No.413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
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REBECCA HARPER; et. al., Plaintiffs, vs. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; *et al.*, Defendants, NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; *et al.*, Plaintiffs, vs. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; *et al.*, Defendants.	From Wake County

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LEGISLATIVE DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTIONS FOR TEMPORARY STAY AND PETITIONS FOR WRIT OF SUPERSEDEAS PENDING APPEAL

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Legislative Defendants file this response in opposition to Plaintiffs' Motions for Temporary Stay and Petitions for Writ of Supersedeas Pending Appeal

I. THE LEGISLATIVELY ENACTED MAPS ARE PRESUMED CONSTITUTIONAL AND ARE, IN FACT, CONSTITUTIONAL UNDER THIS COURT'S CRITERIA.

The trial court had before it three acts of the General Assembly. Like the trial court, this Court must presume them to be constitutional. *Wayne Cnty. Citizens Ass'n for Better Tax Control v. Wayne Cnty. Bd. of Comm'rs*, 328 N.C. 24, 399 S.E.2d 311, 315 (1991). *See also* Trial Court Order 11 January 2022, COL ¶21[1] ("The Constitution is a restriction of powers and those powers not surrendered are reserved to the people to be exercised through their representatives in the General Assembly; therefore so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial decision"); COL ¶23 ("Declaring as unconstitutional, an act of the branch of government that represents the people is a task that is not taken lightly. There is a strong presumption that enactments of the General Assembly are constitutional."). That presumption applies in full force, even though the acts were enacted to remedy prior redistricting acts the Court invalidated. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324–25 (2018).

The trial court's role, and this Court's review, is limited to assessing the acts' compliance with legal standards and efficacy in remedying the supposed legal

[1] Throughout this Memorandum, Legislative Defendants' will cite to specific Conclusions of Law (COL) or Findings of Fact (FOF) from the Trial Court's 11 January 2022 Order. The North Carolina Supreme Court held that the trial court's findings were not clearly erroneous and adopted them in full. *Harper v. Hall*, 2022-NCSC-17, ¶2 (Feb. 4, 2022).

violations. *See Stephenson v. Bartlett*, 357 N.C. 301, 314, 582 S.E.2d 247, 254 (2003). Courts are bound to "follow the policies and preferences" of the General Assembly, without clear proof of a legal violation. *White v. Weiser*, 412 U.S. 783, 795 (1973). Courts are not to engage in policy-making by comparing the enacted maps with others that Plaintiffs opine might be "more fair" or "optimized" in some manner. "[S]o long as an act is not forbidden, the wisdom and expediency of the enactment [even as compared to other possible outcomes] is a legislative, not a judicial, decision." *Wayne County*, 328 N.C. at 29, 399 S.E.2d at 315.

II. THE MOTIONS ARE WITHOUT MERIT BECAUSE THE HOUSE AND SENATE PLANS FULLY COMPLY WITH THE PARTISAN METRICS.

In finding that certain districts were the product of "intentional pro-Republican redistricting," the Superior Court relied heavily upon Dr. Mattingly's analysis of each county grouping. To conduct his analysis, Dr. Mattingly relied upon 12 elections: 2016 Lt. Governor, 2016 President, 2020Commissioner of Agriculture 2020 Treasurer, 2020 Lt. Governor, 2020 US Senate, 2020 Commissioner of Labor, 2020 President, 2020 Attorney General, 2020 Auditor, 2020, Secretary of State, 2020 Governor. *See e.g.* FOF ¶239. This Court later held that the trial court's findings were not clearly erroneous and adopted them in full. *Harper v. Hall*, 2022-NCSC-17, ¶2 (Feb. 4, 2022).

When the General Assembly began the task of drawing remedial districting plans, Legislative Defendants knew that the plans needed to score well under mathematical tests like the efficiency gap and the mean-median test. On February 14, 2022, this Court clarified standards for these tests that would make them

presumptively constitutional. In that Opinion, the Court held that a 1% threshold for mean-median and a 7% threshold for efficiency gap would make plans presumptively constitutional.

In order to conduct the tests to determine if the statewide remedial plans met this threshold, it was not only rational, but also prudent for the General Assembly to use those same elections that Dr. Mattingly used to analyze county groupings, and that this Court relied upon heavily in its January 11, 2022 opinion. And under this set of 12 elections that Dr. Mattingly used in his analysis, the General Assembly's plans meet the thresholds set forth by the North Carolina Supreme Court. However, this is not the case for all proposed remedial plans. A table below shows the scores, as calculated by Dr. Barber in his Amended Expert Report on Remedial plans [2] under Dr. Mattingly's 12 set of elections:

Test	**Remedial Senate**	**Remedial Congress**	**Remedial House**	**Harper Senate**	**Harper Congress**	**NCLCV Senate**	**NCLCV Congress**	**NCLCV House**
Mean Median	-.65%	-.61%	-.7%	.17%	.04%	.34%	1.65%	-1.22%
Efficiency Gap	-3.97%	-5.29%	-.84%	-3.64%	1.03%	.03%	7.92%	-1.43%

As shown above, all of the General Assembly's plans fall within the threshold of presumptive constitutionality as defined by this Court. The use of Dr. Mattingly's election set to compare all plans to is appropriate because of the reliance upon the same during the trial. As the Court can see, many of the score differences are small

[2] Because of Common Cause Plaintiffs' failure to incorporate their remedial districts into a full statewide plan, and because the efficiency gap and mean-median are measures of statewide plans, no analysis could be conducted on the Common Cause proposed districts.

fraction of a percent. For an example the Harper Senate Efficiency Gap and the Remedial Senate Efficiency gap have a difference of just 0.3%. Furthermore, the NCLCV House Plan is not an appropriate Remedial Plans because it falls outside of the guidance issued by this Court.

Use of different election results after the fact would be inappropriate. For example, after espousing the 12 elections above for the majority of Dr. Mattingly's report, and with the full knowledge that the trial court relied upon his analysis using these results, Harper Plaintiffs then decided that Dr. Mattingly's other, and scarcely used 16-election set, was appropriate for this Remedial Phase of the case. In addition to the 12 elections listed above, they sought to use 4 additional elections to measure the plans, including three from 2016 (Attorney General, Governor, US Senate) and the 2020 Commissioner of Insurance election.

This belies logic. If one set of elections was an appropriate choice to prove the existence of districts that were the product of "pro-Republican redistricting" then why are they not an equally appropriate choice to test whether the districts now meet the mathematical tests laid out in this Court's opinion? As shown by all experts at trial, the choice of election used to measure these tests can lead to varying results. This is why it is most prudent for the Court to analyze all plans under the set it already found persuasive. But Harper Plaintiffs, having chosen a curated set of elections to attempt to prove the existence of partisan gerrymandering, advocated scoring their plans under a different set of elections. This has the appearance of gaming the choice of elections, to make their scores seem better or the General Assembly's scores seem

worse. In advocating for the use of a new set of elections, Harper Plaintiffs invite this Court to enter the fray of blatantly partisan gamesmanship—an invitation this Court should decline.

Notwithstanding that the General Assembly maintains that the Mattingly 12 is the appropriate set of elections to score the plan against, Dr. Barber scored all proposed remedial plans under Dr. Mattingly's new curated set of elections:

Test	Remedial Senate	Remedial Congress	Remedial House	Harper Senate	Harper Congress	NCLCV Senate	NCLCV Congress	NCLCV House
Mean Median	-.61%	-.86%	-.92%	.11%	0%	.45%	1.62%	-1.21%
Efficiency Gap	-4.28%	-5.1%	-2.9%	-1.95%	1.22%	-.45%	.83%	-2.16%

Even under the new curated election set, the General Assembly's Remedial Plans are still within the threshold set by the North Carolina Supreme Court. The NCLCV House Plan continued to fall well outside of the Court's threshold for Mean Median and Efficiency Gap.

III. HARPER PLAINTIFFS MOTION IS WITHOUT MERIT BECAUSE THE REMEDIAL SENATE PLAN IS CONSTITUTIONAL.

The Senate Remedial Plan made constitutionally significant changes to the enacted plans. The Senate changed the county groupings in the Northeastern part of the state (Senate Districts 1 and 2) that Plaintiff-Common Cause addressed in their complaint. (FOF ¶295, 296). While Legislative Defendants maintain that the previous choice of county groups for this region was perfectly legal, these groupings were adopted in the spirit of compromise and to create a more Democratic leaning county grouping. (FOF¶297-298). The remainder of the county groupings for the Senate

remained the same as the enacted plan. Because the remainder of the county-groupings remained the same, 13 single county grouping districts from the enacted plan were transferred to the remedial plan. The Senate had no discretion to change these single county grouping districts. In all other respects, the Senate drew entirely new districts from scratch in compliance with the criteria and with the North Carolina Supreme Court's orders. In drawing the remedial plans, the Senate complied with the criteria passed by the House and Senate Redistricting Committees (LDTX15) unless it conflicted with the North Carolina Supreme Court's Orders. In scenarios where there was any ambiguity, higher weight was given to the North Carolina Supreme Courts Orders.

Senator Newton testified in detail during the February 16 Senate Committee hearing about the statewide changes that into the Senate Remedial plan. Senator Newton stated that the Remedial Senate plan was drawn to prioritize the map as a whole, as required by the North Carolina Supreme Court's opinions to ensure that voters have equal representational influence. Senator Newton also pointed to the Court's guidance on the Mean-Median and Efficiency Gap and testified that the Remedial Senate plan met each of the Court's thresholds, using the 12 statewide elections used by Dr. Mattingly to analyze county groupings in his report to calculate these scores. Meeting these measures successfully makes the Senate remedial plan, by the Supreme Court's standards, presumptively constitutional.

Importantly, Senator Newton also testified about the competitive nature of the remedial plan. The proposed remedial map included 10 districts that were within 10

points in the 2020 presidential race – meaning 10 competitive districts – and eight within a range of 47 to 53 percent for the Republican vote share in the 2020 presidential race. Four districts are 49-49 or 50-48 in favor of one side or the other. Senator Newton also testified that in the enacted Senate map from 2020, Governor Cooper would have won 23 of the districts. In the proposed remedial Senate map, Cooper would have won 25 districts.

Senator Newton also testified that in the previously enacted Senate map, they had worked hard to keep municipalities whole, which resulted in 19 split precincts. However, since the plaintiffs' expert, Dr. Mattingly, testified that in his opinion, municipalities were only kept whole in the Senate map to gain partisan advantage, Senator Newton testified that in the proposed remedial map they prioritized compliance with the North Carolina Supreme Court's order – using mean-median and efficiency gap standards – keeping precincts whole and prioritizing competitiveness, and compactness over keeping municipalities whole. As a result, Senator Newton testified that the proposed remedial map, reduced split VTDs statewide from 19 to 3. Senator Newton further explained that all three of these split VTDs occurred in Wake County because the population deviation in the Wake-Granville county grouping provides little flexibility.

Senator Newton testified that incumbency was considered and that no Senators are double-bunked with other members, other than those who are paired

together due to the *Stephenson* county groupings criteria.[3] Those who had announced retirement or announced a run for another office, like Senator Clark were not considered "incumbents." Senator Newton confirmed there were no Democratic members double-bunked with other incumbents.

While the proposed Senate Remedial plan was adjusted state-wide, Senator Newton detailed the following significant changes from the enacted plan as compared to the Senate Remedial plan:

- Split VTDs in Buncombe, Cabarrus, Caldwell, Guilford, Randolph, and Sampson counties were removed;

- In the Cumberland-Moore county grouping, Senate District 19 and Senate District 21 were altered to make SD-21 extremely competitive. In the composite score developed by Dr. Mattingly to evaluate the districts, the composite Republican average for SD-21 is 50.17 percent. Senator Newton testified that this hyper-competitive district was drawn to comply with the Court's order, which results in more competitive districts;

- In the Guilford-Rockingham county grouping, Senate District 28 was re-drawn to match the court-ordered configuration for the 2018 and 2020 elections. Senator Newton testified that the proposed remedial draw for SD-28 exactly replicated the court-ordered draw, which was completed by the Special Master at that time, Dr. Persily. Senator Newton testified that the border between SD-26 and SD-27 in southern Guilford County was drawn to follow Dr. Persily's draw exactly. Senator Newton testified that they attempted to maximize compactness in these districts, while also considering member residences in Guilford County. Senator Newton noted that Senator Berger lives in SD-26, Senator Garrett lives in SD-27, and Senator Robinson lives in SD-28.

- In the Forsyth-Stokes county grouping, Senator Newton testified that SD-31 and SD-32 were drawn to respect member residences, and that Senator Krawiec lives in SD-31 and Senator Lowe lives in SD-32. Senator Newton testified that in the enacted map, they had attempted to keep as much of Winston-Salem whole as possible, but in the proposed remedial map, they attempted to draw two compact districts and meet the Court's statewide

[3] Upon information and belief, the following Senators are not running for re-election: Senators Harrington, Edwards, Foushee, Nickel, Jeff Jackson, and Clark.

guidance for partisan fairness. Senator Newton testified that they considered the Democrats' preferred alternate grouping for Forsyth County that pairs it with Yadkin instead of Stokes. In evaluating that configuration, Senator Newton testified that the resulting districts – SD-31, SD-32, and SD-36 in Alexander, Wilkes, Surry, and Stokes counties – would have been less compact. Senator Newton also noted that Yadkin county in the alternate pairing is more Republican than Stokes county, and that they were concerned about complying with the Court's order on partisanship if the county grouping that was more Republican was picked, over one that was less Republican.

- Senator Newton also testified that alternative county groupings were examined around Buncombe county as well. But, that the switch would have resulted in districts that would have been significantly less compact than what the proposed Remedial Plan created. Senator Newton also testified that n Buncombe County, Senate District 46 and Senate District 49, were altered to make each district more compact than in the enacted map.

- In the Iredell-Mecklenburg county grouping, Senator Newton testified that six districts were drawn while respecting incumbent residences, and that Senators Sawyer, Marcus, Waddell, Mohammed, and Salvador each had districts. Senator Newton also testified that the proposed remedial plan created an open seat in southern Mecklenburg County where Senator Jeff Jackson, who decided not to seek re-election, is living. Senator Newton noted that this district in the Enacted plan was quasi-competitive, but leaning Democratic. But now in the proposed Remedial map, the Republican composite percentage dropped to 45.5 percent with former President Trump receiving only 41.6 percent of the vote in 2020. Senator Newton noted this change was done to comply with the North Carolina Supreme Court's Order.

- In the northeast, Senator Newton testified that the County groupings were flipped to the configurations preferred by Plaintiffs. This proposed that Senate District 1 include Carteret, Pamlico, Hyde, Dare, Washington, Chowan, Perquimans, and Pasquotank; and the other district include Warren, Halifax, Northampton, Martin, Bertie, Hertford, Gates, Camden, Currituck, and Tyrrell. Senator Newton testified these districts were drawn to meet the Court guidance on partisanship.

- In New Hanover County, Senator Newton testified that changes were made to make the districts more competitive in compliance with the Court's order and prioritize compactness. By swapping some precincts in Districts 7 and 8, the proposed remedial plan created a 7th district won by President Biden in 2020, while also making the districts more compact. Senator Newton testified this change was a key component ensuring the statewide plan met the Court's proposed guidance on partisanship and competitiveness.

- In Wake County, Senator Newton testified that the proposed remedial map split 3 VTDs, down from 10, and these were split only to balance population and keep the districts within the 5% deviation. Senator Newton also noted that all incumbents in the county – Senators Blue, Batch, Chaudhuri, Crawford, and Nickel – had their own districts. Senator Newton testified that they attempted to maximize compactness in these districts and comply with the Court's order on statewide partisan fairness. Senate District 17 is more Democrat-leaning than in the enacted map. President Biden carried the district 51.5 to 46.4. What is now Senate District 18, which includes Granville County and northern Wake County, is also more Democrat-leaning compared to what was Senate District 13 in the enacted Senate map. SD-18 was carried by Biden 50.9 to 47.3. Again, these districts were drawn to meet the Court's proposed metrics for mean-median and efficiency gap tests of statewide partisan fairness and political responsiveness.

Ultimately, SB744 passed the Senate Redistricting Committee on February 16, 2022 and was passed by the Senate and the House on February 17, 2022.

With its remedial plan, the Senate took seriously the task of complying with the Supreme Court's directives. The Remedial Senate Plan is well within the North Carolina Supreme Court's guidance on presumptively constitutional districts, with an efficiency gap of -3.97% and a mean-median of -.65%. For these reasons, and others shown in the legislative debates and materials submitted to the trial court, the Senate Remedial plan should have been upheld.

In contrast The Remedial Harper Plan has a polsby-popper mean of .35 and a reock mean of .42. The Remedial Harper Plan is, therefore, less compact than the Remedial Senate Plan in both measures of compactness. It is important to note that since many of the county groupings and districts are formulaic draws due to the *Stephenson* criteria, the difference in compactness is solely attributable to elective map-drawing decisions in a handful of counties. While the statewide reock and

polsby-popper compactness means indicate that the Remedial Senate Plan is slightly better than the Harper Remedial Plan, since many of the county groupings and districts are the same in the two plans due to the *Stephenson* criteria, this small difference in compactness indicates an even more pronounced difference in compactness in the counties and districts where map-drawing discretion is afforded. The table below compares the Remedial Senate Plan with the Remedial Harper plan on the two compactness measures, reock and polsby-popper, averaging the district compactness ratings withing county groupings where map-drawing discretion is allowed and comparable:

		Remedial Senate Plan		**Remedial Harper Plan**		**Notes**
Counties	***Districts***	***Reock Mean***	***Polsby-Popper Mean***	***Reock Mean***	***Polsby-Popper Mean***	
Iredell, Mecklenburg	37, 38, 39, 40, 41, 42	.41	.44	.39	.28	The Remedial Senate Plan is more compact in both measures.
Granville, Wake	13, 14, 15, 16, 17, 18	.46	.40	.47	.44	The Remedial Harper Plan is slightly more compact in both measures, but splits 22 VTDs (versus 3 for the Remedial Senate Plan) to achieve this.
Guilford, Rockingham	26, 27, 28	.53	.37	.44	.42	The Remedial Senate Plan is more compact using reock; the Remedial Harper Plan is more compact using polsby-popper.
Brunswick, Columbus,	7, 8	.34	.36	.33	.37	The Remedial Senate Plan is more compact

New Hanover						using reock; the Remedial Harper Plan is more compact using polsby-popper.
Buncombe, Burke, Cleveland, Gaston, Henderson, Lincoln, McDowell, Polk, Rutherford	43, 44, 46, 48, 49	.44	.39	.40	.32	The Remedial Senate Plan is significantly more compact using both compactness measures.
Alexander, Forsyth, Stokes, Surry, Wilkes, Yadkin	31, 32, 36	.51	.44	.38	.30	The Remedial Senate Map is significantly more compact using both compactness measures.

The Remedial Harper Plan double-bunks 5 pairs of incumbents. While the Chairs attempted to follow the Supreme Court's directive to consider member residences in drawing the Remedial Senate Plan and successfully eliminated *all* elective double-bunkings, the Remedial Harper Plan electively pairs these incumbents: Senator Tom McInnis (Republican) and Senator Kirk deViere (Democrat) in a district favoring Democrats and Senator Amy Galey (Republican) and Senator Dave Craven (Republican). Each of these double-bunkings are easily avoidable while following traditional, neutral districting criteria, and demonstrate evidence of partisan bias in that they purposely target two Republican members for elimination.

The Remedial Harper Plan fairs even worse when comparing split VTDs. While the Chairs sought to eliminate unnecessary split VTDs in the Remedial Senate Plan, bringing the number of splits down to 3, the Remedial Harper Plan splits 27 VTDs,

or nine times as many as the General Assembly's Remedial Senate Plan. Notably, the Remedial Harper Plan splits 22 VTDs in Wake County alone. Subordinating neutral criteria for partisan reasons, this Court has said, is a sign of partisan gerrymandering. *Harper v. Hall*, 2022-NCSC-17, ¶¶ 5, 163. The Remedial Harper Plan's draw in Wake County is a clear example, with over seven times as many VTD splits as the Remedial Senate Plan includes statewide. The Remedial Harper Plan also includes split VTDs in Forsyth and New Hanover counties, where they intentionally gerrymander Senator Joyce Krawiec (R-Forsyth) and Senator Michael Lee (R-New Hanover) into unwinnable districts. Specifically Senator Lee's district had a VTD split with the effect of running down the population and to remove Republican leaning VTDs for no neutral or population related reason. This is clear evidence of the Harper Plaintiffs splitting VTDs for their own political gain.

In summary, the General Assembly's Remedial Senate Plan is the most compact, pairs the fewest incumbents, and splits the fewest VTDs. The Remedial Senate Plan falls within the Supreme Court's suggested ranges for partisan fairness and competitiveness (mean-median and efficiency gap) and is, therefore, presumptively constitutional. While the Harper plan scores slightly "better" than the Remedial Senate Plan on mean-median and efficiency gap, this plan only accomplishes this by subverting traditional, neutral districting criteria. The Harper Remedial Senate plan is less compact (much less compact in counties with elective draws, pointing to an intent to gerrymander), intentionally paired more incumbents (purposely targeting certain Republicans), and split far more VTDs (particularly in

counties where the Plaintiffs gratuitously target Republican incumbents, such as Sen. Krawiec in Forsyth, and Sen. Lee in New Hanover). The Remedial Senate Plan scored significantly better on measures of traditional redistricting criteria and it was error for the trial court to have selected these maps over the presumed constitutional maps passed by the General Assembly.

IV. THE NCLCV MOTION IS WITHOUT MERIT AND SHOULD BE DENIED.

NCLCV's motion is without merit and their plans are not proper substitutes for the plans enacted by the General Assembly. Note only does each of NCLCV's plans subvert traditional redistricting criteria to achieve subjectively "better" scores, the plans also impermissible consider race, without conducting a full *Gingles* Analysis.

A. The NCLCV House Plan

The Remedial House plan, which passed the House with strong bipartisan support, has a polsby-popper mean of .38, and a reock mean of .46. The Remedial House plan double bunks only two sets of incumbents, but all members who are double bunked are Republicans. The Remedial House plan splits only 8 VTDs and 36 counties. The Remedial House plan splits 108 municipalities, but of those, only 75 involve population.

The NCLCV House plan compares poorly to the Remedial House plan under metrics of traditional redistricting criteria. While the NCLCV House plan is slightly more compact under the polsby-popper measure, it has a virtually identical reock mean. The NCLCV House plan pairs significantly more incumbents than the Remedial House plan. In fact, the NCLCV House plan pairs 13 sets of incumbents.

Of those that are double bunked, eight sets are Republican with Republican, three sets are Democrat on Democrat, and two sets are Republican on Democrat. This alone can be used to infer a political bias to the detriment of Republican incumbents. *Larios v. Cox,* 300 F.Supp.2d 1320, 1329 (N.D. Ga. 2003) *affirmed, Cox v. Larios,* 542 U.S. 947 (2004). Furthermore, while the author of the NCLCV algorithm, Counselor Hirsch, testified in his deposition that the algorithm did not consider incumbency, nothing prevented the NCLCV Plaintiffs from amending their plans for the remedial phase of this submission to improve upon them. Instead, NCLCV Plaintiffs left evidence of their algorithmic assassination of Republican incumbents bare for all to see. (Hirsch Depo. 95:12-23)

Yet, the number of incumbent pairings in the NCLCV proposed maps does not tell the full story—the double-bunking in the NCLCV plan appears surgically targeted at removing senior members of North Carolina House Republican leadership from the General Assembly. Rep. Jimmy Dixon, Senior Chairman of the House Agriculture Committee and the Appropriations Committee charged with providing funding for agriculture, environmental enforcement, and economic development, is double-bunked with House Majority Leader John Bell, an outcome that would severely reduce the voice of Eastern North Carolina in the General Assembly. House Majority Whip Jon Hardister is placed into a heavily Democratic seat with Rep. Amos Quick (D-Guilford). Donny Lambeth, Senior Chairman of the House Appropriations Committee and co-chairman of the committee currently considering Medicaid Expansion in North Carolina, is placed into a heavily Democratic district with Rep.

Evelyn Terry (D-Forsyth). Chairman of the Rules and Redistricting Committee, Rep. Destin Hall, is double-bunked with Rep. Ray Pickett (R-Watauga). And the Speaker of the House Tim Moore is double-bunked with Rep. Kelly Hastings (R-Gaston). In fact, it is difficult to find a member of House Republican leadership not targeted for elimination by the NCLCV Plaintiff's proposed map.

The NCLCV Plan also splits 38 counties, and 187 VTDs (171 involving population). This is 23 times more VTD splits than the Remedial House plan. Significantly, under the NCLCV House Plan 19 VTDs are split into three districts, and one VTD is split into four districts. It is precisely these sort of egregious splits that would make it even more difficult for the State and Local elections boards to prepare for the upcoming election on an already short time frame.

While the NCLCV House Plan splits fewer municipalities (71, with 59 of those involving population), there are some municipality splits that fail to take communities of interest into account at all. For example, the town of Apex is split into four[4] different house districts, and Sanford, which is a hub for the sandhills region, is split into two different House districts. Monroe, a town of less than 35,000, and one of the most Republican leaning areas in the Charlotte suburbs is mysteriously split into two districts. Wake Forest, with a population of about half the ideal size of a House district, is split into four different house districts.[5] This is the inherent danger

[4] One of these splits does not involve population. The remainder of Apex is split into three districts.
[5] While one split is mandatory because of a small portion of Wake Forest that is in Franklin County, the remaining residents are split amongst three districts. Curiously Wake Forest is also one of the most republican leaning towns in Wake County.

with districts drawn by algorithms. While the algorithm may be able to "optimize" a plan for the fewest number of splits over all, it cannot take into account the human element of considering communities of interest. Legislative Defendants doubt very much that the residents of Apex, Wake Forest, or would find it "optimal" to vote in three or more different House districts.

In sum, the NCLCV House plan suffers from huge failures under traditional redistricting criteria when it comes to county, VTD, and municipality splits, as well as their treatment of incumbents. As such, the Court should order the General Assembly Remedial House plan, that was the subject of overwhelming bipartisan support to be used for the 2022 elections.[6]

B. The NCLCV Senate Plan

The Remedial Senate Plan passed by the General Assembly has a polsby-popper mean of .38 and a reock mean of .44 and double-bunks two incumbents, the bare minimum for this criteria and only because to the incumbent pairs residing in a single-district county grouping dictated by the *Stephenson* criteria with no discretion to un-pair these members. The Remedial Senate Plan removes a pairing from the

[6] This chart was created using the Stat Packs submitted to the trial court on 18 February 2022.

Test	**NCLCV Result**	**GA Remedial Result**
Polsby Popper Mean	.414	.38
Reock Mean	.465	.46
Incumbency	13 (8 R/R, 3 D/D, 2 R/D)	2, (All R/R)
Split VTD	187 (171 involving population)	8 (all involving population)
Municipality	71 (59 involving population),	108 (75 involving population)
Counties	38	36

Enacted Senate Plan, Senator Vicki Sawyer (Republican) with Senator Natasha Marcus (Democrat) in Senate District 37. One of the members that is double-bunked in the Remedial Senate Plan is the co-chair of the Senate Committee on Elections and Redistricting, Senator Ralph Hise. The Enacted Senate Plan split 19 VTDs statewide in order to keep as many municipalities within a single county containing population whole as possible. However, during the trial, the Plaintiffs' expert, Dr. Mattingly, testified that this strategy of prioritizing the elimination of municipal splits in the Senate map was done intentionally to favor Republican candidates politically. Therefore, in the Remedial Senate Plan, the Chairs attempted to adhere to the Court's findings by removing all elective VTD splits statewide and prioritizing that criterion over the elimination of municipal splits. The Remedial Senate Plan splits only 3 VTDs statewide, down from the 19 in the Enacted Senate Plan, and all three of these splits in Wake County for the sole purpose of balancing population in that county grouping, which is very close to the minimum population deviation (-4.98 percent), and thus impossible to draw without splitting VTDs. Split VTDs were eliminated in the following counties in the Remedial Senate Plan: Buncombe, Cabarrus, Caldwell, Guilford, Randolph, Sampson, and 7 of the 10 splits in Wake.

The Remedial NCLCV Plan fails to beat the presumptively constitutional Remedial Senate Plan's polsby-popper mean of .38 and reock mean of .44. Again, it is important to note that since many of the county groupings and districts are formulaic draws due to the *Stephenson* criteria, the difference in compactness scores is solely attributable to elective map-drawing decisions in a handful of counties. While the

statewide reock and compactness scores indicate that the Remedial Senate Plan is slightly better than the Remedial NCLCV Plan, since many of the county groupings and districts are the same in the two plans due to the Stephenson criteria, this small difference in compactness indicates a more notable difference in compactness in the counties and districts where map-drawing discretion is afforded. The table below compares the Remedial Senate Plan with the Remedial NCLCV plan on the two compactness measures, reock and polsby-popper, averaging the district compactness ratings withing county groupings where map-drawing discretion is allowed and comparable:

		Remedial Senate Plan		**Remedial NCLCV Plan**		**Notes**
Counties	***Districts***	***Reock Mean***	***Polsby-Popper Mean***	***Reock Mean***	***Polsby-Popper Mean***	
Iredell, Mecklenburg	37, 38, 39, 40, 41, 42	.41	.44	.46	.47	The Remedial NCLCV Plan is more compact on both measures, but ignores incumbents residency and double-bunks two Senators.
Granville, Wake	13, 14, 15, 16, 17, 18	.46	.40	.52	.44	The Remedial Harper Plan is slightly more compact in both measures, but splits 22 VTDs (versus 3 for the Remedial Senate Plan) to achieve this and double-bunks an African American Senator with another incumbent.
Guilford, Rockingham	26, 27, 28	.53	.37	.44	.37	The Remedial Senate Plan is more compact using reock; the two plans tie using polsby-popper. However, the Remedial NCLCV Plan

						splits 5 VTDs to achieve these compactness scores and double-bunks an African American Senator with another incumbent.
Brunswick, Columbus, New Hanover	7, 8	.34	.36	.51	.45	The Remedial NCLCV Plan is more compact using both measurers. However, the NCLCV Plan ignores traditional districting principles and splits a VTD and runs the population of SD-7 down to -4.99% in a blatant partisan gerrymander.
Buncombe, Burke, Cleveland, Gaston, Henderson, Lincoln, McDowell, Polk, Rutherford	43, 44, 46, 48, 49	.44	.39	.36	.26	The Remedial Senate Plan is significantly more compact using both compactness measures.
Alexander, Forsyth, Stokes, Surry, Wilkes, Yadkin	31, 32, 36	.51	.44	.40	.33	The Remedial Senate Map is significantly more compact using both compactness measures.

The Remedial NCLCV Plan double-bunks 8 member pairs, or 32 percent of all current North Carolina Senators. Again, while the Chairs attempted to follow the Supreme Court's directive to consider member residences in drawing the Remedial Senate Plan and eliminate elective double-bunkings, the Remedial NCLCV Plan electively pairs these incumbents:

- Senator Dan Blue (African American Democrat) and Senator Sarah Crawford (white Democrat),
- Senator Gladys Robinson (African American Democrat) and Senator Michael Garrett (white Democrat),

- Senator Paul Lowe (African American Democrat) and Senator Joyce Krawiec (Republican),
- Senator Vicki Sawyer (Republican) and Senator Natasha Marcus (Democrat),
- Senator Chuck Edwards (Republican) and Senator Julie Mayfield (Democrat).

Each of these double-bunkings are easily avoidable while following traditional, neutral districting criteria. It is truly remarkable that the Remedial NCLCV Plan would target three African American Senators (Blue, Robinson, and Lowe), flouting the Supreme Courts' instructions to consider incumbency evenly, particularly veteran African American members.

The remedial NCLCV plan fairs worse when looking at splitting VTDs. The Remedial NCLCV Plan splits a whopping 49 VTDs, over 16 times as many splits as the General Assembly's Remedial Senate Plan. Even more egregiously than the Remedial Harper Plan, the Remedial NCLCV Plan splits multiple VTDs in the following counties to intentionally gerrymander the districts for partisan gain: 2 split VTDs in Buncombe, 2 splits in Forsyth, 5 in Guilford, 1 in New Hanover, 22 in Wake County (the same number as the Remedial Harper Plan), and another 17 VTD splits in an additional 7 counties. Drilling into a few of these examples, the two split VTDs in Buncombe County enabled NCLCV to draw the "Asheville Finger" from Henderson County into downtown Asheville. The two split VTDs in Forsyth County were drawn to target Senator Joyce Krawiec in a district a Republican would be unable to win and double-bunk her with African American Senator Paul Lowe (Democrat). Perhaps the most deplorable example of splitting VTDs and manipulating district population deviations occurs in New Hanover County. In that county, the Remedial NCLCV Plan splits a VTD and draws Senate District 7, home to incumbent Senator Michael Lee

(Republican), close to the bare minimum for population deviation, 198,465 people, or is -4.9# percent, while the other district that includes parts of New Hanover, Senate District 8, has 214,553 people. This imbalanced population deviation within a county grouping demonstrates the Plaintiff's intent to remove as many Republican voters from the New Hanover-based Senate District 7 as possible to purposefully gerrymander Senator Michael Lee into a Democratic district.

While the Chairs crafted Senate District 7 to be as competitive as possible in the Remedial Senate Plan, improving the partisan fairness scores (mean-median and efficiency gap) statewide, the NCLCV attempts to remove competition in New Hanover County by drawing a safe Democratic seat. Courts have ruled previously that selectively creating districts with wide variations in population deviations, as the NCLCV does in New Hanover, with Senate District 7 at the very bottom of the allowable population deviation range, while Senate District 8 is above the average ideal population for a Senate district, is evidence of intentional racial or partisan gerrymandering and weakens the strength of a voting bloc in one district while advantaging the other. In this case, the Remedial NCLCV Plan buries as many Republican voters in New Hanover in the already strongly Republican Senate District 8, taking Senate District 7 from a competitive seat to a safe Democratic seat.

In summary, the General Assembly's Remedial Senate Plan was the most compact, paired the fewest incumbents, and split the fewest VTDs; it also fell within this Court's suggested ranges for partisan fairness and competitiveness (mean-median and efficiency gap). It is nearly inexplicable for the trial court to have selected

the NCLCV remedial senate plan. While it scores slightly "better" than the Remedial Senate Plan on mean-median and efficiency gap, this plan only accomplishes this by ignoring traditional, neutral districting criteria. It is less compact (much less compact in counties with elective draws, pointing to an intent to gerrymander), intentionally pairs more incumbents (purposely targeting certain Republicans and inexplicitly double-bunking African American members), and splits far more VTDs (particularly in counties where the Plaintiffs gratuitously target Republican incumbents, such as Sen. Berger in Guilford, Sen. Krawiec in Forsyth, and Sen. Lee in New Hanover). The Court should have ordered the General Assembly's Remedial Senate plan into use for the 2022 elections.

C. Subordinating Traditional Criteria to Race Was Unwarranted

While in its Opinion this Court referenced an alleged failure of the General Assembly to do a polarization analysis in 2021, this Court seems to have overlooked the fact that none of the plaintiffs (nor any other third party) has ever submitted a state-wide polarization study. Specifically, the NCLCV have never provided any evidence of any area of the state where it contends the three *Gingles* threshold conditions are present.

Despite the absence of a *Gingles* quality polarization study, NCLCV Plaintiffs have submitted plans based upon an algorithm intentionally programmed to use race to maximize the number of "electoral opportunity" districts. Unsurprisingly, the NCLCV has never produced a listing showing the black voting age population ("BVAP") included in each of its alleged minority opportunity districts. Neither the

Legislative Defendants nor the court knows the exact BVAP included in these districts and cannot therefore test if the districts perform as alleged by NCLCV. But what we do know is that Dr. Duchin has studied the NCLCV maps and that in her opinion these plans create "effective black districts" that consist of black voting age population as low as 25%. The fact that Dr. Duchin believes that effective districts can be established with less than 50% BVAP, standing alone, confirms that nothing in the NCLCV plans meets the threshold conditions required by *Gingles*.

NCLCV Plaintiffs admit as much in their brief on their proposed remedial map, and by doing so, have confirmed that their plans constitute illegal racial gerrymanders. Consistent with Dr. Duchin's study, NCLCV Plaintiffs argue that their plans give black voters intentionally drawn "opportunity" districts, even in the absence of any of the *Gingles* threshold elements that must be present to justify the use of race in drawing them. NCLCV Rem at 4. Starting with the premise that black voters are "entitled" to a state-wide percentage of districts drawn using race, reveals a "maximization" strategy that does not apply to any other group of voters and which violates the Fourteenth Amendment. *Bartlett v. Strickland*, 556 U. S. 1. 14, 15, 21 (2009). This alone renders the NCLCV maps illegal gerrymanders in their entirety.

NCLCV correctly cites *Bartlett* for the proposition that proportionality in the number of districts in which African Americans can elect their candidates of choice "is the baseline for measuring opportunity to elect under § 2." *Bartlett*, 556 U.S. at 29. But *Bartlett* certainly does not endorse the intentional creation of districting plans that give African American voters a number of opportunity districts that

exceeds their percentage of the voting age population. But, not surprisingly, because of the NCLCV's premise that African American voters are entitled to the maximum number of opportunity districts, all three NCLCV maps provide African Americans extra-proportionality in the number of districts Dr. Duchin defines as "effective."

In their most recent brief, NCLCV advertises that their congressional plan includes four "effective black districts, or 29% of North Carolina's 14 congressional districts. NCLCV Rem. at 4. They also admit that their proposed senate map establishes 12 effective black districts or 24% of the state's 50 Senate districts. *Id.* Finally, NCLCV Plaintiffs disclose that their proposed House plan establishes 36 out of 120 House districts (30%) as effective black districts. The percentages of effective black districts all exceed the percentage of Afircan Americans found in the state's voting age population (20%).

Obviously aware of their exposure to claims of racial gerrymandering resulting from the number of effective black districts created by their proposed plans, NCLCV Plaintiffs argue that these percentages are justified because "protected minority groups constitute just over 30% of North Carolina's adult citizen population. "NCLCV Rem. at 4. Other than citing to a Census Bureau Report, NCLCV Plaintiffs offer no definition explaining which minority groups are encompassed within their definition or why they were included. Regardless, these arguments advanced by NCLCV to explain their racially gerrymandered maps. are problematic for several reasons.

First, the type of district in which one or more minority groups constitute a majority of the voting age population is often described as a "coalition district."

Bartlett, 556 U.S. at 13-14. To date, the Supreme Court has never decided whether states can be compelled to draw coalition districts in order to comply with § 2. *Id.* There is certainly no precedent for a court to order a legislature to draw coalition districts prior to an actual lawsuit under § 2. In any case, the issue of coalition districts is irrelevant to this litigation because NCLCV admits that the districts created by their maps are crossover districts, "meaning that Black-preferred candidates can prevail as a result of joint support of Black voters and white Democrats, making it unnecessary for the Black voting age population in the district to constitute a majority of the district's population." NCLCV Rem. at 17. In other words, NCLCV admits that the purpose of their algorithm was to determine the targeted percentage of black voters needed to make the district effective without regard to votes cast by other minority groups. The algorithm was not programmed to create a majority minority pool by gathering different minority groups, which collectively could constitute a majority, and then determining if racial bloc voting prevented this combination of minority groups from electing their preferred candidate.

Thus, just as NCLCV has failed to show evidence of the *Gingles* threshold conditions to establish majority black districts, they have utterly failed to offer evidence of threshold conditions which could justify a coalition district. Under *Gingles*, a plaintiff not only has to prove that the minority group (or combination of minority groups) constitute a majority in a geographically compact district, they also have to prove that the minority group or groups are politically cohesive. Put simply,

plaintiffs pursing § 2 districts must produce evidence that their minority group or groups vote for the same candidate. *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986). NCLCV Plaintiffs have offered absolutely no evidence that black voters are cohesive with any other minority group. To the contrary, for example, past litigation indicates that African Americans are not politically cohesive with Native Americans. *Harris v, McCrory*, 158 F.Supp.3d 600, 617 (M.D.N.C. 2016), *aff'd sub. nom, Cooper v. Harris*, 137 S. Ct. 1455 (2017) (testimony by Congressman Mel Watt that African Americans in Mecklenburg County are not politically cohesive with Native Americans in southeastern North Carolina).

The NCLCV maps have also been drawn to meet the partisan metrics this Court has now deemed mandatory in measuring the alleged partisan fairness of state-wide maps. Obviously, the way a single district is drawn, much less four congressional districts, 12 Senate districts and 36 House districts, impacts the partisan balance of every other district and the entire map. Clearly, NCLCV's admitted motive to create opportunity districts whenever possible (and in excess of black voters' proportional share of the voting age population), necessarily infuse[d] race into every line drawn by the algorithm for every district. *League of United Latin American Voters v Perry*, 548 U.S, 399, 445-46 (2006). To justify districts drawn based upon race, NCLCV would be required to do a district-by-district analysis explaining the justification of using race in the drawing of each. *Covington*, 316 F.R.D. at 142-65. Given the evidence and record before the court, it was error to adopt the NCLCV simulated

plans because these plans ratify racial gerrymanders that are equally illegal as the districts declared unlawful in *Harris* and *Covington*.

V. COMMON CAUSES' MOTION IS WITHOUT MERIT AND SHOULD BE DENIED.

Common Cause argues that the North Carolina Constitution requires that the General Assembly use race to draw crossover districts, not because of a judgment in favor of a plaintiff in a § 2 lawsuit, but instead because of eleventh hour submissions purporting to show a vote dilution claim through "demonstrative" majority black districts. This is a clearly erroneous. At the outset, the Superior Court found as a matter of fact, that Legislative Defendants complied with the Supreme Court's order regarding a racially polarized voting analysis, and that the Remedial Plans provide African Americans with a proportional opportunity to elect their candidate of choice. (23 February 2022 Superior Court Order ¶16-18). Legislative Defendants complied with the Court's order to conduct a racially polarized voting analysis and that Any order from the the North Carolina Supreme Court, requiring the General Assembly to draw districts based upon race, as argued by the Common Cause, will violate the Fourteenth Amendment.

First, we are aware of no decision by any court compelling a legislature to use race to draw districts during the legislature's legislative deliberations or prior to the resolution of an actual lawsuit challenging an enacted plan or districts under § 2 of the VRA. Common Cause is grossly misconstruing *Stephenson I* if they believe any court can compel a legislature to classify its citizens based upon race before any such legislation is enacted. Instead, the remedy for any failure to use race in the drawing

of districts is a § 2 lawsuit where the normal rules of civil procedure and burdens of proof will apply, and which will require plaintiffs to prove to a judge following discovery and cross examination that race-based districts are necessary to protect minority voters from vote dilution. To date, none of the Plaintiffs, including Common Cause, have alleged a claim under § 2.

Common Cause also completely misconstrues the meaning of *Shaw I* and all of its progeny. The question in *Shaw* was not whether a third party can submit reports to a legislature which would compel the legislature to use race in drawing districts. Instead, the 'the Fourteenth Amendment requires that state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest." *Shaw I*, 509 U.S. at 643-44, citing e.g., *Wygant v. Jackson Bd. Of Ed.*, 476 U.S. 267, 277-78 (1986). Thus *Shaw* focuses on the requirements that must be met by a legislature if it chooses to draw districts based upon race. To date, the only compelling interest that can be used to justify a legislature's decision to use race in the drawing of districts is when the legislature concludes that it has good reasons to believe that using race is necessary for the state to avoid liability under the VRA. *Cooper*, 137 S.Ct. at 1470. As we have discussed, in the case of potential liability under § 2, the legislature must conclude that it has substantial evidence of the three *Gingles* threshold conditions. *Id.*

There is no support for the proposition that a third party can by-pass the requirements of proving a § 2 claim before a court of competent jurisdiction, simply by submitting to the legislature documents it has prepared. While Common Cause

has submitted summaries of an alleged polarization analysis, it has declined to submit an actual expert report or even identify the expert who performed the analysis. The General Assembly clearly cannot depose the Common Cause expert, review the expert's data and output from a polarization analysis, hire their own expert to evaluate or refute the study performed by the Common Cause expert, or test the quality of the Common Cause submission before an independent trier of fact.

While Common Cause has made no § 2 claims in their pleadings, even assuming they had raised such claims, no court would even consider imposing § 2 districts based solely on the evidence proffered by Common Cause. Based upon the record before the court, any order imposing race-based districts at this stage could easily subject the state to liability for drawing racial gerrymanders. In contrast, Common Cause will not be left without a remedy should the court decline its invitation to impose race-based districts. Common Cause will have every right to file a new lawsuit alleging violations of § 2 which the State will then be able to fully litigate and refute before a court of law.[7]

Next, the information submitted by Common Cause would not be sufficient to support a court order requiring the use of race to draw districts—in an actual § 2 lawsuit.

[7] Requiring Common Cause to actually allege a claim under § 2, instead of allowing it to be litigated and decided sub nom under the current abbreviated schedule and record, would also give the Legislative Defendants the opportunity to remove that claim to federal court. See 28 USC §1441.

First, the Common Cause submission fails to satisfy the first *Gingles* threshold condition requiring evidence of a "compact" minority population that can constitute a majority in a single member district.

The Common Cause submission starts with proposed "demonstrative" majority black districts purportedly offered to meet all of the *Gingles* requirements. The two Common Cause Demonstrative districts are designated as Demonstrative HD 10 and to Demonstrative SD 4. Pictures of both demonstrative districts are embedded below:

Figure 1: HD10 *Gingles I* VRA Demonstrative

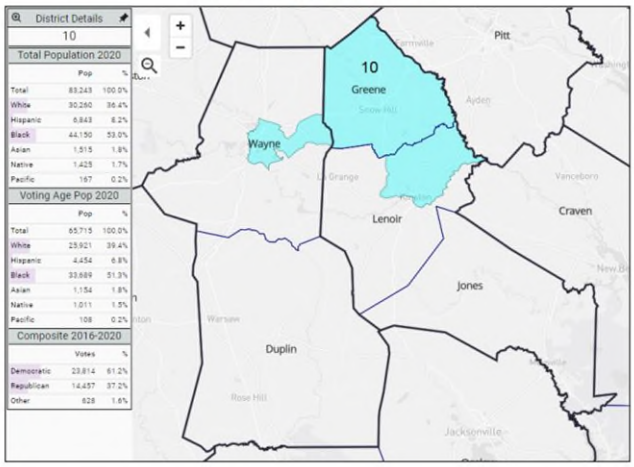
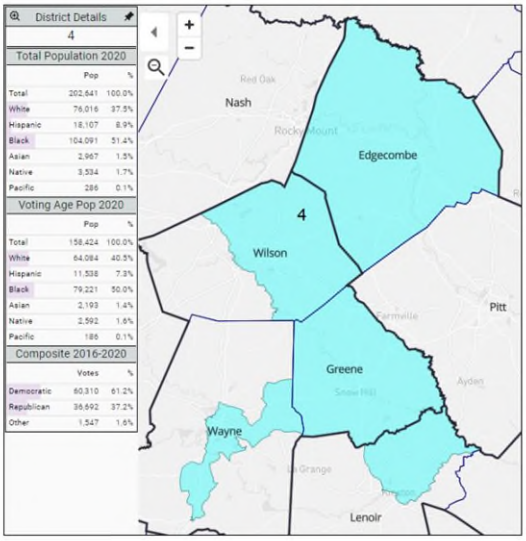
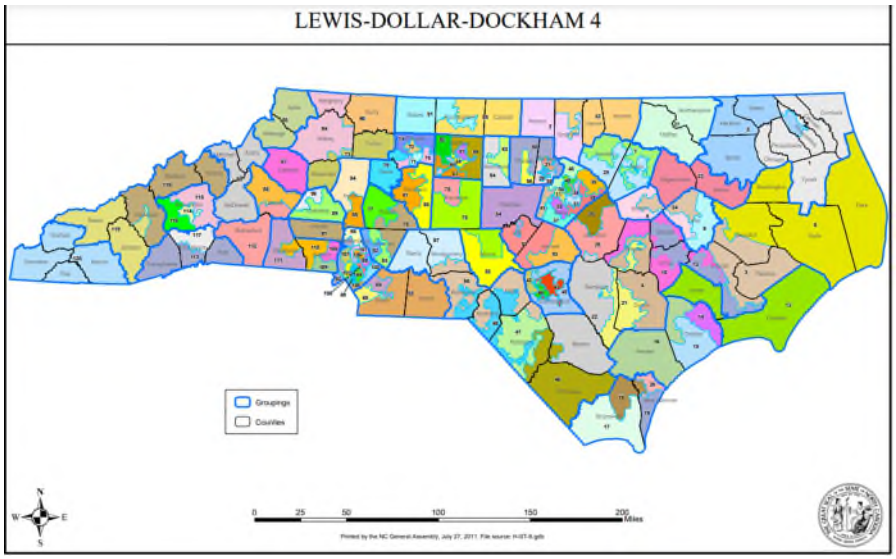
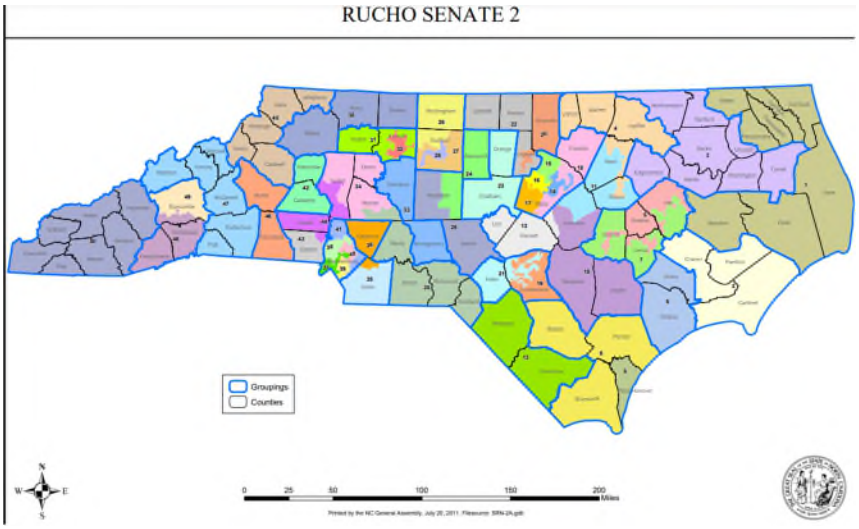


Figure 3: SD4 VRA *Gingles* I Demonstrative



In *Covington*, the district court found that 28 House and senate majority black districts, enacted in 2011, constituted racial gerrymanders. *Id*. 316 F.R.D. at 128, 142-65. Shown below are the 2011 senate and house plans which include all of the districts declared illegal by the *Covington* court:





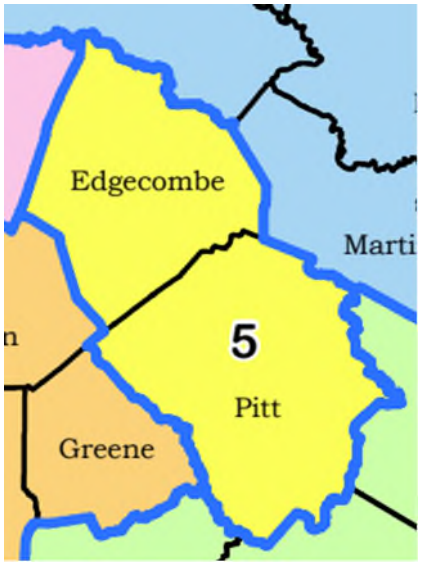
Common Cause Demonstrative HD 10 and SD 4 are both multi-county districts. A comparison of the Common Cause demonstrative districts with the illegal 2011 districts shows that both demonstratives closely resemble several multi-county districts declared unconstitutional in *Covington*. These include but are not limited to including: 2011 HD 5, 24, 32, and 2011 SD 4, 5. Like the districts found to be illegal in *Covington*, neither of the Common Cause demonstrative districts are based upon a reasonably compact black population. At a minimum, given the appearances of the

Common Cause districts, the General Assembly would have more than ample reasons to believe that adopting either district will not protect the state from § 2 liability and instead will invite lawsuits challenging the demonstrative districts as racial gerrymanders. If the districts found to be illegal racial gerrymanders in the 2011 plans continue to be illegal, it is impossible to distinguish those districts from the Common Cause Demonstrative HD 10 and SD 4.

Second, the evidence submitted by Common Cause does not indicate the presence of the third *Gingles* threshold condition, i.e., that a § 2 plaintiff must show the presence of legally significant racially polarized voting. The Common Cause demonstrative districts are both majority black. Thus, neither of them shows a district or districts where the white majority has consistently voted to defeat the minority group's preferred candidate of choice. There is no "white majority" in either district. At best, all that the Common Cause analysis arguably shows is the presence of statistically significant racially polarized voting within the confines of a hypothetical majority black district.

To prove the presence of the third *Gingles* threshold condition, Common Cause is obligated to provide evidence of legally significant racially polarized voting in a larger area of the state demonstrating that black voters in enacted HD 10 and SD 4 could constitute a compact majority in a single member district but have been unable to elect their candidate of choice because they were submerged into a majority white district. Absent this type of evidence, there is no proof that the "white majority" regularly votes as a bloc to defeat the minority's preferred candidate.

Common Cause Demonstrative SD 4 clearly is not needed to remedy a possible § 2 violation. Demonstrative SD 4 includes all of Edgecombe and Greene Counties and portions of Wilson, Wayne, and Lenoir Counties. In comparison, under the enacted Senate Plan, all of Edgecombe and Pitt Counties are assigned to a *Stephenson* required two-county single member SD 5. A copy of enacted SD 5 is shown below:



Common Cause has offered no proof that legally significant racially polarized voting exists either in Edgecombe County or enacted SD 5. In fact, enacted SD 5 has a BVAP of 39.3%, and therefore represents a naturally occurring crossover district in which the minority voters of Edgecombe County already have the ability to elect their preferred candidate of choice. (LDTX109 Ex.B at p 10). Voters in Edgecombe County clearly do not reside in a district where a "white majority" can consistently vote as a bloc to defeat the minority group's candidate of choice.

The next problem with the Common Cause submission is the bizarre distinctions found in their "demonstrative districts" as compared to their proposed "remedial districts." In both instances, Common Cause argues that the presence of a

hypothetical majority black district requires the state to draw a remedial crossover district in the place of the proposed majority black district. A copy of the Common Cause Remedial HD 10 and SD 4 are below.

Figure 2: HD10 VRA Remedial

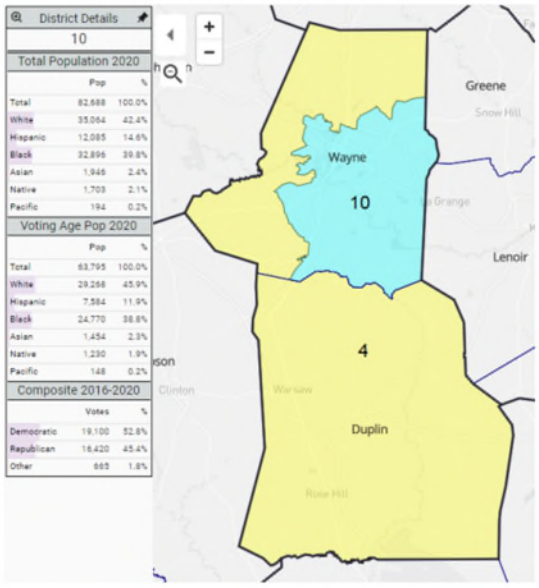
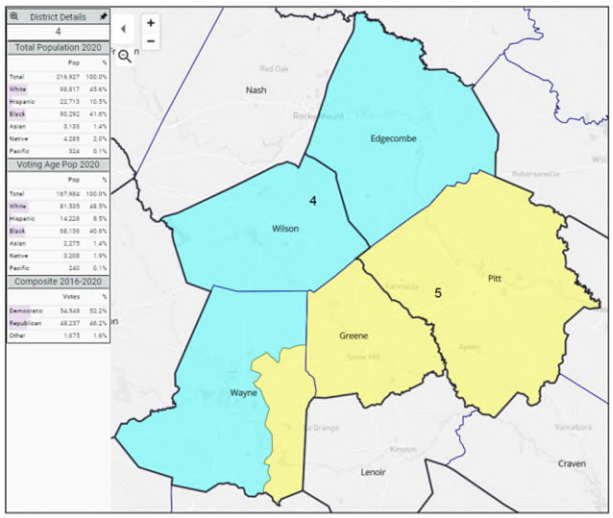


Figure 4: SD4 VRA Remedial



The glaring illogic associated with the Common Cause proposal is that their "remedy" would only provide a remedy for some but not all of the voters who reside in the demonstratives. Compare Common Cause Demonstrative HD 10 with Remedial SD 10 and Demonstrative SD 10 with Remedial SD 4. In both instances, the proposed Common Cause remedial districts only include portions of their demonstrative districts. Also, in both instances, the remedial districts include population that was not included in the demonstrative districts. As to those voters, there is no proof that they are victims of vote dilution. The remedy proposed by Common Cause therefore violates the basic principle that the remedial district

adopted to redress vote dilution must include the voters who actually suffered "vote dilution injuries." *Shaw II*, 517 U.S. at 916.

For example, Demonstrative HD 10 includes all of Greene County, a portion of Lenoir County, and a bizarre extension into Wayne County. The snake-like extension into Wayne County is clearly intended to include only a portion of Goldsboro in order to artificially create HD 10 with a BVAP of over 50%. This aspect of Demonstrative SD 4 closely resembles similar extensions found in several of the illegal 2011 majority black districts including HD 21 and SD 4. Common Cause then plays a sleight of hand and locates its remedial HD 10 solely in Wayne County. Voters residing in Greene and Lenoir County, who according to Common Cause Demonstrative HD 10 have suffered a vote dilution injury, are not included in the remedial district.

Similarly, Common Cause Demonstrative SD 4 includes all of Edgecombe and Greene Counties and portions of Wilson, Wayne, and Lenoir Counties. Yet the Common Cause Remedial SD 4 receives a completely different configuration. It consists of all of Edgecombe and Wilson Counties and a portion of Wayne County. Voters included in demonstrative district SD 4 residing in Greene and Lenoir are excluded. The Common Cause remedial SD 4 also includes all of Pitt County, an area for which Common Cause has offered absolutely no polarization analysis. Moreover, the Common Cause Remedial SD 4 ignores that fact that under enacted SD 4, all of the minority voters in Pitt, like the minority voters in Edgecombe, are already assigned to a performing crossover district. There is no basis for including Pitt County in a remedial district purportedly designed to remedy vote dilution in 5

different counties. Furthermore, while it is not clear how the Common Cause map would treat incumbents, because Common Cause failed to comply with the Superior Court's order regarding submission materials, it appears as though Common Cause would pair senior members of North Carolina House Republican leadership from the General Assembly. Rep. Jimmy Dixon, Senior Chairman of the House Agriculture Committee and the Appropriations Committee charged with providing funding for agriculture, environmental enforcement, and economic development, appears to be double-bunked with House Majority Leader John Bell, an outcome that would severely reduce the voice of Eastern North Carolina in the General Assembly.

If the Common Cause demonstrative maps actually justified the use of race to draw districts to protect the state from § 2 liability, then the remedy is to require the state to adopt the demonstrative majority black districts, and not crossover districts that encompass only portions of the demonstrative districts. *Shaw II*, 517 U.S. at 916. States have the discretion to draw majority black districts when there is evidence of the three *Gingles* threshold condition, but this does not give states the authority to replace majority black districts with crossover or influence districts. *Bartlett*, 556 U.S. 1.

The Common Cause proposed configuration for Remedial SD 4 exposes their true intentions. If the court orders the state to adopt Common Cause's proposed remedial SD 4, the state would also be required to change the county groups involving Edgecombe, Wilson, Pitt, Greene, and Wayne. This in turn would result in the state

also being required to adopt Common Cause's proposed reconfiguration of SD 5. (See above Common Cause Remedial SD 4 map).

Reconfigured SD 5 reveals what Common Cause truly seeks is not lawful majority black remedial districts, but instead a redistricting plan that maximizes the political voting strength of minority voters who just so happen to consistently vote the Democrat ticket. The Common Cause remedial districts clearly are intended to inappropriately use race as a proxy for politics. *Bush v. Vera*, 517 U.S. 952, 958 (1996). This type of "maximization" theory concerning the requirements of § 2 has been expressly rejected by the Supreme Court in both *Bartlett* and *LULAC*. It is also wholly inappropriate for a court to order that the state adopt these districts when the enacted House and Senate plans already provide black voters with more than proportionality in the number of districts where they have an equal opportunity to elect their candidate. See *Johnson v. De Grandy*, 512 U.S. 997, 1013-15 (1994).

Furthermore, Common Cause revealed in their briefing that Christopher Ketchie is the person responsible for its polarization summaries. Whether Mr. Ketchie would qualify as an expert on calculating racial polarization rates is an open question. What we do know is that the Legislative Defendants, and ultimately the voters of North Carolina, have not been given access to Mr. Ketchie' s supporting data, outputs, and calculations and that Legislative Defendants have not been able to depose Mr. Ketchie. As a result, Legislative Defendants do not know the process followed by Mr. Ketchie at arriving at the configuration of the Common Cause demonstrative districts. Did Mr. Ketchie simply program his computer to concentrate

only on race in his efforts to configure a majority black district before he performed any polarization analysis? As we have explained, it is quite simple to attest to the existence of statistically significant RPV in any majority black district, no matter how the district might look and without regard to its lines being heavily gerrymandered. It is much harder to identify a majority white district in which a black population has been submerged and is therefore unable to elect their candidate of choice. And exactly how did Mr. Ketchie identify the geographic contours of the proposed demonstratives? How many iterations of his drawings had to be made to get to a majority black population and was race the predominate reason (and in fact, the only reason) for any change ?

It is also self-evident that Mr. Ketchie' s mission was similar to the instructions given to the General Assembly's map drawer in 2011. In both instances, the person directing the map drawer "purposely established a racial target [for districts]: African Americans should make up no less than a majority of the voting age population." *Cooper v. Harris*, 137 S.Ct. 1455, 1468 (2017).

It is telling that the shapes of the Common Cause demonstrative districts (and for that matter their proposed remedial districts) are nowhere to be found in the thousands of simulations generated by the Harper plaintiffs or the remedial districts proposed by the North Carolina League of Conservation Voters ("NCLCV"). NCLCV has candidly admitted that its proposed maps are a result of programing intended to maximize the number of so called "effective black district" from which African American can purportedly elect their candidate of choice. NCLCV Brief on Proposed

Remedial Plans ("NCLCV Rem. Brief") at 4. The fact that an algorithmic-drawn map, designed to create as many effective black districts as possible, fails to include districts resembling the proposed Common Cause districts , further exposes Common Causse's blatantly racial intentions.

VI. CONCLUSION

The Supreme Court should deny NCLCV, Harper, and Common Cause Plaintiffs Petitions and Motions for Temporary stay for the reasons set forth herein.

Respectfully submitted this 23rd day of February 2022.

/s/ Phillip J. Strach

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It is hereby certified that on this the 23rd day of February, 2022, the foregoing was served on the individuals below by email:

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