

NORTH CAROLINA COURT OF APPEALS

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BEVERLY BARD; RICHARD LEVY;  
SUSAN KING COPE; ALLEN WELLONS;  
LINDA MINOR; THOMAS W. ROSS, SR.;  
MARIE GORDON; SARAH KATHERINE  
SCHULTZ; JOSEPH J. COCCIA;  
TIMOTHY S. EMERY; and JAMES G.  
ROWE;

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF  
ELECTIONS; ALAN HIRSCH, in his  
official capacity as Chair of the North  
Carolina State Board of elections; JEFF  
CARMON III, in his official capacity as  
Secretary of the North Carolina State  
Board of Elections; STACY “FOUR”  
EGGERS, in his official capacity as a  
Member of the North Carolina State Board  
of Elections; SIOBHAN O’DUFFY  
MILLEN, in her official capacity as a  
Member of the North Carolina State Board  
of Elections; KEVIN N. LEWIS, in his  
official capacity as a Member of the North  
Carolina State Board of Elections; PHILIP  
E. BERGER, in his official capacity as  
President Pro Tempore of the North  
Carolina Senate; and DESTIN HALL<sup>1</sup>, in  
his official capacity as Speaker of the North  
Carolina House of Representatives,

Defendants.

From Wake County  
No. 24CV003534-910

\*\*\*\*\*

**LEGISLATIVE DEFENDANTS’ REPLY TO AMICUS CURIAE BRIEF**

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<sup>1</sup> Pursuant to N.C. R. Civ. P. 25(f)(1), Destin Hall is substituted for former Speaker Moore, who was named in his official capacity as Speaker of the North Carolina House.

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Defendants.

\*\*\*\*\*

**LEGISLATIVE DEFENDANTS’ REPLY TO AMICUS CURIAE BRIEF**

\*\*\*\*\*

## **INTRODUCTION**

On February 28, 2025, counsel for some of Legislative Defendant-Appellees (“Legislative Defendants”) were served with a proposed Amicus brief on behalf of Charles Thelen Plambeck, the Hon. Robin E. Hudson, and Joni L. Walser (the “Amici”). The Amicus Brief, filed in support of Plaintiff-Appellants (“Plaintiffs”), was accepted for filing on March 5, 2025. While Legislative Defendants do not dispute the right of the Amici to file a brief in this action, Legislative Defendants submit this reply under N.C. R. App. P. 28(i)(6) to ensure the Court is not misled by Amici’s inaccurate claims about the redistricting process and the argument Plaintiffs’ actually made to the three-judge panel below.<sup>2</sup>

## **ARGUMENT**

### **I. Amici’s Factual Statements Regarding Redistricting are Misleading.**

Amici argue (at p 5) that “the General Assembly amassed data about the Plaintiffs—their residence, income, age, religion, race, ethnicity, gender, occupation, level of education, political affiliation and other personal information” to engage in the redistricting process.<sup>3</sup> Amici do not cite to any evidence, whether in the record or otherwise, in support of this bold accusation. While redistricting is admittedly complex, Amici’s accusation is, at best, misleading and Legislative Defendants are compelled to correct the record.

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<sup>2</sup> Prior to the acceptance of the Amicus brief, counsel for Legislative Defendants and counsel for Amici met and conferred on these issues, but were unable to reach an agreement.

<sup>3</sup> Tellingly, this is not even an argument raised by Plaintiffs below. Instead, Plaintiffs refer not to any individual data, but pools of data. (See R pp 13-26).

First, when engaging in redistricting, the General Assembly is required under federal and state law to use the decennial census data. U.S. Const. art. 1, §2; N.C. Const. art. II, §§3, 5; *Gaffney v. Cummings*, 412 U.S. 735, 745-47 (1973). The record reveals that the General Assembly complied with that legal mandate. (R pp 32-35). The problem with Amici’s first claim, namely that “the General Assembly amassed data about the Plaintiffs” is that the decennial census expressly does not publish individual level data.<sup>4</sup> (Amici Br. p. 5). In fact, the Census Bureau, a federal agency, is required by law to keep Americans’ individual information confidential.<sup>5</sup> See 13 U.S.C. §§9, 214. The Census Bureau also states publicly that they “do not identify individuals in the data we publish.”<sup>6</sup> In fact, the Census Bureau recently became increasingly concerned about data privacy and security, and made several adjustments since administration of the census in 1990 to enact measures to protect the privacy of individual’s responses.<sup>7</sup> When conducting the 2020 decennial census, the Census Bureau “zealously” guarded Americans’ privacy by using a method called differential privacy, which protects against future data threats, and plugs potential leaks of individual data using mathematical principle to apply statistical noise to the

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<sup>4</sup> Nor obviously does the North Carolina State Board of Elections publish how any individual North Carolinian voted in a given election.

<sup>5</sup> See also *Federal Law*, United States Census Bureau (Feb. 3, 2025), [https://www.census.gov/about/policies/privacy/data\\_stewardship/federal\\_law.html](https://www.census.gov/about/policies/privacy/data_stewardship/federal_law.html). This Court may take judicial notice of information on government websites and other official materials. See *Blackburn v. Bugg*, 723 S.E.2d 585, 2012 WL 1332728, at \*4 (N.C. Ct. App. 2012); *State v. Hinton*, 269 N.C. App. 110, 2019 WL 6875341, at \*4 (2019).

<sup>6</sup> *Data Stewardship*, United States Census Bureau (Nov. 18, 2021), [https://www.census.gov/about/policies/privacy/data\\_stewardship.html](https://www.census.gov/about/policies/privacy/data_stewardship.html).

<sup>7</sup> *Modernizing Privacy Protections for the 2020 Census: Next Steps*, United States Census Bureau (Apr. 28, 2021), [https://www.census.gov/newsroom/blogs/random-samplings/2021/04/modernizing\\_privacy.html](https://www.census.gov/newsroom/blogs/random-samplings/2021/04/modernizing_privacy.html).

dataset.<sup>8</sup> Therefore, it is impossible that the General Assembly, or anyone for that matter, could obtain Plaintiffs' individual information from the decennial census.

Second, the Census Bureau's decennial census data collection process does not even collect much of the information Amici claim the General Assembly "amassed." It is well-documented that the decennial census only collects data regarding a respondent's voting age, race, Hispanic or Latino origin, sex, and information on housing occupancy status including group quarters population.<sup>9</sup> No information is gathered regarding income, religion, occupation, level of education, political affiliation, or "other" personal data in the decennial census.<sup>10</sup> Moreover, simply because the Census Bureau publishes data from the decennial census, does not mean the General Assembly actually used all the published data. It is well-known that the General Assembly has not used racial data in redistricting since 2017. *Pierce v. N. Carolina St. Bd. of Elections*, 97 F.4th 194, 205-06 (4th Cir. 2024). It is likewise undisputed that the General Assembly's 2023 Redistricting Criteria forbid using race to draw districts (R pp 32-35), and that the publicly available legislative record confirms this criterion was followed.<sup>11</sup> In fact, last year a federal district court found

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<sup>8</sup> *Modernizing Privacy Protections for the 2020 Census: Next Steps*, United States Census Bureau (Apr. 28, 2021), [https://www.census.gov/newsroom/blogs/random-samplings/2021/04/modernizing\\_privacy.html](https://www.census.gov/newsroom/blogs/random-samplings/2021/04/modernizing_privacy.html).

<sup>9</sup> *About 2020 Census Data Products*, United States Census Bureau, <https://www.census.gov/programs-surveys/decennial-census/decade/2020/planning-management/release/about-2020-data-products.html> (last accessed Mar. 26, 2025).

<sup>10</sup> While other American Community Surveys may include periodic surveys with some of this information, it is undisputedly not contained in the decennial census data used in redistricting.

<sup>11</sup> See *Pierce*, 97 F.4th at 206; see also *Pierce v. N. Carolina St. Bd. of Elections*, No. 4:23-CV-193, at D.E. 39-5 (E.D.N.C. Dec. 22, 2023), attached hereto as **Exhibit A**, which is a transcript of the legislative deliberations filed with the trial court in the *Pierce* case. The transcript clearly shows that race was not used. The Court may take judicial notice of



that no racial data was used in redistricting of the 2023 Senate Plan, and that race was not loaded into the computer that the General Assembly used to create the Senate, House, and Congressional districting plans in 2023. *Pierce v. N. Carolina State Bd. of Elections*, 713 F. Supp. 3d 195, 207, 211 (E.D.N.C. Jan. 26, 2024). Both factual findings were affirmed by the Fourth Circuit. *Pierce*, 97 F.4th at 205-06. Plaintiffs here do not make any allegations of race-based redistricting or raise any racial claims. As such, not only is the information provided by Amici false and misleading, it's also entirely irrelevant to this appeal.

## **II. The Amicus Brief Shows That the Superior Court Properly Dismissed Plaintiffs' Complaint.**

Instead of grappling with Plaintiffs' arguments and the allegations in their Complaint, Amici present a history of North Carolina's Constitution and raise issues not raised in Plaintiffs' Complaint. But pursuant to North Carolina law, a trial court considering a Rule 12(b)(6) motion is bound by the allegations in the Complaint. *Blue v. Bhiri*, 381 N.C. 1, 5, 871 S.E.2d 691, 694 (2022) ("[W]hen considering a Rule 12(b)(6) motion, the trial court is limited to reviewing the allegations made in the complaint."). On appeal, this Court is likewise bound by the sufficiency of the pleadings. *Proctor v. City of Jacksonville*, 910 S.E.2d 269, 273-74 (N.C. Ct. App. 2024). Plaintiffs only raised a claim in their Complaint under N.C. Const. art. I, § 36. Thus, Amici's arguments regarding N.C. Const. art. I, §§2, 10, 19, 32, 33, 34, and art. II are not issues before this Court. Because Amici's only mention of N.C. Const. art. I, §36

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documents filed in the federal court in *Pierce*. See *State v. Watson*, 258 N.C. App. 347, 352, 812 S.E.2d 392, 396 (2018) (holding that trial and appellate courts may take judicial notice of documents filed in federal court).

is relegated to a footnote, Amici's arguments are nearly entirely unhelpful to this Court (or Plaintiffs) because they tell the Court nothing about the justiciability of the claims Plaintiffs actually made below.<sup>12</sup>

### **CONCLUSION**

The Court should give Amici's arguments little weight given the factual inaccuracies contained in the brief, and because it does not assist the Court in determining the question before it—whether the court below erred in determining that the single claim brought by Plaintiffs is a nonjusticiable political question.

Respectfully submitted, this the 31st day of March, 2025.

**NELSON MULLINS RILEY &  
SCARBOROUGH LLP**

/s/ Electronically Submitted

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N.C. R. App. P. 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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<sup>12</sup> Legislative Defendants expressly do not agree with Amici's novel arguments regarding North Carolina Const. art I §§2, 10, 19, 32, 33, 34, and art. II. However, because these issues were not raised by Plaintiffs below, they are not properly before this Court. *State v. Gentile*, 237 N.C. App. 304, 310-11, 766 S.E.2d 349, 354 (2014). Because Legislative Defendants do not wish to muddy the record or create extra work for the Court by belaboring claims not before it, Legislative Defendants do not exhaustively detail the legal issues with Amici's arguments in this reply.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to North Carolina Rule of Appellate Procedure 28(j), the undersigned certifies that the foregoing brief, which was prepared using a 12-point proportionally spaced font with Century Schoolbook, is approximately 1,389 words, (excluding covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature blocks) as reported by the word-processing server's word count.

This the 31st day of March, 2025.

**NELSON MULLINS RILEY &  
SCARBOROUGH LLP**

/s/ Electronically Submitted  
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**CERTIFICATE OF SERVICE**

It is hereby certified that on this the 31st day of March, 2025, the foregoing was served on the individuals below via email and electronic submission:

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# **Exhibit A**

# **Exhibit 5**

NORTH CAROLINA GENERAL ASSEMBLY  
SENATE REDISTRICTING AND ELECTIONS COMMITTEES

OCTOBER 19, 2023

Transcribed by:

Denise Myers Byrd, CSR 8340  
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1 redistricting.

2           The categories of equal population,  
3 traditional redistricting principles,  
4 compactness, contiguity, respect for existing  
5 political subdivisions, political considerations  
6 and incumbent residence should not be foreign  
7 concepts to members of this committee.

8           The major difference between these two  
9 documents is the use of the county grouping  
10 formula related to legislative maps as required  
11 by our constitution and as contained in the  
12 Stephenson decision.

13           I will note -- it is important to note  
14 that the chairs did not use racial data when  
15 drawing the legislative and congressional maps.  
16 Let me explain why.

17           The predominant use of race to draw  
18 districts violates the US Constitution unless  
19 doing so serves a compelling government  
20 interest. In other words, if the legislature  
21 draws districts predominantly based upon race  
22 without a compelling interest, those districts  
23 would be declared illegal racial gerrymanders.  
24 We know this from the Cooper and Covington  
25 cases.

1           As for the Voting Rights Act, in order  
2           for the predominant use of race to be justified  
3           under Section 2, there must be a strong basis in  
4           evidence of three Gingles conditions. Even  
5           assuming the presence of the three Gingles  
6           conditions, the use of race to draw districts  
7           must also be supported by the totality of the  
8           circumstances.

9           Past decisions and court records  
10          demonstrate that to this point nowhere in  
11          North Carolina can anyone provide evidence of  
12          the three Gingles preconditions. In the absence  
13          of any evidence of the three Gingles  
14          preconditions, the chairs elected not to use  
15          race in drawing these proposed districts  
16          strictly to protect the state from lawsuits  
17          alleging illegal racial gerrymandering.

18          To be clear, the chairs do not believe  
19          that the use of racial data would have been  
20          helpful in reaching any political or other  
21          legislative redistricting goal. Any political  
22          considerations in line drawing have been  
23          informed by political data, not racial data.

24          That said, now that the maps under  
25          consideration have been filed and made public,

1 the chairs will now formally direct central  
2 staff to load racial data into the Maptitude  
3 software following this committee meeting and  
4 apply that data layer to the proposed  
5 congressional and senate maps. We ask the  
6 central staff apply that racial data, update the  
7 stat packs accordingly, and make that  
8 information publicly available on the General  
9 Assembly website as soon as possible.

10 To emphasize once again, the chairs did  
11 not use racial data and statistics at any point  
12 in the construction of these districts, and the  
13 publication of racial statistics here does not  
14 inform the placement of any residents within any  
15 districts within these maps.

16 Finally, as mentioned earlier, the  
17 committee will meet next week, on Monday, and  
18 amendments to these bills will be considered at  
19 this meeting. I do believe that meeting will be  
20 at 10:00 a.m. on Monday, but notices will come  
21 out.

22 The chairs at that time will consider  
23 any evidence that a member of this committee or  
24 a third party advocating altering plans for  
25 racial reasons brings forth that provides a

1 strong basis in evidence that the Gingles  
2 preconditions are present in a particular area  
3 of the state. Only then will the chairs  
4 consider using race in amending the districts to  
5 protect the state from liability under Section 2  
6 of the Voting Rights Act.

7 Are there any questions?

8 Senator Blue.

9 SENATOR BLUE: Thank you, Mr. Chairman.  
10 I -- especially in the explanations of the last  
11 areas that you dipped into, I was reading the  
12 Allen versus Milligan case, the Alabama case  
13 that sort of breathed a new life into Section 2  
14 challenges to redistricting plans. And it  
15 points out pretty specifically that -- and I'll  
16 quote generally and then I'll ask you a  
17 question.

18 It says, "When it comes to considering  
19 race in the context of districting, we have made  
20 clear that there is a difference between being  
21 aware of racial considerations and being  
22 motivated by them."

23 Section 2 itself -- this is a  
24 continuation of a quote.

25 "Section 2 itself demands consideration

1 heard you just say is you haven't done a racial  
2 polarization study in -- to help draw these  
3 maps.

4 SENATOR HISE: Studies regarding racial  
5 polarization were done as part of the lawsuit a  
6 year and a half ago since this data has  
7 been -- since the census data has been released.

8 SENATOR MARCUS: Okay. And then I  
9 guess just one follow-up. So we're to take you  
10 at your word. You said a couple times here that  
11 you've not used racial data to draw these maps  
12 and that you're only now adding it to the state  
13 system for the public to see the racial  
14 implications of the map. And I'm curious if  
15 we're to just take you at your word for that or  
16 if you will be making your redistricting records  
17 publicly available so we know what racial data  
18 was used or not used in drawing these maps.

19 SENATOR HISE: I will confirm that the  
20 chairs have not used racial data. You can  
21 confirm yourself with central staff. It is not  
22 part of the software system. The data has never  
23 been uploaded to -- including the computer that  
24 was provided to the Democrats in 605. Racial  
25 data has not been added up to any of the systems

1 discussion only.

2 Whenever you're ready, Senator Daniels,  
3 you're recognized to explain the bill.

4 SENATOR DANIEL: Thank you, Senator  
5 Hise.

6 Members, and so I'm going to go through  
7 the districts like Senator Hise has been doing  
8 with the other maps, so this could take some  
9 time. I'm not going to try to describe the  
10 color schemes Senator Hise did. You'll have to  
11 kind of figure that out.

12 Senate District 1 is created by the  
13 county grouping choice in northeastern  
14 North Carolina. The chairs chose the  
15 configuration that makes Senate District 1 out  
16 of the following whole counties: Northampton,  
17 Bertie, Hertford, Gates, Perquimans, Pasquotank,  
18 Camden, Currituck, Tyrrell and Dare. This  
19 configuration leaves four of the five finger  
20 counties in northeastern North Carolina in one  
21 district.

22 Many of the residents of these counties  
23 work or travel frequently to the Virginia  
24 Tidewater area. Seven of the ten counties and  
25 81 percent of the population in

1 Senate District 1 are in the Norfolk media  
2 market: Dare, Currituck, Camden, Pasquotank,  
3 Perquimans, Hertford and Gates, with the other  
4 three divided between Greenville market, Tyrrell  
5 and Bertie and Raleigh, Northampton containing  
6 19 percent of the district's population.

7 All of the counties in North Carolina  
8 that are in the Norfolk media market are in  
9 Senate District 1 except for Chowan. The  
10 incumbent in Senate District 1 is Senator Hanig  
11 from Currituck.

12 Senate District 2 follows the Roanoke  
13 River from Warren county to the Albemarle Sound  
14 in Washington county. Chowan county, directly  
15 across the Albemarle Sound from Washington  
16 county, is also grouped into this district.  
17 Hyde County, also on the sound, is in this  
18 district as in -- as is Pamlico county along  
19 with the Pamlico River and Pamlico Sound.

20 Finally, Carteret county spanning the  
21 inner and Outer Banks as the southernmost county  
22 in the district.

23 Five of the eight counties in the  
24 district are in the Greenville media market,  
25 with the other three being split between the

1 Raleigh media market, that would be Warren and  
2 Halifax, and Norfolk media market, Chowan.  
3 Two-thirds of the population of this district  
4 live in the Greenville media market.

5 The incumbent in Senate District 2 is  
6 Senator Sanderson from Pamlico.

7 Senate District 3 is unchanged from the  
8 previous map but renumbered. It is created by  
9 the base county grouping map: Lenoir, Craven  
10 and Beaufort counties.

11 The incumbent in Senate District 3 is  
12 Senator Perry from Lenoir.

13 And if I could get the  
14 sergeant-at--arms to -- I don't have a paper  
15 copy of the map, if someone could bring me one.

16 Senate District 4 is unchanged from the  
17 previous map and is created by the base county  
18 grouping map, Wayne, Wilson in Greene counties.  
19 This incumbent in Senate District 4 is Senator  
20 Buck Newton from Wilson county.

21 Senate District 5 is unchanged from the  
22 previous map and created by the base county  
23 grouping map, Edgecombe and Pitt counties. The  
24 incumbent in Senate District 5 is Senator Smith  
25 from Pitt county.



1 are whole in Senate District 9. Sampson county  
2 is split between the two districts. One  
3 precinct Plain View was moved from Senate  
4 District 9 to 12, leaving the rest of Sampson  
5 county in Senate District 9. The incumbent in  
6 Senate District 9 is Senator Jackson from  
7 Sampson county.

8 Senate District 10 is unchanged from  
9 the previous map and is created by the base  
10 county grouping map Johnston county. The  
11 incumbent is Senator Sawrey from Johnston.

12 Senate District 11 is unchanged from  
13 the previous map and is created by the base  
14 county grouping map, Vance, Franklin and Nash  
15 counties. The incumbent in Senate District 11  
16 is Senator Barnes from Nash county.

17 Senate District 12 is made up of Lee  
18 and Harnett counties, plus the Plain View  
19 precinct in Sampson as described previously.  
20 The incumbent in Senate District 12 is  
21 Senator Burgin from Harnett county.

22 Senate District 13, Wake and Granville  
23 counties form a sixth district, two-county  
24 grouping in the base senate map. The overall  
25 population within the county grouping is