No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

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BRIEF OF PLAINTIFF-APPELLANT COMMON CAUSE

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BRIEF OF PLAINTIFF-APPELLANT COMMON CAUSE

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ISSUE PRESENTED

1. Did the trial court err in approving the Remedial Senate Plan and Remedial House Plan, enacted into law by the General Assembly on 17 February 2022?

STATEMENT OF THE CASE

This is an appeal of a remedial order entered by a three-judge panel of the Superior Court on remand from this Court, approving remedial state House and Senate redistricting plans enacted by the General Assembly on 17 February 2022 and ordering an interim congressional plan for the 2022 general election.

Following the 2020 Decennial Census, the North Carolina General Assembly enacted new redistricting plans for the North Carolina House of Representatives, North Carolina Senate, and United State House of Representatives on 4 November 2021. *NCLCV* Plaintiffs and *Harper* Plaintiffs filed separate suits on 16 and 18 November 2021 challenging the constitutionality of the enacted plans. The matters were consolidated before a three-judge panel appointed in accordance with N.C. Gen. Stat. § 1-267, which subsequently granted the motion by Plaintiff Common Cause to intervene in the matter. Following a three-and-one-half day bench trial in early January 2022, the trial court issued a final Judgment in favor of Defendants that was reversed by this Court in a 4 February 2022 Order (the "Order") followed by a 14 February 2022 Opinion (the "Opinion"). This Court struck down all three plans enacted in 2021 and remanded the matter back to the trial court for remedial proceedings.

The General Assembly engaged in remedial redistricting, enacting remedial redistricting plans on 17 February 2022. Legislative Defendants and all Plaintiffs filed remedial submissions on 18 February 2022 followed by objections on 21 February 2022. On 23 February 2022, the trial court issued an Order on Remedial

Plans (the "Remedial Order") approving the remedial state House and Senate plans enacted by the General Assembly and rejecting the remedial congressional plan, ordering an interim congressional plan for the 2022 general election. All parties appealed the Remedial Order on 23 February 2022 and filed emergency stay applications, which were denied by this Court the same day.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Appeal is taken in the North Carolina Supreme Court pursuant to this Court's inherent authority, N.C. Gen. Stat. § 7A-31, and pursuant to this Court's Order allowing direct appeals in this matter. (*See* R p 894 (8 Dec. 2021 Order ¶ 4)).

INTRODUCTION

On remand, the trial court received clear direction by this Court to approve state legislative maps that satisfy *all* provisions of the North Carolina Constitution. It failed. In its order approving the remedial House and Senate plans enacted by the General Assembly, the trial court ignored legal arguments and supporting evidence that the remedial state legislative plans cause unlawful vote dilution for Black voters and intentionally destroy functioning crossover districts in violation of North Carolina's Equal Protection Clause; it misconstrued and misapplied this Court's direction to evaluate whether the remedial plans provide substantially equal voting power to voters regardless of political affiliation by unjustifiably focusing on just two of the several relevant metrics (missing entirely the forest for the trees); and it

ignored unanimous findings of the expert assistants to the Special Masters, and submissions by Plaintiffs, indicating that the remedial House and Senate maps do not provide voters with an equal opportunity to aggregate and translate their votes to power in the form of a governing majority. If left uncorrected, North Carolinians will be forced to vote in elections that deny their most fundamental right to substantially equal voting power—a plainly undemocratic result that this Court, in its Order and Opinion, specifically sought to avoid in this and future redistricting cycles. This Court should reverse the Remedial Order, strike down the constitutionally deficient remedial state legislative maps, and utilize the remedial districts proposed by Common Cause to ensure there is no unlawful vote dilution for North Carolina's Black voters in contravention of state constitutional requirements.

STATEMENT OF THE FACTS

On 4 February 2022, this Court held that the "General Assembly violates the North Carolina Constitution when it deprives a voter of his or her right to substantially equal voting power on the basis of partisan affiliation[,]" and that "reapportionment plans that do so are subject to strict scrutiny[.]" (R p 3820–21 (Order ¶ 5)). This Court also held that,

> [t]he 'Whole County Provision' must be applied in a manner consonant with the requirements of the Voting Rights Act and federal 'one-person, one-vote' principles. *Stephenson*, 355 N.C. at 382. The General Assembly must first assess whether, using current election and population data, racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African-American voters.

(R p 3823 (Order ¶ 8)).

In its 14 February 2022 Opinion, this Court elaborated on these holdings. The Opinion conclusively established that "when a districting plan systematically makes it harder for individuals because of their party affiliation to elect a governing majority than individuals in a favored party of equal size[,]" that districting plan "deprives on the basis of partisan affiliation a voter of his or her right to equal voting power." (R p 4056 (Opinion ¶ 160)). The Court reiterated that "such a plan is subject to strict scrutiny and is unconstitutional unless the General Assembly can demonstrate that the plan is 'narrowly tailored to advance a compelling governmental interest.' *Stephenson*, 355 N.C. at 377." (*Id.* ¶ 161). The Opinion also held that "[a]chieving partisan advantage incommensurate with a political party's level of statewide voter support is neither a compelling nor legitimate governmental interest," (*id.*), and that "the partisan gerrymandering violation is based on the redistricting plan as a whole, not a finding with regard to any individual district." (*Id.* ¶ 162).

The Opinion also affirmed that,

> the General Assembly's responsibility to conduct a racially polarized voting analysis arises from our state constitution and decisions of this Court, including primarily *Stephenson*, and not from the VRA itself, or for that matter from any federal law.

(R p 4086 (Opinion ¶ 214)).[1]

The Court also set forth a remedial process for the submission and approval of state legislative and congressional redistricting plans that "satisfy *all* provisions of

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[1] The Court declined to reach the issue of Common Cause's claim of intentional racial discrimination in violation of North Carolina's Equal Protection Clause. (R p 4090 (Opinion ¶ 223 n.17)).

the North Carolina Constitution," and directed the trial court to "approve or adopt compliant congressional and state legislative districting plans no later than noon on 23 February 2022[,]" with "[a]ny emergency application for a stay pending appeal . . . filed no later than 23 February 2022 at 5:00 p.m." (R p 3823–24 (Order ¶ 9) (emphasis added)).

On 15 February 2022, Common Cause sent through counsel a letter to Legislative Defendants and the other members of the House and Senate Redistricting Committees noting their obligation, as set forth in the Opinion, to conduct a Racially Polarized Voting ("RPV") analysis prior to drawing districting lines to comply with the North Carolina Constitution and avoid the dilution of minority voting strength. (Doc. Ex. 11624 (15 Feb. Letter at 2)). Common Cause provided demonstrative maps and an RPV analysis showing that two state legislative districts fulfilled the *Gingles* criteria. (*Id.*) Common Cause proposed two remedial districts, House District 10 and Senate District 4, that were narrowly tailored to protect against vote dilution for Black voters while adhering to neutral redistricting criteria, such as compactness and respect for geographic boundaries. (*Id.*)

This information was ignored. Legislative Defendants proposed remedial state House and state Senate maps in the House and Senate Redistricting Committees on 16 February 2022. In both the Senate and House Redistricting Committees, leadership asserted reliance on the December 2021 expert report of Dr. Lewis, submitted at trial, to conclude there was no evidence of legally significant racially polarized voting to require remedial districts and to contend that drawing remedial

districts would violate the Fourteenth Amendment. (*See, e.g.,* Doc. Ex. 14672-77 (16 Feb. Senate Cmte. Hr'g Tr. 5:21-10:20)); (Doc. Ex. 14754-55 (16 Feb. House Cmte. Hr'g Tr. 6:16-7:5)). However, no evidence was presented during the legislative process that the demonstrative districts and RPV information submitted by Common Cause was inaccurate.

Throughout the remedial legislative process, leadership indicated the maps were drawn to meet just two of the many partisan metrics noted by the Supreme Court as relevant. (*See* Doc. Ex. 14669 (16 Feb. Sen. Comm. Hr'g Tr. 2:11-16) (Sen. Newton stating map-drawers were "scoring the map on the metrics required by the Supreme Court, the mean-median and efficiency gap analysis" to assert his belief the remedial Senate map is constitutional)); (Doc. Ex. 14753 (16 Feb. House Cmte. Hrg Tr. 5:13-21) (Rep. Hall asserting that the Court focused on and provided "bright line rules" for mean-median and efficiency gap to state his belief the remedial House map is constitutional)).

In the House floor debate on 16 February, five amendments to the remedial House map were adopted while an amendment from Representative Harrison, proposed to avoid vote dilution and based in part upon information provided by Common Cause in its letter, failed along party lines. (Doc. Ex. 14869 (16 Feb. House floor Tr. 42:23-45:19)). In the Senate floor debate on 17 February, all proposed amendments were tabled. (*See generally* Doc. Ex. 14953-14988 (Tr. 18:21 – 53:20)). The remedial House Map, S.L. 2022-4, was enacted in a 115-5 vote in the House and 41-3 vote in the Senate. The remedial Senate Map, S.L. 2022-4, was also enacted on

17 February 2022 and along party lines. Legislative Defendants did not conduct a racially polarized voting study following the North Carolina Supreme Court's 4 February 2022 Order or 14 February 2022 Opinion, nor did they specify any districts in their proposal were drawn to prevent unlawful vote dilution for Black voters, nor were any such districts adopted during the legislative process.

The parties submitted remedial plans to the trial court on 18 February 2022, including the submission of the Legislative Defendants' Remedial Maps along with supporting materials. In their disclosures, Legislative Defendants relied upon just two metrics, mean-median difference and efficiency gap, to argue their remedial state legislative maps were constitutionally complaint. (R p 4199 (LD Br. at 6)).

Common Cause submitted two remedial district proposals–House District 10 and Senate District 4–that were previously recommended to the Redistricting Committees during the legislative process on the grounds they are required to prevent unlawful vote dilution under both federal and state constitutional grounds. (R p 4576 (Plaintiff Common Cause Submission ("CC Submission") at 2)). Common Cause also submitted supporting documentation required by the trial court, including the RPV studies showing legally significant racially polarized voting in the areas of the proposed remedial districts that had been provided to the Redistricting Committees. (*See* R p 4576-4577 (CC Submission at 2–3); R p 4600, 4604 (Ketchie Exs. 1, 3)). In its submission, Common Cause demonstrated that the remedial districts it proposed were independently required under other provisions of the state constitution, including to remedy the unconstitutional partisan gerrymandering still

present in the remedial House and Senate maps and to remedy intentional discrimination in violation of the North Carolina's Equal Protection Clause arising out of the intentional destruction of functioning crossover districts in both maps. (R p 4577 (CC Submission at 3)).

The parties filed objections to the proposed remedial plans on 21 February 2022. Common Cause objected to all three remedial maps submitted by Legislative Defendants, asserting that they failed constitutional muster on several independent grounds, including as unconstitutional partisan gerrymanders, failing to prevent unlawful vote dilution as required under *Stephenson*, and were intentionally discriminatory in violation of North Carolina's Equal Protection Clause. (R p 4825 (CC Objections)). Common Cause supported these objections with an expert report of Dr. Jonathan Mattingly and Gregory Herschlag, jointly designated with the *Harper* Plaintiffs, as well as an addendum expert report by the same experts, and the affidavit of GIS specialist Christopher Ketchie. (*See* R p 4600, 4602, 4604 (Exhibits 1, 2, and 3 to CC Objections)). These supporting materials included a full set of relevant metrics for the Legislative Defendants' remedial plans, including mean-median difference, efficiency gap, partisan symmetry, plausible number of representatives elected comparison, and relative chances of electing a majority or supermajority. (*Id.*)

SUMMARY OF TRIAL COURT'S REMEDIAL ORDER

On 23 February 2022, the trial court issued an Order on Remedial Plans (the "Remedial Order"), approving the Legislative Defendants' remedial House and

Senate maps and rejecting the enacted remedial Congressional Map. (*See* R p 4884 (Remedial Order ¶ 67)). The trial court also filed supporting materials to its Remedial Order, including a report of its Special Masters and four reports of the Special Masters' Assistants, political science and redistricting experts retained to assist the Special Masters with analysis of the remedial maps. (*See* R pp 4890–5136)).

Although the reports of the Special Masters' Assistants each reflect extensive analysis of several metrics for the remedial maps, including many of those outlined in the North Carolina Supreme Court's Order and Opinion, the Report of the Special Masters and the trial court's Remedial Order focused upon just two of these metrics: the mean-median difference and the efficiency gap. (*See, e.g.,* R p 4876 (Remedial Order ¶ 34); R p 4898 (Special Master Report)). Citing these metrics alone, the trial court determined that the remedial state legislative maps were both "satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion." (R p 4879, 4882 (Order ¶¶ 42, 55)).

In the Remedial Order, the trial court also found that the General Assembly "satisfied the directive in the Supreme Court Remedial Order to determine whether the drawing of a district in an area of the state is required to comply with Section 2 of the Voting Rights Act." (R p 4874 (Remedial Order ¶ 18)). To support this finding, the trial court cited to the conclusion of Legislative Defendants' expert Dr. Lewis that "all three Remedial Plans provide African Americans with proportional opportunity to elect their candidates of choice." (R p 4873 (Remedial Order ¶ 17)). There is no indication, either in the Report or supporting materials, that the proposed remedial

districts from Common Cause or the accompanying RPV submissions were considered by the trial court, Special Masters, or their Assistants. Common Cause timely filed a Notice of Appeal on 23 February 2022. (*See* R p 5156).

ARGUMENT

I. Standard of Review for Remedial Order

On appeal, factual findings may be set aside if not "supported by competent evidence found by the trial judge." *Dickson v. Rucho*, 367 N.C. 542, 551, 766 S.E.2d 238, 245 (2014), *cert. granted, judgment vacated on other grounds,* 575 U.S. 959 (2015). "Conclusions of law are reviewed de novo." *Id.* When reviewing an order on remedial redistricting plans, the Court first considers whether the findings of fact are supported by the evidence, and then determines whether those findings of fact support the conclusions of law. *Stephenson v. Bartlett*, 357 N.C. 301, 314, 582 S.E.2d 247, 254 (2003) (internal citations omitted).

II. The Trial Court Failed to Evaluate Whether Remedial State Legislative Plans Comport with *All* State Constitutional Requirements.

This Court was clear in its 4 February Order and 14 February Opinion: any remedial plans submitted by the General Assembly must satisfy "*all provisions* of the North Carolina Constitution." (R p 3823 (Order ¶ 9) (emphasis added); *see also* R p 4090 (Opinion ¶ 223)). This is because, while "[t]he General Assembly has the power to apportion legislative and congressional districts under article II and state law, . . . exercise of that power is subject to other 'constitutional limitations,' including the Declaration of Rights." (R p 4026 (Order ¶ 119)).

Common Cause raised several independent state constitutional grounds—in addition to unconstitutional partisan gerrymandering—that disqualify the Legislative Defendants' remedial state House and Senate maps. Common Cause provided uncontroverted evidence that the remedial maps violate (i) state constitutional requirements protecting against vote dilution for Black voters and (ii) North Carolina's Equal Protection Clause due to the intentional destruction of functioning crossover districts for Black voters. Under the remand of this Court, and pursuant to its duty to protect the state constitutional rights of North Carolinians, *Corum v. University of North Carolina Through Board of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992), the trial court could not ignore these fundamental issues in its independent evaluation of the General Assembly's remedial maps. But all evidence on the record indicates that is exactly what the trial court did.

The trial court's finding of fact regarding the "General Assembly's Racially Polarized Voting Analysis" describes only the "abbreviated" analysis of Legislative Defendants' expert Dr. Jeffery Lewis, noting it "concluded that all three Remedial Plans provide African Americans with proportional opportunity to elect their candidates of choice." (R p 4873-74 (Remedial Order ¶ 17)). It did not make any finding as to whether there is legally significant racially polarized voting in North Carolina, much less in the specific regions for which Common Cause provided evidence of legally significant racially polarized voting.

Instead, on the finding of purported "proportional" representation alone, the trial court found that the "General Assembly satisfied the directive in the Supreme

Court Remedial Order to determine whether the drawing of a district in an area of the state is required to comply with Section 2 of the Voting Rights Act." (R p 4874 (Remedial Order ¶ 18)). There are no factual findings in the Remedial Order as to whether the General Assembly's determination was itself correct, nor did the trial court address the evidence put forth by Common Cause showing it was not. By treating this issue as one of merely "checking the box," the trial court failed to assess whether the General Assembly made an adequate, supportable, or even correct conclusion on the issue of racially polarized voting, and thus failed to properly evaluate whether the remedial legislative maps comply with the state constitutional prohibition on vote dilution for Black voters.[2] Accordingly, the trial court's single finding of fact on this point is insufficient to support its ultimate conclusion of law that the Legislative Defendants' remedial state plans should be approved.

Similarly, the trial court failed to address the arguments and evidence presented by Common Cause that the remedial House and Senate maps violate North Carolina's Equal Protection Clause due to the intentional destruction of functioning crossover districts. In fact, the trial court's finding of fact never acknowledges any analysis, or the obligation to analyze, the overall constitutionality of the remedial House and Senate maps for compliance with the Equal Protection Clause.

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[2] The Special Master materials also do not reflect any analysis to determine whether the remedial maps satisfied these independent state constitutional requirements. (*See generally* R pp 4890–5136 (Special Master and Assistant reports)).

This failure to recognize—or by all indications even consider—the unconstitutionality of the Legislative Defendants' remedial state legislative maps on any ground other than partisan gerrymandering did not fulfill the trial court's "most fundamental constitutional duty," (R p 4026 (Opinion ¶ 118)), and presents a reversible error here. *See, e.g., Small v. Small*, 107 N.C. App. 474, 477, 420 S.E.2d 678, 681 (N.C. Ct. App. 1992) (citing N.C. Gen. Stat. § 1A-1, Rule 52, and vacating trial court judgment after finding "the findings of fact and conclusions of law set forth . . . do not finally resolve the issues raised in this cause").

III. The Remedial House and Senate Maps Dilute the Voting Strength of African-American Voters in Violation of the State Constitution.

To draw constitutionally compliant remedial maps, it is undisputed that the General Assembly must take steps to avoid impermissible vote dilution by assessing relevant data in certain areas of the state. As this Court recently explained:

> The 'Whole County Provision' must be applied in a manner consonant with the requirements of the Voting Rights Act and federal 'one-person, one-vote' principles. *Stephenson*, 355 N.C. at 382. The General Assembly must first assess whether, using current election and population data, racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African-American voters.

(R p 3823 (Order ¶ 8); *see also* R p 4086 (Opinion ¶ 214) (noting that "the General Assembly's responsibility to conduct a racially polarized voting analysis arises from our state constitution and decisions of this Court")). Though this obligation is straightforward, the General Assembly failed to adhere to it when drawing the remedial maps it submitted to the trial court for approval. As a result, the trial court's factual finding that the "General Assembly satisfied the directive in the Supreme

Court Remedial Order" on this point is unsupported by the evidence on the record, even if it had been properly considered by the trial court.

As described below in more detail, Common Cause provided definitive and uncontroverted evidence demonstrating legally significant racially polarized voting in the areas around the 2021 enacted House District 10 and Senate District 4; areas with geographically compact populations of Black voters that could constitute majorities in a single-member district. This evidence, which addressed the pertinent issue of legally significant racially polarized voting and the need to protect against vote dilution in remedial redistricting, was ignored. To justify their failure to draw remedial districts protecting Black voters from unlawful vote dilution, Legislative Defendants instead relied upon the same inapposite December 2021 Lewis Report from trial, which failed to assess legally significant racially polarized voting at all. They did so without presenting any analysis of (much less demonstrating errors in) the RPV analysis provided by Common Cause during the legislative process.

In their remedial submissions to the trial court, Legislative Defendants also submitted a supplemental expert report from Dr. Lewis that purported to estimate the rates at which Black-preferred candidates could be expected to prevail in general elections under the remedial maps. (R p 4425 (Supplemental Lewis Report ¶ 4)). Far from supporting Legislative Defendants' claims about the constitutionality of its remedial maps, this supplemental report proves that Legislative Defendants knowingly failed to protect against vote dilution in the remedial maps: According to Dr. Lewis's supplemental report, neither the remedial state House nor the Senate

maps have specific districts affording Black voters the opportunity to elect a candidate of choice in the areas required to have such districts, as identified by Common Cause. Remedial House District 10 and Remedial Senate District 4 have zero chance of electing a candidate of choice for Black voters according to Dr. Lewis. (*See* Exhibit B to Lewis Supplemental Report at p. 1 (lines "H980 Third Edition-010"); Exhibit B to Lewis Supplemental Report at p. 4 (lines "SCH22-4-004")).[3]

As set forth below, the analysis and legal assumptions relied upon by Legislative Defendants to conclude that no such remedial districts were required are clearly erroneous and insufficient. As a result, the trial court's approval of these maps is both unsubstantiated by the evidence and legally flawed.

A. Common Cause Submitted Uncontroverted Evidence That Specific Remedial Districts Are Required to Prevent Unlawful Vote Dilution.

This Court has instructed that federal and state precedent instruct how to identify and prevent vote dilution in state legislative redistricting. *See Stephenson v. Bartlett*, 355 N.C. 354, 363, 562 S.E.2d 377, 384–85 (2002) (citing the Voting Rights Act of 1965 and *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986)). Vote dilution inconsistent with Section 2 of the Voting Rights Act ("VRA") occurs if:

> based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State

[3] While Common Cause agrees with Dr. Lewis's assessment that these districts do not afford Black voters the opportunity to elect their candidate of choice, his broader conclusions as to the need for such districts in these areas, as stated in his report, are wholly without support and rely upon the same flawed analysis of his December 2021 initial report. *See* R p 4426 (Lewis Supplemental Report) ¶ 11, 15 (stating Dr. Lewis relied upon an "imperfect" analysis and his December 2021 report to form an "initial assessment that no majority minority district need be drawn in North Carolina in order to afford the Black community an opportunity to elect its candidate of choice.").

> or political subdivision are not equally open to participation by members of a [protected group] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

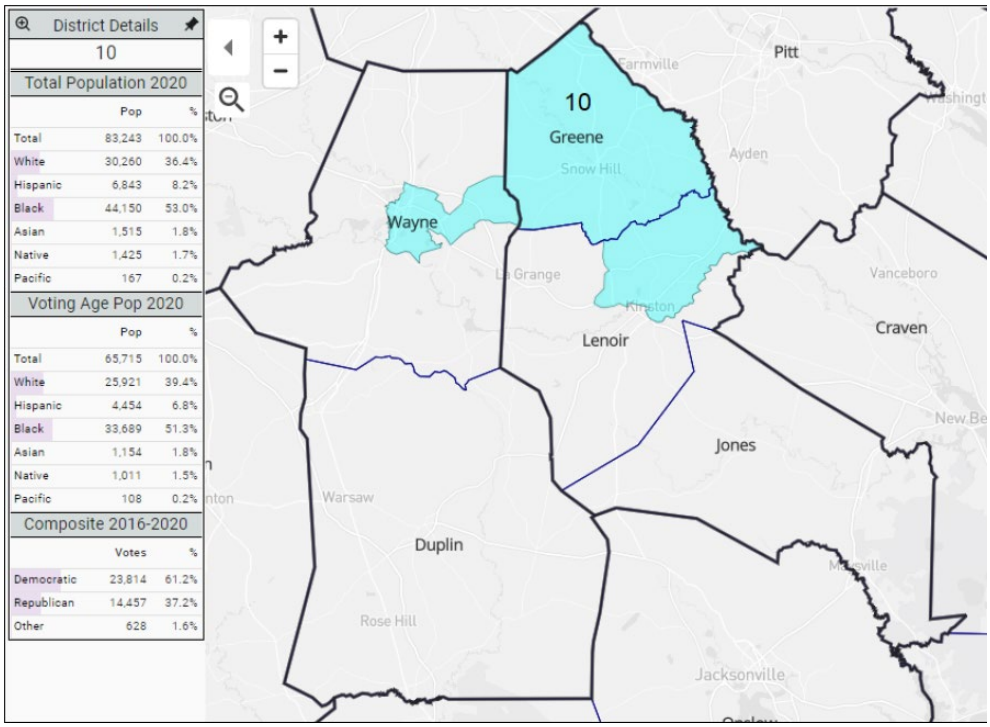
52 U.S.C. § 10301(b); *see also Stephenson*, 355 N.C. at 363, 562 S.E.d2d at 384 (noting the VRA necessarily serves as a "limitation[] upon the state legislative redistricting process"); (R p 4087–88 (Opinion ¶ 216) (holding that compliance with state constitutional Supremacy clauses requires assessing whether steps must be taken to avoid the dilution of minority voting strength)).

In *Gingles*, the Supreme Court established that a minority group alleging a Section 2 vote dilution claim must prove three threshold preconditions: (1) "that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "that [the minority group] is politically cohesive"; and (3) "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50−51; *see also Growe v. Emison*, 507 U.S. 25, 40−41 (1993) (affirming the applicability of the *Gingles* preconditions in the context of Section 2 challenges to single-member districts). When the three threshold *Gingles* requirements are met, courts then assess whether a violation has occurred based on the "totality of the circumstances." *Gingles*, 478 U.S. at 79 (quoting S. Rep. No. 97-417, at 30 (1982)); *see also Bartlett v. Strickland*, 556 U.S. 1, 11−12 (2009) ("*Strickland*"). The analysis of whether the three *Gingles* criteria are met is district specific. *See, e.g.*, *Covington v. North Carolina*, 316 F.R.D. 117, 174 (M.D.N.C. 2016) ("[W]hen drawing the challenged districts, Defendants made no

district-specific assessment regarding the third *Gingles* factor (as properly understood)." (emphasis added)), *aff'd per curiam*, 137 S. Ct. 2211 (2017).

Common Cause provided uncontested evidence to both the General Assembly (Doc. Ex. 11623–37 (15 Feb. letter)) and the trial court (R p 4575 (CC Submission)) that the three *Gingles* criteria are satisfied in the areas of House District 10 and Senate District 4 in the 2021 enacted maps. That evidence demonstrates the following:

House District 10: There exists a sufficiently large and geographically compact population of Black voting-age population ("BVAP") in Greene, Lenoir, and Wayne Counties to constitute a majority in a single-member House district (thereby satisfying *Gingles* I).



(Doc. Ex. 11626 (15 Feb. Letter); R p 4575 (Figure 1 of CC Submission)). The racially polarized voting in this area (and specifically House District 2021 from the 2021

enacted map) is legally significant, as shown by the below RPV analysis provided to Legislative Defendants and the trial court:

RPV in HD10 (SL 2021-175) - Raymond E. Smith Jr.

Beasley vs. Newby - NC Supreme Court 2020GEN

	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (0)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Beasley			100.00%	16.41%	99.12%	6.83%	95.31%	11.65%	46.89%
Newby			0.00%	83.59%	0.86%	93.06%	4.69%	88.35%	53.11%

Holmes vs. Dobson - NC Commissioner of Labor 2020GEN

	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (0)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Holmes			100.00%	14.74%	99.24%	5.67%	96.35%	9.75%	46.31%
Dobson			0.00%	85.26%	1.43%	94.34%	3.65%	90.25%	53.69%

Blue vs. Folwell - NC Treasurer 2016GEN

	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (0)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Blue			100.00%	15.22%	98.33%	11.34%	96.26%	14.78%	46.45%
Folwell			0.00%	84.79%	0.96%	88.74%	3.74%	85.22%	53.55%

Coleman vs. Forest vs. Cole - Lt. Governor 2016GEN

	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (0)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Coleman			100.00%	11.99%	98.57%	7.33%	95.73%	11.25%	43.98%
Forest*			0.00%	88.01%	0.94%	92.82%	4.27%	88.75%	56.02%

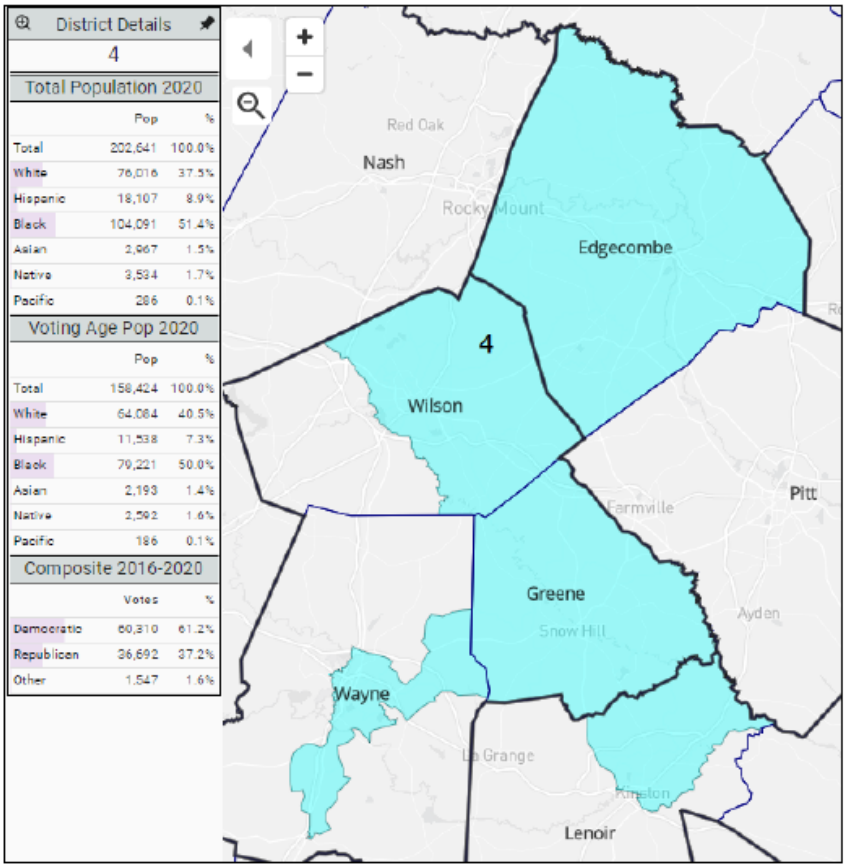
*Combined Election Results for Republican Candidate Dan Forest and Libertarian Candidate Jacki Cole

(Doc. Ex. 11633 (15 Feb. Letter); R p 4601 (First Ketchie Aff. Exhibit 1)).

As the above chart shows, the Ecological Regression data for four state-wide races in 2016 and 2020 indicate that candidates of choice for Black voters received 100% of their support from Black voters in the precincts comprising 2021 Enacted House District 10 (column "Ecological Regression - Support from Black Voters"). The support calculated by the King's Iterative Ecological Inference and the RxC Ecological Inference similarly show support above 95% in all elections. Accordingly, this data supports that Black voters are cohesive in this area (satisfying *Gingles* II). In the

columns showing calculated "Support from White Voters" under each metric, the white majority in these precincts also vote as a bloc against the candidate of choice of Black voters, with support above 80% in all elections and across all metrics. As the final column shows, this white voter cohesion is sufficient in these precincts to enable it to usually defeat the minority's preferred candidate in these areas (satisfying *Gingles* III). Accordingly, for this area, all three *Gingles* requirements are met.

Senate District 4: There also exists a sufficiently large and geographically compact population of Black voting-age-population in the counties east of Raleigh to constitute a majority in a single-member Senate district (satisfying *Gingles* I):



(Doc. Ex. 11629 (15 Feb. Letter); R p 4585-4586 (Figure 3 of CC Submission)). And Common Cause also submitted data showing there exists legally significant racially

polarized voting in this area (and specifically, the 2021 Enacted Senate District 4), such that (i) Black voters vote cohesively (thereby satisfying *Gingles* II) and (ii) white voters typically vote as a bloc sufficient to defeat Black voters' candidates of choice (thereby satisfying *Gingles* III):

RPV in SD4 (SL 2021-173) - Milton "Toby" Fitch Jr.

Beasley vs. Newby - NC Supreme Court 2020GEN

	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (1)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Beasley	94.90%		99.31%	18.74%	98.70%	8.55%	97.38%	10.95%	48.28%
Newby	5.10%		0.69%	81.26%	1.08%	91.40%	2.62%	89.05%	51.72%

Holmes vs. Dobson - NC Commissioner of Labor 2020GEN

	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (1)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Holmes	95.87%		100.00%	16.96%	99.15%	7.28%	97.96%	8.45%	47.68%
Dobson	4.13%		0.00%	83.04%	0.02%	92.70%	2.04%	91.55%	52.32%

Blue vs. Folwell - NC Treasurer 2016GEN

	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (2)	≥ 90% White Precincts (1)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Blue	96.55%	15.82%	100.00%	17.62%	99.03%	13.55%	97.42%	15.86%	48.71%
Folwell	3.45%	84.18%	0.00%	82.38%	0.87%	86.26%	2.58%	84.14%	51.29%

Coleman vs. Forest vs. Cole - Lt. Governor 2016GEN

	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (2)	≥ 90% White Precincts (1)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Coleman	96.76%	13.79%	99.86%	14.28%	99.20%	9.89%	97.87%	11.68%	46.32%
Forest*	3.24%	86.21%	0.14%	85.72%	1.06%	90.23%	2.13%	88.32%	51.96%

*Combined Election Results for Republican Candidate Dan Forest and Libertarian Candidate Jacki Cole

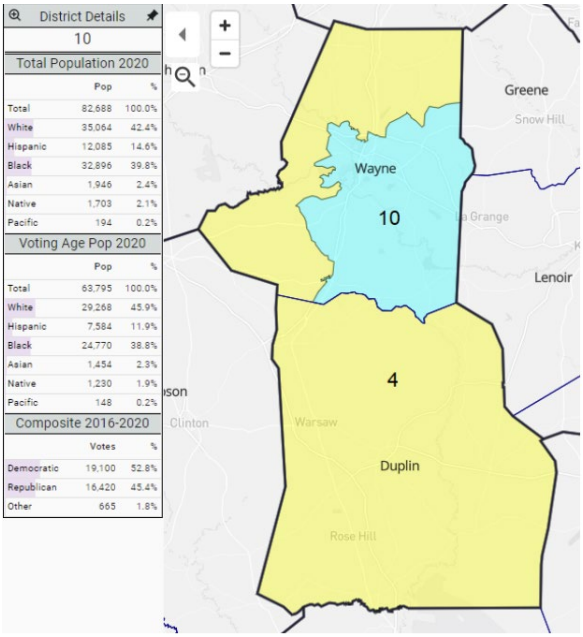
(Doc. Ex. 11635 (15 Feb. Letter); R p 4606 (First Ketchie Aff. Exhibit 3)). Specifically, all four RPV metrics indicate that candidates of choice for Black voters received 95% or more support from Black voters in the precincts comprising 2021 Enacted Senate District 4, showing Black cohesion in this area (and satisfying *Gingles* II). This data also demonstrates that there is racially polarized voting in this area, such that the

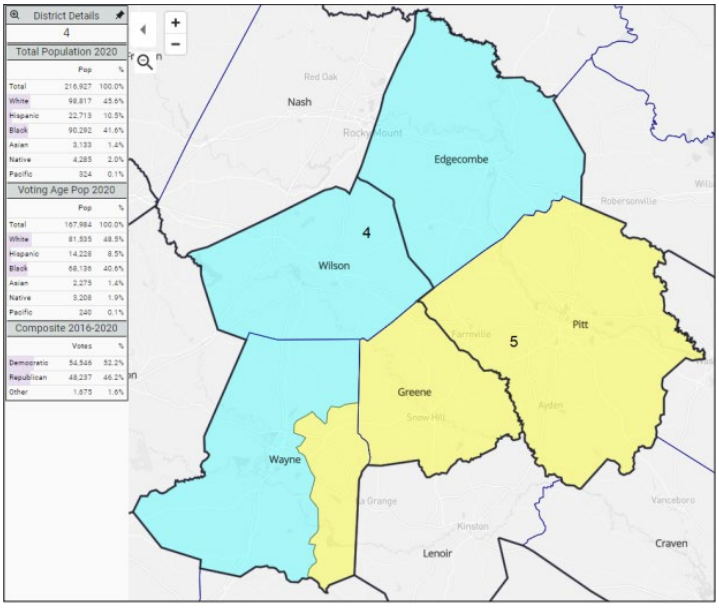
white majority votes sufficiently as a bloc (consistently above 80%) to enable it to usually defeat the minority's preferred candidate (satisfying *Gingles* III).

Totality of the Circumstances: Evidence submitted at trial in this matter, and credited by the trial court, demonstrates by a totality of the circumstances that a failure to include remedial districts will result in unequal access to the electoral process for Black voters in these areas. *See* S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pp. 28–29 (listing the "Senate Factors" for a court to consider in weighing the totality of the circumstances). Specifically, Common Cause's expert, historian Dr. Jim Leloudis, testified as to the history of official voting-related discrimination in North Carolina, how Black voters have borne the effects of discrimination in the areas of education, employment, and health, hindering their ability to participate in the political process, the use of overt and subtle racial appeals in political campaigns, and the limited extent to which Black candidates have been successfully elected to public office. (*See generally* Doc. Ex. 6591–6679 (PX1486 Leloudis Rep.)). This trial court credited Dr. Leloudis's testimony in its 11 January 2022 Judgment. (*See* R p 3700 (Judgment ¶¶ 578–82)). These findings by the trial court are also consistent with recent holdings in the Fourth Circuit Court of Appeals and the Superior Court for Wake County. *See generally N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 220–25 (4th Cir. 2016) (holding that "unquestionably, North Carolina has a long history of race discrimination generally and race-based vote suppression in particular" and that "state officials continued in their efforts to restrict or dilute African American voting strength well after 1980 and up to the present day"); *Holmes*

v. Moore, 270 N.C. App. 7, 20–23, 840 S.E.2d 244, 257–59 (N.C. Ct. App. 2020) (citing *McCrory* and summarizing the discriminatory history of photo ID laws in North Carolina to strike down S.B. 824 as violating North Carolina's Equal Protection Clause), *petition for disc. rev. granted,* No. 342PA19-2 (N.C. Sup. Ct. March 2, 2022); Final Judgment and Order at pp 14, 25, *Cmty. Success Initiative v. Moore*, No. 19-CVS-15941 (N.C. Super. Ct. Mar. 28, 2022) (finding that "[t]he goal of the felony disenfranchisement regime . . . was to discriminate against and to disenfranchise African American people."), *petition for disc. rev. granted,* No. 331PA21 (N.C. Sup. Ct. May 4, 2022). The totality of the circumstances definitively support that remedial districts are required in the areas proposed by Common Cause to ensure equal access to the electoral process for Black voters.

To prevent unlawful vote dilution, Common Cause proposed a remedial House District 10 (left) and Senate District 4 (right) during the remedial process:





(*See* R p 4584, 4588 (CC 18 Feb. Submission Figures 2 and 4); Doc. Ex. 15726 and 15727 (Shapefiles)). The remedial House and Senate districts proposed by Common Cause contain 38.8% and 40.6% BVAP respectively, sufficient for Black voters to have an equal opportunity to elect candidates of choice, as shown by the RPV data provided by Common Cause in Exhibit 2 (House) and Exhibit 4 (Senate) to the First Ketchie Affidavit. (*See* R p 4602, 4606).

B. There is No Competent Evidence on the Record to Support a Finding That the Remedial House and Senate Plans Protect Against Unlawful Vote Dilution for Voters of Color.

To this day, Legislative Defendants have not identified any error or reason to discount the RPV analysis provided by Common Cause as part of the remedial process. Their principal factual critique was that Common Cause failed "to provide evidence of legally significant racially polarized voting in a larger area of the state." LD Br. at p. 48. But this argument has no support in the law and runs contrary to established precedent requiring the analysis to be *district specific*. *See Covington*, 316 F.R.D. at 174 ("[W]hen drawing the challenged districts, Defendants made no district-specific assessment regarding the third *Gingles* factor (as properly understood).").[4]

Similarly, Legislative Defendants argued that since the "Common Cause demonstrative districts are both majority black . . . neither of them shows a district

[4] The Supreme Court recently confirmed again the importance of a district-specific analysis. *See Wisconsin Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1250 (2022) (Per Curiam) (reversing lower court because "[r]ather than carefully evaluating evidence at the *district level*, the court improperly relied on generalizations to reach the conclusion that the preconditions were satisfied' and noting that the court "made virtually no effort to parse that data at the district level" (emphasis added)).

or districts where the white majority has consistently voted to defeat the minority group's preferred candidate of choice." (R p 4240 (LD Br. at 47)). This statement betrays the gross misunderstanding of *Gingles* advanced by Legislative Defendants: of course the demonstrative districts are both majority Black, *Gingles I* requires identifying a population that would constitute a majority in a single-member district. Overall, the Legislative Defendants conflated, confused, and mis-cited the demonstrative and remedial districts proposed by Common Cause in their objections submitted to the trial court. (*Compare* R p 4243 (LD 18 Feb. Mem. at p. 50 (asserting, incorrectly, that the "Common Cause remedial [Senate District 4] also includes all of Pitt County.")) *with* R p 4588 (CC Submission Figure 4, "SD4 Remedial District" in blue comprised of Edgecombe, Wilson, and parts of Wayne (and not Pitt) counties).

In light of this failure to articulate the core tenets of the *Gingles* standard or properly represent the evidence put forth by Common Cause, it is no wonder that the Legislative Defendants failed to satisfy this Court's directive to undertake the requisite analysis to protect voters of color from unlawful vote dilution, and thus failed to provide competent evidence to the trial court of doing so. Instead, in a deficient effort to meet their burden during the remedial legislative process, and subsequently in the remedial briefing to the trial court, Legislative Defendants relied on the expert report of Dr. Lewis from December 2021. (*See* R p 4233 (LD Br. at 40)). Dr. Lewis' report, however, provides an incomplete and insufficient statistical analysis that failed to properly address the *Gingles* factors.

As his December 2021 report shows, Dr. Lewis did not even attempt to identify populations of Black voters in North Carolina satisfying *Gingles* I. (*See generally* Doc. Ex. 9583–9649 (LDTX109, December 2021 Lewis Rep.)). His supporting tables include no analysis of white bloc voting across the districts he analyzes, much less the breakdown by RPV metric demonstrated in the Common Cause-submitted tables above. (Doc. Ex. 9601–49). The conclusions he draws from this in his report never address legally significant racially polarized voting at all. (Doc. Ex. 9588–9589 (Lewis Rep. ¶¶ 17–23)). In his deposition, Dr. Lewis admitted that his analysis fell short of what would normally be done. R p 5201 (Lewis Dep. Tr. 13:4–21) (stating that the analysis was done "on a highly-expedited timeline" and that "it would have been prohibitive . . . to have fit the more computationally-intensive" analysis in this timeline, including the several different methods he "normally" might apply).[5]

The trial court's holdings confirm the inherent deficiencies in Dr. Lewis' analysis, noting Dr. Lewis only analyzed whether the definition of "effective Black districts" advanced by *NCLCV* Plaintiffs' expert Dr. Moon Duchin was met anywhere in the 2021 Enacted Plans. (*See* R p 3703 (Judgment ¶ 594) (finding Dr. Lewis "then used and relaxed, without endorsing, Dr. Duchin's definition of effective Black districts")). But according to both Dr. Duchin and the trial court, evaluating "effective Black districts" as defined by Dr. Duchin is *not* the same as conducting a *Gingles* analysis. (*See* T2 479:18–22 (Duchin) (Judge Shirley: "So you didn't do a Gingles

[5] The Lewis Deposition Transcript is included in the Proposed Supplement to the Record on Appeal appended to the Motion to Supplement the Record filed by Plaintiff-Appellant Common Cause concomitantly with this Brief.

analysis?" Dr. Duchin: "That's right."); R p 3765 (Judgment ¶ 176) ("While Dr. Duchin conducted an analysis and made findings concerning the 'effective' districts for Black voters, admittedly, she did not conduct step 1 of the *Gingles* analysis.")). Legislative Defendants were on notice of these findings, as well as the fact that Dr. Lewis admitted under oath that he did not perform an analysis of legally significant racially polarized voting. (*See* R pp 5204–05 (Lewis Deposition Tr. 15:21–16:15, in which Dr. Lewis stated "I don't have an opinion about, you know, what constitutes a level of racially polarized voting that would require some sort of action.")).[6]

Given these deficiencies in Dr. Lewis's analysis, any argument that Legislative Defendants' reliance on his report was sufficient to satisfy their obligation to assess whether "racially polarized voting is legally sufficient in any area of the state" (R p 3823 (Order ¶ 8) fails. Nevertheless, Legislative Defendants chose to rely solely on this insufficient analysis during the remedial redistricting phase to contend that no remedial districts were required to protect against vote dilution. By extension, the trial court's conclusion that Legislative Defendants satisfied their obligation to prevent vote dilution in the remedial state House and Senate maps is unsupported by competent evidence and erroneous.[7] Instead, all competent evidence before the

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[6] *See supra* n.5.

[7] For the same reasons, the trial court's "us[e]" of Dr. Duchin's definition of effective Black districts against Dr. Lewis's data set to find that "in no district, enacted or in 2020, does it appear that a majority of BVAP is needed for that district to regularly generate majority support for minority-preferred candidates in the reconstituted elections" is not determinative of whether the *Gingles* factors are satisfied in the areas around House District 10 and Senate District 4. In any event,

trial court (as submitted by Common Cause) supports that all three *Gingles* preconditions are satisfied such as to require specific remedial districts to prevent unlawful vote dilution for Black voters.

As for the remaining analysis of whether the remedial legislative plans will cause unlawful vote dilution—the "totality of the circumstances" described above—Legislative Defendants at no point put forth any rebuttal evidence or arguments at trial. Likewise, the trial court failed to make any specific findings as to whether the maps impermissibly dilute the voting strength of African Americans. Rather, the trial court merely adopted the finding of Legislative Defendants' expert that "all three Remedial Plans provide African Americans with proportional opportunity to elect their candidates of choice." (R p 4873 (Remedial Order ¶ 17)).

Setting aside the lack of competent evidence supporting that conclusion, this finding alone is legally insufficient to support any conclusion of law that the maps do not impermissibly dilute the voting strength of Black voters. *See Johnson v. De Grandy*, 512 U.S. 997, 1026 (1994) (O'Connor, J., concurring) ("Proportionality is not a safe harbor for States"); *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 437 (2006) ("The role of proportionality is not to displace this local appraisal or to allow the State to trade off the rights of some against the rights of others. Instead, it provides some evidence of whether 'the political processes leading to nomination or election in the State or political subdivision are not equally open to participation.'"

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this finding of fact preceded Common Cause's remedial submissions demonstrating that the *Gingles* factors are, in fact, satisfied in these areas.

(quoting 52 U.S.C. § 10301(b))); *see also Wisconsin Legislature*, 142 S. Ct. at 1250 (finding the lower court erred because it "focused exclusively on proportionality" while ignoring the other Senate factors after concluding they had "no role to play" in its analysis).

C. Any Implied Adoption by the Trial Court of Legislative Defendants' Arguments For Failing to Protect Against Unlawful Vote Dilution Was Erroneous.

In an effort to justify their decision to reject Common Cause's proposed remedial districts, Legislative Defendants also misinterpreted applicable law in their submissions to the trial court. To the extent the trial court adopted these arguments in its conclusions of law, these misinterpretations of law constitute reversable error upon de novo review by this Court.

First, Legislative Defendants argued that including remedial districts—specifically those proposed by Common Cause—would constitute racial gerrymandering in violation of the Fourteenth Amendment. (*See* R p 4244 (LD Br. at 31)). But racial gerrymandering only occurs where race "predominates" over all other factors in drafting a district. *See Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 272 (2015). That test is not relevant here, where the remedial districts proposed by Common Cause were narrowly tailored to adhere to traditional redistricting criteria and to allow Black voters an equal opportunity to elect their candidates of choice *without* using race as the predominating factor. (*See* R p 4597 (First Ketchie Affidavit at ¶ 11) ("I also considered minimizing county splits and traversals, minimizing splits of community related boundaries such as municipalities and precincts, and maximizing compactness because I did not intend or want race to

predominate in the drawing of these remedial district lines.")). Legislative Defendants provide no evidence on the record challenging this fact, and also ignore the fact that they could similarly have crafted remedial districts during remedial redistricting without using race as a predominating factor.

Furthermore, even if the Common Cause proposed remedial districts were drawn with race as a predominating factor (which they were not), they would be narrowly tailored to satisfy the independent compelling interests of ensuring compliance with both federal statutory and state Constitutional requirements. *See Alabama Legislative Black Caucus*, 575 U.S. at 278-79. The remedial Senate District 4 and House District 10 proposed by Common Cause were drawn to prevent vote dilution for Black voters that is specifically prohibited by the state constitution and the Voting Rights Act. Legislative Defendants' first argument is thus legally inapposite.

Second, Legislative Defendants argued that drawing a remedial crossover district to prevent vote dilution would be illegal under *Strickland*. (*See* R p 4236 (LD Br. at 43)). This is a plain misreading of *Strickland*, which simply held that crossover populations could not be used to satisfy the *Gingles I* criteria. *See Strickland*, 556 U.S. at 18 ("[T]he majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?"). As shown above, there exists a sufficient population of Black voters to constitute a majority in the areas identified by Common Cause, satisfying *Gingles I*, and thus *Strickland*'s holding on that point is inapplicable here. On the

other hand, the remedial districts proposed by *Common Cause*—which would be crossover districts—reflect an approach that was specifically endorsed by *Strickland*. *See id.* at 23 ("[Section] 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts." (citing *Georgia v. Ashcroft*, 539 U.S. 461, 480–82 (2003))). Legislative Defendants' reliance on *Strickland* is therefore erroneous.

Third, Legislative Defendants' suggestion that the remedial districts proposed by Common Cause are otherwise inappropriate lacks purchase. Remedial districts designed to avoid vote dilution must be based upon a "practical evaluation of the 'past and present reality'" of political processes in this area of the state, as well as a "functional" view of the political process, to determine whether the political processes are equally open to Black voters. *Gingles*, 478 U.S. at 45 (quoting S. Rep. No. 97-417, p. 30 & n.120 (1982)). Contrary to what the General Assembly has previously dictated (and Legislative Defendants have implied), "VRA districts" should not be created to simply meet a rigid and uniform 50%+1 BVAP population requirement. Instead, based on the facts of this case, remedial districts should be developed to achieve the BVAP level required to ensure Black voters have an equal opportunity to elect representatives of their choice within the particular area. This is precisely what Common Cause's proposed remedial districts—drawn by adhering to neutral redistricting criteria—achieve.

This approach thus prevents unlawful vote dilution under state constitutional law and is consistent with federal instruction on how to craft VRA districts. *See, e.g.*,

Strickland, 556 U.S. at 23 (2009) (VRA remedial districts "may include drawing crossover districts.");*League of United Latin Am. Citizens*, 548 U.S. at 429 (observing that even a majority of voting-age population in a district does not automatically make it an opportunity district, and that the analysis depends on whether the group "could have had an opportunity district" given how district lines are drawn); *Covington*, 316 F.R.D. at 166 ("Narrow tailoring also requires that each district be drawn in a manner that actually remedies the potential VRA violation.").

To the extent the trial court's holdings could be construed as implicitly adopting these arguments advanced by Legislative Defendants, such conclusions of law are erroneous and reversable on de novo review.

* * *

In its remedial order, the trial court failed to properly assess whether the remedial state legislative maps protect against unlawful vote dilution, as required by state constitutional law and this Court's instruction. Since all competent evidence indicates that remedial districts are required to prevent unlawful vote dilution in the areas of House District 10 and Senate District 4, the trial court's Remedial Order should be reversed on these grounds and the remedial districts proposed by Common Cause should be required in any interim maps ordered.

IV. The Remedial House and Senate Maps Intentionally Destroy Functioning Crossover Districts in Violation of the North Carolina Equal Protection Clause.

The General Assembly ignored Common Cause's proposed remedial districts, and instead intentionally enacted maps that will dilute the Black vote and prevent Black voters from electing their candidate of choice in House District 10 and Senate

District 4. The legislative history, historical context, and discriminatory impact of these maps thus support a finding that these maps violate the Equal Protection Clause in Article I, Section 19 of the North Carolina Constitution. *Cf. Strickland*, 556 U.S. at 24 ("[I]f there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments.").

The supplemental expert report of Dr. Michael Barber, submitted by Legislative Defendants on 18 February 2022, demonstrates the intentional destruction of these crossover districts by tracking the BVAP levels for 2018, 2020, 2021 and the 2022 remedial maps. Specifically, Dr. Barber's table for the House map shows the BVAP levels for the district in this area (District 21 in 2018 / 2020 maps and District 10 in the 2021 / 2022 maps) significantly decreased from 39% to 34% in both the 2021 Enacted House map and the 2022 Remedial House Map. (*See* R p 4404 (Barber Supplemental Report p. 30, at line "Smith, R.")). Dr. Barber also included a table reviewing the BVAP levels for Senate District 4, and again, his table shows a significant decrease in BVAP across maps, from 47.5% to 35%. (R p 4415 (Barber Supplemental Rep. p. 41 (at line "Fitch"))).

Legislative Defendants and other legislators were well aware that such a reduction would likely eliminate the opportunity for Black voters in these areas to elect their candidates of choice. Not only did the RPV analysis provided by Common Cause for these areas provide evidence of this, but the 2021 report of Legislative Defendants' own expert Dr. Lewis, which Legislative Defendants purported to rely on

during the remedial legislative process, said so. By Dr. Lewis's estimation, there needed to be over 38% BVAP in the area encompassing House District 10, and over 35% in Senate District 4 to allow the opportunity for Black voters to elect candidates of their choice. (*See* Doc. Ex. 9605 (LDTX109 Lewis Rebuttal Rep. at Table 1 p. 5 (line "LD21-010")); Doc. Ex. 9610 (Table 1 p. 10 ("line SD21-010"))).

The fact that Legislative Defendants were both aware of the demographic changes in the remedial districts and agreed to remedy other House and Senate districts illustrates the deliberate choice Legislative Defendants made to destroy functioning crossover districts in these maps. As set forth below, Common Cause presented the trial court with ample evidence to conclude that Legislative Defendants acted with discriminatory intent in adopting the remedial plans—evidence that was, by all accounts, ignored. Accordingly, even if the trial court had specifically found the maps were not racially discriminatory (which they failed to do), such a finding would be unsupported by the competent evidence.

A. The Historical Background of the Remedial Plans Strongly Supports an Inference of Discriminatory Intent.

"The historical background of [a] decision is one evidentiary source [in proving intentional discrimination], particularly if it reveals a series of official actions taken for invidious purposes." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977). "A historical pattern of laws producing discriminatory results provides important context for determining whether the same decisionmaking body has also enacted a law with discriminatory purpose." *McCrory*, 831 F.3d at 223–24; *see also Holmes*, 270 N.C. App. at 20, 840 S.E.2d at 257 (citing *McCrory*).

Evidence that "highlight[s] the manner in which race and party are inexorably linked in North Carolina" frequently "constitutes a critical—perhaps the most critical—piece of historical evidence" in intentional discrimination claims in the voting context. *Holmes*, 270 N.C. App. at 23, 840 S.E.2d at 258 (2020) (citing *McCrory*, 831 F.3d at 225); *see also Holmes v. Moore*, No. 18-CVS-15292 (Wake Cnty. Super. Ct. Sept. 17, 2021), Slip Op. at 5 ¶ 18 ("It is enough to show that the legislature had a purpose to diminish the power of African American voters because of polarized voting in North Carolina.").[8] In other words:

> Using race as a proxy for party may be an effective way to win an election. But intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose.

McCrory, 831 F.3d at 222.

Here again, the testimony of Common Cause's expert Dr. James Leloudis established that the history of voting and elections laws in North Carolina shows a recurring pattern in which the expansion of voting rights and ballot access to African Americans is followed by periods of backlash and retrenchment that roll back those gains for African-American voters. (*See generally* Doc. Ex. 6591–6679 (PX1486 Leloudis Rep.)). The history of this backlash is characterized by facially neutral laws that did not always explicitly discriminate by race but were still enacted with the intent of restricting the voting rights of African Americans. (*Id.*)

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[8] *Available at* https://www.documentcloud.org/documents/21064388-holmes-v-moore-final-judgment-18-cvs-15292-210917.

Dr. Leloudis described this historical pattern of discrimination that still exists today. In the decades after Reconstruction, a time during which Black North Carolinians had made rapid gains in their ability to win representation, (Doc. Ex. 6587–92 (Leloudis Rep.)), conservative politicians used violence and racial appeals to gain a majority in the legislature. (*Id.* at 6599–6601). They subsequently instituted facially race-neutral literacy tests and the payment of a poll tax as prerequisites to register to vote. (*Id.* at 6601–02.) These devices resulted in the wholesale disenfranchisement of Black North Carolinians and their removal from political life in the state. (*Id.*)

In the mid-1950s, after Black North Carolinians made another push toward equality, winning temporary political victories and increasing representation, (*id.* at 6611), the white political establishment altered methods of election to keep Black candidates from winning. (*Id.* at 6614). The pattern—apparently race-neutral changes to election methodology—occurred again in the 1960s and 1970s upon the passage of the Voting Rights Act and the federal judiciary's move toward enforcing individual rights. (*Id.* at 6611). As with redistricting today, the laws were neutral on their face and altered the seemingly "wonky" field of electoral mechanics. (T2 p 308 (Leloudis)). Yet, they successfully prevented Black voters from marshalling their resources to elect their candidates of choice. (*Id.* p 309).

This history of pursuing the goal of restricting African American voting rights through facially race-neutral laws is also a 21st century phenomenon. H.B. 589, the first voter ID law successfully enacted by the General Assembly in 2013, was

invalidated because it was designed to discriminate against African-American voters. (T2 p 309:8–21 (Leloudis)). And a follow-up effort to pass another voter ID law was struck down just last year as racially discriminatory. *See Holmes*, No. 18-CVS-15292, at *74.

It is well understood that Black voters vote for Democratic candidates at a much higher rate than white voters. (T2 p 315 (Leloudis); Doc. Ex. 6638 (PX1486 Leloudis Rep.)). Because of this, targeting Black voters in redistricting is not only an effective tool to limit Black political participation, but is part and parcel of partisan gerrymandering in the South. (Doc. Ex. 6639 (Leloudis Rep.)). Additionally, because this is the first redistricting cycle since the 2013 decision in *Shelby County, Ala. v. Holder*, 570 U.S. 529, the Legislature could act without the need to comply with preclearance before enactment. (*Id.* at 6643–44).

The North Carolina General Assembly's intentional destruction of crossover districts in the remedial redistricting cycle "fit[s] the pattern of conservative backlash to minority gains." (Doc. Ex. 6583 (PX1486 Leloudis Rep.)). As in past years, pursuit of seemingly race-neutral policies (and, as discussed above, the General Assembly's repeated failure to conduct the appropriate analysis of racial data to prevent vote dilution) are being weaponized as an effective tool to limit Black political participation and ensure partisan control over state government.[9] Thus, the

[9] For this reason, the trial court's determination at the merits stage that "[t]here is no express language showing discriminatory intent within the text of the session laws establishing the Enacted Plans," (R p 3698 (Judgment ¶ 570)), misses the mark and, in any event, does not take into account the remedial legislative process.

historical context in which the remedial plans were passed by the General Assembly supports Common Cause's claim that the legislature intended to discriminate against African-American voters.

In the merits phase, the trial court credited Dr. Leloudis with providing "a contextual backdrop for the way redistricting maps have been drawn, litigated, and accordingly struck down in the past[.]" (R p 3763 (Judgment ¶ 169)). This contextual backdrop is critical to understanding how the Legislature continued to target Black voters in the remedial stage as well. The Legislature has demonstrated that it is not acting in good faith—a fact which has been corroborated by Common Cause's presentation of evidence during the remedial phase. Thus, the burden necessarily shifts to the Legislative Defendants to demonstrate that they would have drawn the same remedial maps without racial discrimination. *See Hunter v. Underwood*, 471 U.S. 222, 228 (1985) ("Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor.").

B. The Sequence of Events and Legislative History Demonstrates That the Impact of the Enacted Maps on Black Voters Was Both Foreseeable and Intentional.

The sequences of events and legislative history of the 2021 Enacted and Remedial Maps reveals how the discriminatory results impacting North Carolina's Black voters were not coincidental or a by-product of an otherwise lawful process; rather, it was foreseeable and intentional conduct that led to the Legislative Defendants' enactment of discriminatory maps.

In 2021, Legislative Defendants took unprecedented steps to prohibit any public consideration of race in this process that would have both revealed the discriminatory effects of their plans and enabled other map-drawers to prevent the destruction of performing crossover districts. Legislative Defendants proposed criteria (ultimately adopted by the Redistricting Committees) that prohibited the use of racial data in the consideration and analysis of proposed maps, (Doc. Ex. 214 (PX33 2021 Joint Redistricting Committee Proposed Criteria); Doc. Ex. 216 (PX34 2021 Joint Redistricting Committee Adopted Criteria)), stifling analysis and public comment about the discriminatory effects of the maps.[10]

In violation of state constitutional requirements, Legislative Defendants in 2021 failed to conduct a racially polarized voting study (as they had in previous cycles) that would assist members in protecting voters of color. The did this in defiance of the decades-old instruction that "legislative districts required by the VRA shall be formed prior to creation of non-VRA districts[,]" *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 396–97, and despite repeated requests throughout the legislative process by legislators and Common Cause. (*See, e.g.*, Doc. Ex. 883:2–5 (PX77 Joint Committee Meeting Tr.) (Senator Blue stating, "I think that *Stephenson* makes it relatively clear that before you consider clustering or groupings, you have to make that VRA determination."); Doc. Ex. 1125:13–19 (PX80 Senate Redistricting Committee Tr.) (Senator Marcus stating, "it is incumbent on this committee to make that

[10] *See also* Doc. Ex. 3717:6–7 (PX146 Hise Dep. Tr.) ("There is a prohibition of using racial data for the consideration [of maps].").

determination, and to do so, you would need a racially polarized voting study"); R p 3534–35 (Judgment ¶¶ 64–65) (finding Counsel for Common Cause submitted multiple letters to Legislative Defendants, elucidating their legal duties under *Stephenson* in detail and identifying potentially problematic racial consequences of their failure to conduct a racially polarized voting study accordingly)).

As the trial court acknowledged, "the process in creating the Enacted Plans deviated from past procedure in not following *Stephenson* by drawing VRA districts first." (R p 3701 (Judgment ¶ 583)). The result was 2021 Enacted Maps that systematically diminished the opportunity of Black voters to elect their candidates of choice. The Enacted House Map systematically reduced the Black voting-age population of at least two districts that, under the 2019 House Map, had successfully allowed Black voters to elect their candidates of choice: (1) House District 5, which was reduced from 44.32% BVAP under the 2019 House Map (allowing Black voters the opportunity to elect their candidate of choice, Rep. Howard Hunter III) to 38.59%; and (2) House District 21, which was reduced from 39% BVAP (allowing Black voters the opportunity to elect their candidate of choice, Rep. Raymond Smith) to 34.27% BVAP and double-bunking him against Rep. John R. Bell IV. (*See* Doc. Ex. 6846 (PX1566 Ketchie Aff. Ex. 5, Ex. 6)). The 2021 Enacted House map also unnecessarily double-bunked Black elected Representatives Abe Jones and James Roberson of 2019 House Districts 38 and 39, who are both the candidates of choice for Black voters in their districts. (Doc. Ex. 6846 (PX1566 Ketchie Aff. Ex. 5)).

The 2021 Enacted Senate plan also reduced the opportunity for Black voters to elect candidates of choice in (1) Senate District 24, reducing Sen. Clark's former District 21 from 42.15% BVAP under the 2019 Senate Map to 29.63% in the 2021 Enacted Map and double-bunking him with Sen. Danny Earl Britt, Jr., *see* Doc. Ex. 6844 (PX1565 Ketchie Aff. Ex. 4), (2) Senate District 4, reducing Sen. Fitch's district from 47.46% BVAP under the 2019 Senate Map to 35.02% BVAP and depriving Black voters the opportunity to elect their candidate of choice, and (3) the northeast, where the General Assembly had two options for clusters and selected the one in which both would have BVAPs too low to give Black voters any opportunity to elect a candidate of choice in either district. (*See* Doc. Ex. 6579–80 (PX1485 Mattingly Addendum Rep.) (showing 2021 Enacted Map used cluster with districts BVAPs of 30.0% and 29.49% and not the option with BVAPs of 42.33% and 17.47%)).

During the remedial phase in 2022, the Legislature had ample information as to the impact of district choices on the opportunity of Black voters to elect their candidates of choice. This information came not only from the robust trial record and their own expert's report showing BVAP levels, but the additional advocacy from Common Cause discussed above in Section III.A. Legislative Defendants also had the explicit instruction from this Court to comply with *Stephenson I* during the remedial phase of the mapdrawing process by performing a racially polarized voting study, a step that they nonetheless failed to properly undertake a second time this redistricting cycle.

These failures are even more telling given that, during the remedial redistricting process, Legislative Defendants remediated *other* districts in an attempt to bring their remedial legislative maps into constitutional compliance for partisan gerrymandering purposes. In the remedial House proceedings specifically, Rep. Harrison offered an amendment that included districts based upon the Common Cause-proposed House District 10 as well as other changes. (*See* Doc. Ex. 12076 (Proposed Amendment Map titled "HMT22-10")). This was the only proposed floor amendments that failed, doing so on partisan lines, (Doc. Ex. 14875 (16 Feb. House Floor Tr. 48:20-23)), indicating that legislators targeted Black voters specifically to preserve the Republican bias in the map in light of their agreement to compromise in other districts. *See McCrory*, 831 F.3d at 222 ("[I]ntentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose."); (R p 4201-4208 (LD Br. at 8-15) (discussing the other areas of compromise in the remedial state House map)).

In the Senate legislative process, no legitimate justifications were provided for deliberately destroying the functioning crossover district in Senate District 4 when modifying the 2021 Enacted Senate map during the remedial redistricting phase, despite the modification of several other areas. (*See, e.g.,* Doc. Ex. 14717 (16 Feb. Sen. Cmte. Hr'g Tr. 50:16-24) (Sen. Newton stating drafters of the remedial map "started with the enacted map" and worked in specific jurisdictions to "improve the scoring"); Doc. Ex. 14686–97 (16 Feb. Sen. Cmte. Hr'g Tr. 19:4-30:17) (Sen. Newton describing "county-by-county and district-by-district" changes")).

Overall, Legislative Defendants made no legitimate effort to achieve compliance in House District 10 and Senate District 4 with other constitutional requirements, despite the fact that these districts would further reduce the partisan bias in these maps (as set forth below in Section V.C). The legislative record thus substantiates that Legislative Defendants consistently targeted and destroyed these effective crossover districts that gave Black voters the ability to elect candidates of their choice deliberately and despite overwhelming evidence they should act otherwise. Such a showing strongly supports a finding of intentional discrimination in the enactment of the remedial state legislative maps.

C. There is No Compelling Non-Racial State Interest That Can Justify These Discriminatory Maps.

"Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Underwood*, 471 U.S. at 228. "Racial discrimination is not just another competing consideration," and any deference otherwise accorded to the acts of the North Carolina General Assembly disappears once the law has been shown to be the product of a racially discriminatory purpose. *Arlington Heights*, 429 U.S. at 265–66 ("When there is proof that a discriminatory purpose has been a motivating factor in the decision . . . judicial deference is no longer justified." (footnote omitted)).

The proper inquiry at this stage is identifying the actual purpose of the legislators who passed the Enacted Maps, not hypothetical or after-the-fact justifications. The Court must "scrutinize the legislature's actual non-racial

motivations to determine whether they alone can justify the legislature's choices," and whether the Enacted Maps would have been enacted "irrespective of any alleged underlying discriminatory intent." *Holmes*, 270 N.C. App. at 33–34, 840 S.E.2d at 265 (emphasis omitted).

Legislative Defendants cannot advance any non-racial motivation for their intentional discrimination in the adoption of the Enacted Plans. The closest Legislative Defendants have come to articulating any justification for the discriminatory actions they have taken is arguing that past precedent and the trial court's Judgment would forbid them from preserving these districts. (*See, e.g.*, R p 14873–74 (16 Feb. House Floor Tr. 46:2-47:4) (Rep. Hall stating he opposed this amendment based upon trial record)).[11] But as described above in Section III, this argument is disingenuous and clearly erroneous under applicable law. Additionally, it is based upon a deliberate failure not once, but *twice* now in this redistricting cycle, to fulfill their obligations under *Stephenson* despite the efforts of Common Cause, their colleagues in the legislature, and the direction of this Court. Such shortcomings cannot provide a justification for the intentional targeting of Black voters in the remedial state legislative maps.

* * *

The trial court failed to consider whether the remedial state House and Senate maps comport with North Carolina's Equal Protection Clause despite ample evidence

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[11] Representative Hall's other reasons for rejecting the Amendment were applicable only to other attributes to the Amendment proposed by Rep. Harrison that are not present in remedial districts proposed by Common Cause.

put before it during the remedial phase, as well as the robust record adduced at trial, showing that Legislative Defendants continued their pattern of intentionally targeting Black voters in enacting remedial maps. This alone is reason for a reversal by this Court. But even if the trial court had reached this issue, the competent and substantial record support demonstrating that the legislature once again targeted Black voters by knowingly and intentionally destroying functioning crossover districts in the remedial state legislative maps warrants a reversal by this Court.

V. The Remedial House and Senate Maps Must Be Struck Down As Unconstitutional Partisan Gerrymanders.

A. The Trial Court Misinterpreted and Misapplied This Court's Direction to Identify Unconstitutional Partisan Gerrymandering.

The trial court applied an incorrect and unjustifiably myopic interpretation of this Court's 4 February Order and 14 February Opinion when evaluating the Legislative Defendants' remedial state Legislative maps.

This Court held that a "variety of direct and circumstantial evidence" could be relevant to demonstrating whether a redistricting plan makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters, thereby diminishing or diluting their voting power in violation of North Carolina's Constitution. (R p 4071 (Opinion ¶ 180)). Such evidence included,

> median-mean difference analysis, efficiency gap analysis; close-votes-close seats analysis, partisan symmetry analysis; comparing the number of representatives that a group of voters of one partisan affiliation can plausibly elect with the number of representatives that a group of voters of the same size of another partisan affiliation can plausibly elect; and comparing the relative chances of groups of voters of equal size who support each party of electing a supermajority or majority of representatives under various possible electoral conditions.

(R p 4071–72 (Opinion ¶ 180)).

Consistent with other redistricting jurisprudence, this Court expressly declined to delineate a bright line standard that would automatically render a plan presumptively constitutional without the sensitive, multi-factored, fact intensive analysis required to determine whether a map truly denies voters equal voting power, thereby permitting the development of a body of doctrine on a case-by-case basis. *See* (R p 4057–58 (Opinion ¶ 163). The metrics noted by the Court were clearly demonstrative. (*See* R p 4061 (Opinion ¶ 167) (noting one threshold standard "could be" a mean-median difference of 1% or less, and that it is "entirely workable to consider the seven percent efficiency gap threshold as a presumption of constitutionality, such that absent other evidence, any plan falling within that limit is presumptively constitutional.")). Overall, the focus of the analysis is to assess whether "some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan." (R p 4058-59 (Opinion ¶ 163)).

The Court also repeatedly reinforced the importance of assessing whether a plan made it systematically more difficult for one party to elect a governing majority as compared to the other party. (*See, e.g.*, R p 4049–50 (Opinion ¶ 150) ("We conclude that when on the basis of partisanship the General Assembly enacts a districting plan that diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a **governing majority**—that is, when a districting plan systematically

makes it harder for one group of voters to elect a governing majority than another group of voters of equal size—the General Assembly unconstitutionally infringes upon that voter's fundamental rights to vote on equal terms and to substantially equal voting power."); (*see also* R p 4048, 4055–56, 4063 (Opinion ¶¶ 148, 159–61, 170, 179–180)).

In the Remedial Order, the trial court disregarded this Court's direction, opting instead to focus on just two of the many relevant measures of partisan skew, finding only that each plan was "satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion," citing the measure of mean-median difference of 1% or less and efficiency gap less than 7%. (*See* R p 4879, 4882 (Remedial Order ¶¶ 42 (Senate), 55 (House))). But it failed to make the necessary findings of fact to support its legal conclusion that the remedial House and Senate maps are constitutional. There is no mention of the several other metrics this Court found to be relevant to this analysis, and omitted entirely are factual findings as to whether these plans would provide voters of all political parties substantially equal opportunity to translate votes into seats across the maps, or whether they systematically diminish or dilute a voter's opportunity to aggregate with likeminded voters to elect a governing majority. Accordingly, the factual findings in the Remedial Order (which, as discussed below, are similarly not supported by competent evidence), are insufficient to support the ultimate conclusion of law that the state House and Senate maps are constitutional under the standard set forth by this Court.

B. Under the Standard Articulated by the North Carolina Supreme Court, The Remedial House and Remedial Senate Maps Are Impermissible Partisan Gerrymanders.

When correctly assessed using the standard set forth by this Court, the remedial state House and Senate maps cannot be presumptively constitutional as they plainly deny voters substantially equal voting power. Furthermore, there is no compelling government interest that is served by this lack of partisan symmetry, especially given the remedial maps' failure to prevent the destruction of two effective crossover districts contribute to the unconstitutional partisan skew of the maps. The remedial House and Senate maps therefore fail to meet constitutional standards.

1. The Remedial House Map Denies Voters Substantially Equal Voting Power.

The assessments by each of the Special Masters' Assistants support an evidentiary finding that the remedial House map denies substantially equal voting power to Democratic-affiliated voters.

Dr. Grofman found the House map had a 2.70% seats bias, suggesting a "*substantial* pro-Republican bias in terms of the likelihood that a majority of the voters will be able to win a majority of the seats." (R p 5041 (emphasis added)). He emphasized these measures of partisan bias as key to understanding the partisan skew, noting that other metrics, namely mean-median gap, should be "informed by the results of other measures such as partisan bias." (R p 5030).

Dr. McGee similarly found that "[t]he Legislative Defendants' plan still favors Republicans: the party would likely hold about 64 of 120 seats with half the vote, and it would take the Democrats somewhere close to 52% of the vote to bring that number

down to 60." (R p 5068). His additional metrics further support persistent and significant partisan bias, with an efficiency gap of 3.0R, mean-median difference of 1.4R, partisan symmetry of 2.9R, and declination of 0.16R (as calculated without taking into account incumbency). (R p 5066 (House report, table 1)).

Dr. Wang concluded that "all three of the Legislative Defendants' plans favor Republicans in six metrics evaluated: seat partisan asymmetry, mean-median difference, partisan bias, lopsided wins, declination angle, and efficiency gap," including a seat partisan asymmetry of "7.2 seats in the House plan." (R p 5075). All of the additional metrics he calculated confirm the systematic Republican bias of this plan, including a mean-median difference of 0.9%, partisan bias of 2.7%, 7.1% lopsided wins difference, 4.5 declination, and 3.0% efficiency gap. (R p 5085–86).

Dr. Jarvis conducted an ensemble analysis and did not explicitly opine on the degree of partisan bias in the maps. Still, his ensemble confirms that the House map denied Democratic-affiliated voters equal voting power by revealing that they can aggregate to achieve a governing majority in *just two* of the eleven election scenarios in which he ran ensembles: the 2020 Governor race and the 2020 Secretary of State ("SST"), R p 5127 (Figure 15 at "G20_GV" and "G20_SST")), where Democratic vote share was extremely high at 52.32% and 51.21%, respectively. (*See* Doc. Ex. 4731 (PX 629, Mattingly December 2021 Report at Table 1, "GV20" and "SST20")). All other elections, including those with majority-Democratic vote shares, yielded Republican majorities. (*See id.* ("AG16", "AG20", and "GV16" showing democratic majority vote-shares); R p 5127 (Jarvis rep. Figure 15 at "G16_AG", "G20_AG" and "G16_Gov")). By

contrast, Dr. Jarvis projects Republicans would gain a majority of 64 seats in an election with just 49.8% of the vote share. (*See* Doc. Ex. (Mattingly December Report at Table 1, showing "AG16" with 50.2% Democratic vote share); R p 5127 (Jarvis Rep. Figure 15 at "G16_AG")). But Democratic-affiliated voters do not have equal voting power when they require a wave election to achieve a simple majority of representation, while their Republican-affiliated counterparts can do the same with less than half of the vote share. Dr. Jarvis's other metrics confirm the systematic bias of the House map, finding a -1.5 mean-median difference, -2.7 partisan bias, -2.7 average efficiency gap, and -5.7 declination. (R p 5117-5121 (Tables 9 through 12)).

Common Cause's submissions to the trial court were consistent with these findings of substantial pro-Republican bias in the remedial House map:

Metric	**Mattingly Rep.**[12]	**Additional Comparators**[13]
Mean-Median	1.45%	1.4% R Source: PlanScore
Efficiency Gap	3.23%	3.0% R Source: PlanScore
Partisan Symmetry (Partisan Bias)	1.575 seat average deviation	2.9% R Source: PlanScore
Plausible Number of Representatives Elected Comparison	6.59375 seats average deviation	57D-63R / 58D-62R Source: DRA Composite / PlanScore

[12] Dr. Mattingly and Dr. Herschlag calculated their metrics using the results of sixteen recent statewide elections, (*see* R p 4754) and these metrics and their analysis of the remedial House Map can be found in the Mattingly Addendum Report (R p 4854–55).

[13] The source data and methodology for calculating these additional comparators is disclosed in the Second Ketchie Affidavit, and is all based upon publicly available information. (*See* R p 4849 (Second Ketchie Aff. ¶ 18)).

Relative Chances of Electing Majority (61) or Supermajority (72)	*See* Figures 2.1 and 2.2 in Mattingly Addendum	R Majority: 4/6 Scenarios D Majority: 1/6 Scenarios R Supermajority: 1/6 Scenarios D Supermajority: 0/6 Scenarios

(R p 4585 (CC Submission at 11)).

Considered as a whole, and indeed in any "combination," these findings are not ambiguous: rather, they show incontrovertibly the substantial and significant bias in the remedial House map that will deprive voters of an equal opportunity to translate their votes into seats. Importantly, all assessments indicate that Democratic-affiliated voters will be deprived an equal chance to aggregate their votes to achieve a governing majority.

The Report of the Special Masters glossed over these findings in a single paragraph which, much like the trial court, reported only the specifics of two metrics: efficiency gap and mean-median difference. (R p 4900 (Section I)). Nowhere did the Special Masters provide a view on whether the remedial House map would allow voters an equal opportunity to elect a governing majority to equal opportunity to translate their votes into seats. (*Id.*) In other words, the Special Masters ignored the very factors this Court emphasized as most important to determining the presumptive constitutionality of the House map.

2. The Remedial Senate Map Denies Voters Substantially Equal Voting Power.

The evidence of partisan bias in the Senate map is even more egregious, where once again all four sets of metrics calculated by the Special Masters indicate an even more substantial bias against Democratic-affiliated voters.

Dr. Grofman concluded the remedial Senate map had a 4.07% seats bias that suggested a "substantial pro-Republican bias in terms of the likelihood that a majority of the voters will be able to win a majority of seats." (R p 5027). He further calculated a mean-median difference of 0.77%, 2.02% votes bias, and 4.24% efficiency gap, indicating a systematic Republican bias across all metrics. (R p 5039 (Table 1)).

Dr. McGhee concluded that the remedial Senate plan would require Democrats to win "as much as 53% of the vote to claim 25 seats" while, in a tied election, Republicans would still hold "27 or 28 seats." (R p 5074 (Senate report, Conclusion)). His calculations showed that "[a]ll metric values . . . are more than 50% likely to favor Republicans throughout the decade," including 4.8R efficiency gap, 2.2R mean-median difference, 4.8R symmetry, and 2.0 declination (as calculated without taking into account incumbency). (R p 5072 (Senate report, table 1)).

Dr. Wang calculated a 2.1 seats bias in the remedial Senate plan, determining that "[a]ll of the five other metrics also favor Republicans" including a 0.8% mean-median difference, 4.2% partisan bias, 4.0% lopsided wins difference, 11.4 declination angle, and 2.2% efficiency gap. (R p 5085–86 (Section V.A and Exhibit 6)).

Dr. Jarvis's ensemble analysis for the Senate map again confirms that in all but two of the eleven elections considered there would be a Republican majority in the Senate. Of the two exceptions, the 2020 Governor's race (where Democratic vote share was 52.32%) would yield a mere tie in seats and the 2020 Secretary of State would yield just 26 Democratic seats with 51.21% Democratic vote share. (*See* Doc. Ex. 4740 (Mattingly December Expert Rep. at Table 2, "GV20" and "SST20"); R p

5117 (Jarvis Rep. Figure 9)). By contrast, Dr. Jarvis projects that Republicans would gain an even greater majority of 27 Republican seats in elections where they fail to achieve a majority vote share at all. (*See* Doc. Ex. 4740 (Mattingly December Expert Rep. at Table 2, showing Democratic majority vote shares for elections "AG16", "AG20" "GV 16"); R p 5117 (Jarvis Rep. Figure 9 predicting 23 Democratic (and thus 27 Republican) Senate seats for elections "G16_AG", "G20_AG", and "Gov '16")). The additional metrics Dr. Jarvis calculated further support that the remedial Senate map is substantially biased towards Republicans. (*See* R p 5124-5125 (Tables 5 through 8) (calculating average mean-median difference of -1.4, average partisan bias of -4.0, efficiency gap of -4.0, and declination of -.70)).

These overall metrics are consistent with those provided to the trial court by Common Cause, which show significant and persistent Republican bias in the remedial Senate map:

Common Cause Submitted Metrics		
Metric	**Mattingly (Ex. 1)**[14]	**Additional Comparators**[15]
Mean-Median	1.304%	2.2% R Source: PlanScore
Efficiency Gap	4.072%	4.8% R Source: PlanScore
Partisan Symmetry (Partisan Bias)	4.0125 seat bias	4.8% R Source: PlanScore

[14] Dr. Mattingly and Dr. Herschlag calculated their metrics using the results of sixteen recent statewide elections. (*See* R p 4754) and these Senate metric scores are reflected from pages 6-7 of their report (R p 4759–60).

[15] The source data and methodology for calculating these additional comparators is disclosed in the Second Ketchie Affidavit, and is all based upon publicly available information. (*See* R p 4846–67 (Second Ketchie Aff. ¶ 11)).

Plausible Number of Representatives Elected Comparison	29-30 R seats with 52% R vote share v. 25-26 D seats with 52% D vote share	22D-28R / 21D-29R Source: DRA Composite / PlanScore
Relative Chances of Electing Majority (26) or Supermajority (30)	R supermajority (or close) with 48 – 49% R votes D majority with 51-52% votes	R Majority: 4/6 Scenarios D Majority: 0/6 Scenarios R Supermajority: 1/6 Scenarios D Supermajority: 0/6 Scenarios Source: Second Ketchie Affidavit

(R p 4829-4830 (CC Objections at pp. 5-6)). Once again, considered as a whole, and indeed in any "combination," these findings are not ambiguous: rather, they show incontrovertibly the substantial and significant bias in the remedial Senate map that will deprive voters of an equal opportunity to translate their votes into seats. Importantly, all assessments indicate Democratic-affiliated voters will be deprived an equal chance to aggregate their votes to achieve a governing majority.

As with the House map, the Special Masters glossed over these findings, and instead focused only on efficiency gap and mean-median difference. (*See* R p 4900 (Special Masters Rep. Section II)). But even here, the Special Master incorrectly asserted that the "majority of the advisors and experts found the mean-median difference of the proposed remedial Senate plan to be less than 1%." *Id.* This is just wrong. Only two of the assistants (Dr. Grofman and Dr. Wang) found a mean-median difference of slightly less than 1%, and these calculations are outliers. All other Assistants, as well as Plaintiffs' experts, instead found a mean-median difference exceeding 1%. Accordingly, even if the Special Masters had conducted the appropriate

analysis of considering all relevant underlying metrics, it would not support a factual finding that the remedial Senate map is constitutionally compliant.

3. The Trial Court's Attribution of Partisan Bias to Political Geography is Legally and Factually Wrong.

In its factual findings, the trial court dismissed the partisan skew remaining in the remedial state House and Senate plans by finding that, "to the extent there remains a partisan skew" in these plans, it is "*explained by* the political geography of North Carolina." (R p 4879, 4882 (Remedial Order ¶¶ 43 (Senate), 56 (House) (emphasis added). This factual finding is unsupported by the evidence and incorrectly applies political geography to assess constitutionality.

When determining constitutionality of a remedial map, the trial court should have considered "whether a meaningful partisan skew *necessarily results* from North Carolina's unique political geography." (R p 4058 (Opinion ¶ 163)). Where political geography necessitates a certain level of partisan skew, it will emerge when adhering to neutral districting criteria area. *Id.* ¶ 163 n.15 ("[A]dherence to neutral districting criteria primarily goes to whether the map is justified by a compelling governmental interest."). In other words, political geography is not a blank check to enact maps that deny North Carolinians substantially equal voting power, as the trial court implied. Instead, political geography may be determinative only when maps drawn pursuant to neutral districting criteria *require* a certain level partisan skew. This is far different from whether a presumptively unconstitutional map's partisan bias can conceivably be "explained" by political geography as the trial court found.

A look at the underlying expert analyses reveals that the evidence of slight natural bias caused by the political geography of North Carolina is not nearly enough to justify, much less require, the substantial partisan bias present in the remedial House and Senate maps. For example, Common Cause Experts Dr. Mattingly and Dr. Herschlog determined for the remedial House map that, "if the mapmakers had simply picked 20 random plans from [their] ensemble, then with 99.9989% probability the mapmakers would have found at least one plan with a better partisan symmetry than the Legislature's remedial plan." (R p 4855 (Mattingly Addendum at 2); *see also id.* at 4856 (Figure 3, showing partisan symmetry of demonstrative ensemble plan)). For the Senate, they determined that picking just "1 random plan from [their] ensemble . . . would have found a plan with higher partisan symmetry than the S744 plan with a 99.6% chance." (R p 4759 (Mattingly Remedial Rep. at 6)). If the political geography of North Carolina *required* some partisan skew to adhere to neutral redistricting criteria, then the plan would certainly not be such an outlier; rather, a comparison to the ensemble would reveal the plan to be just as likely to have the same or greater partisan skew as the ensemble.

The analysis of the Special Masters' assistants also forecloses any competent evidence that the partisan skew in the maps was *required* to adhere to neutral redistricting criteria. None of them found as much. In his ensemble analysis comparing the remedial maps to 80,000 ensemble maps for each of 11 prior election results, Dr. Jarvis noted outliers consistently present across metrics for the House, and concluded that the remedial Senate plan "is often a significant outlier in favor of

Republicans." (R p 5116 (Jarvis Rep. at 15)). But were the partisan skew in these maps *necessitated* by political geography, neither map would be an outlier so consistently. Dr. Grofman specifically found only a "low level of so-called natural bias compared to most other states" and specifically refutes the notion that "whatever bias is found in a given plan is due to geography." (R p 5034 & n.13).

4. The Remedial State Legislative Maps Fail Strict Scrutiny.

Once determined to be presumptively unconstitutional, the remedial maps are subject to strict scrutiny where "the government must demonstrate that the classification it has imposed is necessary to promote a compelling governmental interest." (R p 4063 (Opinion ¶ 170) (quoting *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746, 392 S.E.2d 352, 355 (1990))). "[P]artisan advantage . . . is neither a compelling nor a legitimate government interest" and incumbency protection is also "not a compelling governmental interest that justifies the denial to a voter of the fundamental right to substantially equal voting power." (*Id.*) "[A]dherence to neutral districting criteria primarily goes to whether the map is justified by a compelling governmental interest" including neutral criteria such as "compactness, contiguity, and respect for political subdivisions." (R p 4058 (Opinion ¶ 170 n.15)).

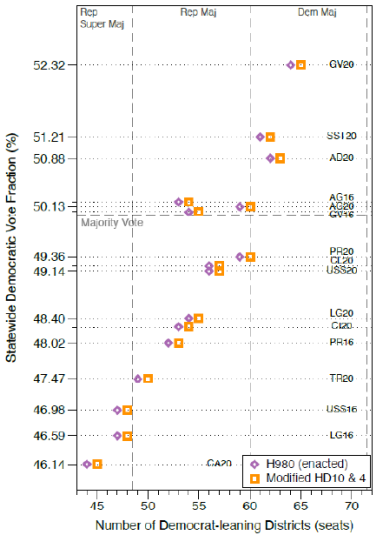
In their remedial submissions, Legislative Defendants failed to present evidence of a narrowly tailored explanation for the partisan skew in their remedial House and Senate maps that would serve a compelling government interest. The ensemble evidence at the remedial stage demonstrates that adherence to neutral redistricting criteria (which the ensembles were generated to do) does not support

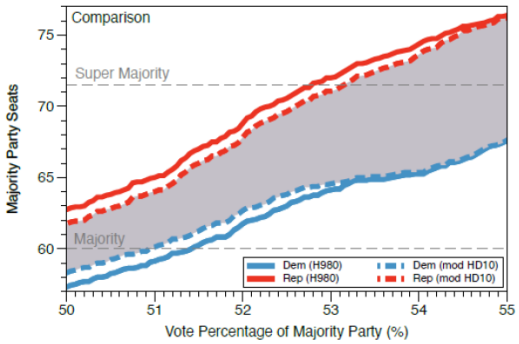
such an explanation. Furthermore, Legislative Defendants admit to overtly relying upon partisan considerations in drafting the maps. For the House Map, they assert that map-drawers used partisan data to "intentionally create more Democratic Districts," and "primarily relied upon the Mean-Median and the Efficiency Gap tests" to do so. (R p 4199 (LD Br. at 6)). But while the use of partisan considerations is permitted to achieve political fairness, (*see* R p 4064 (Opinion ¶ 170 n.16)), it cannot justify maps, like these, that fail to eliminate unconstitutional partisan bias.

C. The Remedial Districts Proposed by Common Cause Should Be Adopted Because They Would Help Bring the State Legislative Maps into Constitutional Compliance.

In addition to complying with state Constitutional requirements to protect against vote dilution for voters of color, the remedial districts proposed by Common Cause would, if adopted, further resolve the unconstitutional partisan bias in the remedial state Legislative Maps. The racially polarized voting studies provided by Common Cause for the proposed remedial district show that Black voters overwhelmingly prefer Democratic candidates in these areas, thereby reducing the pro-Republican bias in the maps overall. (*See* R p 4602, 4606 (Exhibits 2 and 4 to the First Ketchie Aff.); R p 4057 (Opinion at ¶ 162) (holding that partisan fairness and compliance with state constitutional prohibition on partisan gerrymandering can be measured on a statewide basis)).

Figures 1 and 2 of the Mattingly Addendum further show that incorporating Common Cause's remedial House District 10 consistently improves upon the partisan symmetry score in the House map overall:





(R p 4855 (Mattingly Addendum)). As shown by Figure 1 (left), this modification significantly reduces the partisan bias of the remedial House Map by consistently increasing the number of Democratic-leaning districts across an entire range of electoral potentials. As Figure 2 (right) further demonstrates, this remedial district also improves symmetry in how Democratic-leaning and Republican-leaning voters are treated overall, by narrowing the vote percentage necessary to obtain a majority between each group.

The additional evidence put forth by Common Cause confirms that the inclusion of the Common Cause remedial House District 10 reduces the mean-median difference and efficiency gaps of the House map. (*See* R p 4854 (Mattingly Addendum at 1) (stating modified House map has a reduced mean-median difference of 1.01% and efficiency gap of 2.61%); R p 4850–51 (Second Ketchie Aff. ¶ 22) (using alternative method to calculate mean-median difference of 1.2% R, efficiency gap of 2.6% R, and partisan bias of 2.5% R)). The same is true for the remedial Senate map. A plan that incorporates Common Cause's Remedial Senate District 4 and the alternative

proposed clusters—which were tabled during the legislative process—would drastically reduce the partisan skew in the remedial Senate map, and likely comport with constitutional requirements by achieving a mean-median difference of -0.2%, efficiency gap of 1.0%, and partisan symmetry of –0.7%. (*See* R p 4850 (Second Ketchie Affidavit ¶ 21)).[16] Since these remedial districts were drawn to maximize adherence to neutral redistricting criteria (minimizing county splits and traversals, splits of communities, and maximizing compactness), their inclusion does not sacrifice adherence to neutral redistricting criteria in the plans as a whole. (*See* R p 4597−98 (Ketchie Aff. ¶ 11); R p 5179−5188 ("stat packs" for Common Cause proposed remedial districts included in Exhibits 11 and 12 to the First Ketchie Affidavit)).[17]

Overall, the implementation of Common Cause's proposed remedial districts in House District 10 and Senate District 4 are required on several grounds. Not only

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[16] These additional county cluster groupings are further appropriate for modification because Legislative Defendants themselves acknowledged they had Republican support and should be modified during the legislative process, (*see* R p 4252 (LD Br. Ex. 1 at email from Sen. Paul Newton (Wake/Granville, Mecklenburg/Iredell, and New Hanover Counties)), and those that were otherwise considered during the legislative process (Cumberland, Guilford, Forsyth, and Buncombe). These cluster options are further appropriate for modification because all but one were found to be partisan outliers by the trial court in findings adopted by this Court, (*see* R p 3596–97 (Judgment ¶¶ 241–46) (Wake/Granville); R p 3610–12, (Judgment ¶¶ 283–92) (Mecklenburg/Iredell); R p 3598–601 (Judgment ¶¶ 249–56) (Cumberland/Moore); R p 3602–67 (Judgment ¶¶ 259–67) (Guilford/Rockingham); R p 3603–08 (Judgment ¶¶ 270–80) (Forsyth/Stokes); R p 3616–17 (Judgment ¶¶ 303–08) (Buncombe/Burke/McDowell)), and they were the focus of public commentary requesting fair districts that keep communities of interest whole.

[17] Exhibits 11 and 12 to the First Ketchie Exhibit are included in the Proposed Supplement to the Record on Appeal appended to the Motion to Supplement the Record filed by Plaintiff-Appellant Common Cause concomitantly with this Brief.

would they solve the unlawful vote dilution in the remedial state House and Senate maps and undo the intentionally discriminatory diminishment of Black voting power, they would also help remedy the unconstitutional partisan bias present in these plans.

CONCLUSION

The trial court's approval of the remedial state legislative maps enacted by the General Assembly in 2022 should be reversed on several independent constitutional grounds. While this Court could remand the issue of whether the remedial House and Senate maps comport with all constitutional requirements back to the trial court, such a step is unnecessary in light of the factual record developed during the remedial stage. *See Blue v. Bhiro*, 2022-NCSC-45, ¶ 16, 871 S.E.2d 691, 696 (Earls, J. concurring) ("It is indisputable that this Court possesses the authority to resolve this case now under these circumstances. Indeed, it is routine for this Court to address dispositive issues not resolved by the Court of Appeals when doing so requires making purely legal determinations."); *Farm Bureau v. Cully's Motorcross Park*, 366 N.C. 505, 514, 742 S.E.2d 781, 788 (2013) ("When the new analysis relies upon conclusions of law rather than findings of fact, and when the findings of fact made by the trial court are unchallenged, this Court may elect to conduct the analysis rather than to remand the case.").

As a result, the remedial districts proposed by Common Cause are justified by the existing record before this Court, would remedy the constitutionally deficient remedial state House and Senate maps adopted by the Generally Assembly in February 2022, and should therefore be specifically ordered by this Court as

necessary to protect against unlawful vote dilution for North Carolina's Black voters. Only this holding will fulfill the promise to ensure the "fundamental right of each North Carolinian to substantially equal voting power," *Stephenson*, 355 N.C. at 379, 562 S.E.2d at 394, regardless of race or partisan affiliation.

Respectfully submitted, this the 27 day of June, 2022.

SOUTHERN COALITION FOR SOCIAL JUSTICE

By: _____
Hilary H. Klein
N.C. State Bar No. 53711
hilaryhklein@scsj.org

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.

Allison J. Riggs
N.C. State Bar No. 40028
allison@southerncoalition.org
Mitchell Brown
N.C. State Bar No. 56122
Mitchellbrown@scsj.org
Katelin Kaiser
N.C State Bar No. 56799
Katelin@scsj.org
Jeffrey Loperfido
N.C. State Bar No. 52939
jeffloperfido@scsj.org
Noor Taj
N.C. State Bar No. 58508
noor@scsj.org

1415 W. Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3909
Facsimile: 919-323-3942

HOGAN LOVELLS US LLP

J. Tom Boer*
D.C. Bar No. 469585
CA Bar. No. 199563
tom.boer@hoganlovells.com
Olivia T. Molodanof*
CA Bar No. 328554
olivia.molodanof@hoganlovells.com

3 Embarcadero Center, Suite 1500
San Francisco, California 94111
Telephone: 415-374-2300
Facsimile: 415-374-2499

*Admitted *pro hac vice*

Counsel for Petitioner Common Cause

CERTIFICATE OF SERVICE

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

Sam Hirsch
Jessica Ring Amunson
Kali Bracey
Zachary C. Schuaf
Karthik P. Reddy
Urja Mittal
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, D.C. 20001
shirsch@jenner.com
zschauf@jenner.com

Stephen D. Feldman
ROBINSON, BRADSHAW & HINSON, P.A.
434 Fayetteville Street, Suite 1600
Raleigh, NC 27501
sfeldman@robinsonbradshaw.com

Adam K. Doerr
ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
adoerr@robinsonbradshaw.com

Erik R. Zimmerman
ROBINSON, BRADSHAW & HINSON, P.A.
1450 Raleigh Road, Suite 100
Chapel Hill, NC 27517
ezimmerman@robinsonbradshaw.com

Counsel for North Carolina League of Conservation Voters, INC., et al. Plaintiffs

Burton Craige
Narendra K. Ghosh
Paul E. Smith
PATTERSON HARKAVY LLP
100 Europa Dr., Suite 420
Chapel Hill, NC 27517
bcraige@pathlaw.com
nghosh@pathlaw.com
psmith@pathlaw.com

Lalitha D. Madduri
Jacob D. Shelly
Graham W. White
ELIAS LAW GROUP LLP
10 G. Street NE, Suite 600
Washington, D.C. 20002
MElias@elias.law
ABranch@elias.law
LMadduri@elias.law
JShelly@elias.law
GWhite@elias.law

Abha Khanna
ELIAS LAW GROUP LLP
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
AKhanna@elias.law

Elisabeth S. Theodore
R. Stanton Jones
Samuel F. Callahan
ARNOLD AND PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue NW
Washington, DC 20001
elisabeth.theodore@arnoldporter.com

Counsel for Rebecca Harper, et al. Plaintiffs

Phillip J. Strach
Thomas A. Farr
Alyssa M. Riggins
NELSON MULLINS RILEY & SCARBOROUGH LLP
4140 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612
phillip.strach@nelsonmullins.com
tom.farr@nelsonmullins.com
alyssa.riggins@nelsonmullins.com

Mark E. Braden
Katherine McKnight
Richard Raile
BAKER HOSTETLER LLP
1050 Connecticut Ave NW
Suite 1100
Washington, DC 20036
mBraden@bakerlaw.com
kmcknight@bakerlaw.com
rraile@bakerlaw.com

Counsel for Legislative Defendants

Terence Steed
Special Deputy Attorney General
Stephanie A. Brennan
Special Deputy Attorney General
Amar Majmundar
Senior Deputy Attorney General

NC DEPARTMENT OF JUSTICE
P.O. Box 629
Raleigh, NC 27602
tsteed@ncdoj.gov
sbrennan@ncdoj.gov
amajmundar@ncdoj.gov

Counsel for the State Defendants

This the 27th day of June, 2022.

By: s/ Hilary H. Klein
Hilary H. Klein
Southern Coalition for Social Justice