidate-Filing Period Proceeding on the Basis of Unlawful Maps.

Relief from an appellate court—either the Court of Appeals or this Court—is needed to preserve the status quo and avoid the waste and inconvenience that will result from the opening of the candidate-filing period on the basis of the unlawful Enacted Plans.

A. Conducting the Candidate-Filing Period under Unlawful Maps Will Lead to Waste and Inconvenience.

If necessary, an order from this Court is warranted to prevent the waste and inconvenience that the candidate-filing period will yield. Writs of supersedeas often issue in election-law cases, *see, e.g.*, *Cmty. Success Initiative v. Moore*, 861 S.E.2d 885, 886 (N.C. 2021) (unpublished), and in other cases implicating important

[7] The panel also stated that the NCLCV Petitioners could not pursue state-law claims concerning congressional districts because "it is the federal Constitution which provides the North Carolina General Assembly with the power to establish such districts" and thus, supposedly, "to address these claims, this Court must derive authority from the federal Constitution." December 3 Order at 11–12 (App. 11–12). The panel, however, cited no authority to support that proposition. None exists. If the General Assembly violates state law in drawing congressional districts, state law may provide a remedy.

constitutional questions, *see, e.g.*, *N.C. State Bd. of Educ. v. State*, 371 N.C. 170, 175, 814 S.E.2d 67, 71 (2018).

Indeed, the relief sought here is consistent with what other courts have granted: In *Harper*, for example, the three-judge panel enjoined the candidate-filing period for the 2020 congressional primary election "until further order," to "allow the Court sufficient opportunity" to review the legality of maps at issue.[8] In *Stephenson I*, this Court granted far more significant relief—enjoining the primary elections for the Senate and House, resulting in a deferral of the candidate-filing period and the deferral of all primary elections. 355 N.C. at 360, 562 S.E.2d at 382.

If the Enacted Plans are ultimately used in the 2022 primary and general elections, the NCLCV Petitioners will suffer irreparable harm of the most grievous sort: Their fundamental right to vote will lose all meaning. *See Holmes*, 270 N.C. App. at 35, 840 S.E.2d at 266 ("Courts routinely deem restrictions on fundamental voting rights irreparable injury.… [D]iscriminatory voting procedures in particular are the kind of serious violation of the Constitution … for which courts have granted immediate relief." (quoting *League of Women Voters of N.C. v. North Carolina*, 769

[8] Order at 2, *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct. Nov. 20, 2019) (unpublished); *see also* Order at 1, *Harper v. Lewis*, No. 19-CVS-012667 (N.C. Super. Ct. Dec. 2, 2019) (unpublished) (setting aside the injunction delaying the filing period for the congressional elections and ordering that period to begin by directing the State Board to "immediately accept for filing any notices of candidacy" from congressional candidates); *accord Harper*, 2019 N.C. Super. LEXIS 122, at *24–25 (preliminarily enjoining legislative defendants and State Board of Elections "from preparing for or administering the 2020 primary and general elections" and retaining jurisdiction "to move the primary date for the congressional elections, or all of the State's 2020 primaries, including for offices other than Congressional Representatives, should doing so become necessary to provide effective relief").

F.3d 224, 247 (4th Cir. 2014))). To be sure, that most grievous irreparable harm is not at issue in this petition: The NCLCV Petitioners are seeking, via their appeal on the merits, an injunction against the use of the Enacted Plans—and even if the candidate-filing period proceeds under the Enacted Plans, it can be redone if this Court enjoins the Enacted Plans. Nonetheless, permitting the candidate-filing period to proceed will yield waste and inconvenience, which a writ of supersedeas can avoid.

The waste and inconvenience will take at least four forms. First, the 2022 election season will commence in earnest based on unlawful maps designed to entrench one party in power. Second, absent a court order, the State Board will have to waste public resources by conducting candidate filing under unlawful maps. After those maps are declared unlawful (as is likely) the State Board will have to do this process over again. Third, opening the candidate-filing process, and then restarting it after the Enacted Plans are declared unconstitutional, could create unnecessary confusion. Candidates that have already filed will have to refile their candidacies, potentially in different districts. *Cf. Holmes*, 270 N.C. App. at 36, 840 S.E.2d at 266 ("While the future of [the requested] injunction and litigation is uncertain, enjoining the law during the litigation of this action … further helps prevent voter confusion…."). Fourth, even though it is feasible for the State Board to redo the candidate-filing period if the Enacted Plans are enjoined, Petitioners expect that the General Assembly will—incorrectly—invoke the closing of the candidate-filing period as militating against enjoining the Enacted Plans.

None of this is necessary. As detailed below, the Court can conserve public resources and allow for the orderly adjudication of the NCLCV Petitioners' claims without harm to the sound administration of the 2022 primary. Indeed, it was this very urgency that the panel recognized when it promptly scheduled a hearing for December 3, when it rapidly issued its order just hours after argument, and when it immediately certified for appeal its December 3 Order. Tr. 74:17–25 (App. 88) ("But let's be honest, we are on this compressed schedule, being required to make a determination five hours and four minutes before the next business -- five hours and four business minutes from the date that the filings begin because the legislature wouldn't move back the filing period or the primaries for the congressional and legislative districts while they … gave that possibility to municipal[ities]."). While the panel reached the wrong result on the merits, it correctly recognized the urgency. If necessary, this Court should do the same by staying the candidate-filing period while the NCLCV Petitioners pursue review.

B. The Balance of the Equities and the Public Interest Favor Immediate Relief.

The balance of the equities and the public interest also favor halting the candidate-filing period from proceeding. Given that geocoding under the Enacted Plans can occur simultaneously with the candidate-filing period, as the State Board explained in the Superior Court, it appears that the primary elections can occur as scheduled even with a delay in the filing period. *See Holmes*, 270 N.C. at 36, 840 S.E.2d at 266 (finding that the "public interest" and the "balance of equities" supported preliminary injunctive relief aimed at avoiding "voter confusion").

At most, this challenge may eventually require a delay in the March 8 primary date. But if such a delay becomes necessary, it will not be unusual or unprecedented. Indeed, in *Harper*, the General Assembly stated that while it might "prefer not to move elections or otherwise change the current schedule," it "acknowledge[d] that the election schedule can be changed if necessary." *Harper*, 2019 N.C. Super. LEXIS 122, at *20. In fact, in another suit challenging the General Assembly's 2021 redistricting process, the former head of the State Board testified that he had overseen "delayed primaries in the 1990s, in 2002, and in 2004." Affidavit of Gary Bartlett ¶ 11, *N.C. State Conf. of NAACP v. Berger*, No. 21-CVS-014476 (N.C. Super. Ct. Nov. 5, 2021). That included this Court's decision in *Stephenson I*, which likewise resulted in the delay of the May 2002 primary by several months. *Stephenson I*, 355 N.C. at 359–60, 562 S.E.2d at 382–83; *N.C. State Bd. of Elec. v. United States*, 208 F. Supp. 2d 14, 16 (D.D.C. 2002); *see Stephenson II*, 357 N.C. at 303–04, 582 S.E.2d at 248–49.

Here, any concerns about delay should be alleviated by the State Board's confirmation that holding the primary election as late as May 17 is feasible so long as the Board receives new district maps no later than the week of February 14. Bell Aff. ¶ 23 (App. 695). The NCLCV Petitioners have proposed an expedited schedule to meet that deadline with ample time to spare.[9]

[9] The NCLCV Petitioners are seeking a writ of supersedeas preserving the status quo and staying the candidate-filing period for ***all*** offices, even though they challenge only the maps for Congress and the General Assembly. That is because some candidates may be deciding which of several offices to run for. It would therefore be inappropriate to allow the candidate-filing period to proceed for some offices even as it remains stayed for other offices. Similarly, to the extent a delay in the March 8 primary ultimately proves necessary, the State Board has explained that it desires a

Delay-based concerns are especially immaterial because the General Assembly's own actions are the only reason postponement may be needed here. When the State Board told the General Assembly that it should push back the March 2022 primary to May 2022 because of the delayed census data, the General Assembly refused—even though a May 2022 primary is consistent with (or earlier than) the schedules set by every other state (except Texas). A May 2022 primary is also consistent with the schedules for the first primaries after the prior redistricting cycles in 2000 and 2010—when primaries were set for May, not March. Bartlett Aff. ¶ 30.

C. Suspending the Candidate-Filing Period Will Preserve the Status Quo.

Preserving the status quo by suspending the candidate-filing period is appropriate relief here, pending review of the December 3 Order. The "status quo" is the "last peaceable" status that existed between the parties "before the dispute … arose." *State v. Fayetteville St. Christian Sch.*, 299 N.C. 731, 733, 265 S.E.2d 387, 388 (1980). In cases like this one that involve constitutional challenges to statutes (or analogous government action), the last peaceable uncontested status between the parties is the status ***before*** the statute takes effect. *See, e.g.*, *Firearm Owners Against Crime v. Lower Merion Twp.*, 151 A.3d 1172, 1181 (Pa. Commw. Ct. 2016);

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delay of ***all*** March 8 primary elections, not just those for Congress and the General Assembly. Bell Aff. ¶¶ 15–22 (App. 692–95). According to the State Board, allowing ***some*** of the March 8 primaries to proceed would be more disruptive than delaying ***all*** of the March 8 primaries. If this Court nonetheless determines that the requested relief is too broad, the NCLCV Petitioners request in the alternative that the filing period be postponed solely for candidates for Congress, the state Senate, and the state House. The temporary stay granted by the Court of Appeals applies only to the primary elections for Congress, the state Senate, and the state House.

Makindu v. Ill. High Sch. Ass'n, 40 N.E.3d 182, 193 (Ill. Ct. App. 2015). As relevant to this petition, the NCLCV Petitioners seek to preserve the status quo that exists ***before*** the candidate-filing period begins. Candidates have never filed for candidacy under the unlawful Enacted Plans, and the NCLCV Petitioners seek to preserve that status quo.

CONCLUSION

For the reasons set forth above, the NCLCV Petitioners ask that this Court allow discretionary review of the December 3 Order prior to determination by the Court of Appeals, or alternatively issue a writ of certiorari, and suspend the appellate rules to expedite a decision on this matter in the public interest. To the extent necessary or appropriate, the NCLCV Petitioners also respectfully urge this Court to issue a writ of supersedeas or prohibition to stay the candidate-filing period pending this Court's review of the December 3 Order.

Respectfully submitted this 6th day of December, 2021.

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N.C. R. App. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it:

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VERIFICATION

The undersigned attorney for Petitioners, after being duly sworn, says:

The material allegations of the foregoing are true to the best of my personal knowledge. Pursuant to Appellate Rules 22 and 23, I also hereby certify that the documents attached to this Petition are believed to be true and correct copies of the pleadings and other documents from or associated with the file in Wake County Superior Court pertaining to this action, including documents that were served or submitted for consideration as contemplated by Appellate Rule 11.

Erik R. Zimmerman

Orange County, North Carolina

Sworn to and subscribed before me by
this 6th day of December 2021.

Sarah Ericksen
Notary Public

SARAH ERICKSEN
NOTARY PUBLIC
Wake County
North Carolina
My Commission Expires Jan. 18, 2026

Sarah Ericksen
Printed Name

My commission expires: JAN. 18, 2026

CERTIFICATE OF SERVICE

Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I hereby certify that the foregoing document and all attachments have been filed with the Clerk of the North Carolina Supreme Court by electronic submission. I further certify that a copy of this document has been duly served upon the following counsel of record by electronic mail:

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This the 6th day of December, 2021.

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