No. TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
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NORTH CAROLINA STATE CONFERENCE OF THE NAACP, COMMON CAUSE, MARILYN HARRIS, GARY GRANT, JOYAH BULLUCK, and THOMASINA WILLIAMS, Plaintiffs-Petitioners, v. PHILIP E. BERGER *in his official capacity as President Pro Tempore of the North Carolina Senate*; TIMOTHY K. MOORE *in his official capacity as Speaker of the North Carolina House of Representatives*; RALPH E. HISE, JR., WARREN DANIEL, PAUL NEWTON, *in their official capacities as Co-Chairmen of the Senate Committee on Redistricting and Elections*; DESTIN HALL, *in his official capacity as Chairman of the House Standing Committee on Redistricting*; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA STATE BOARD OF ELECTIONS; DAMON CIRCOSTA*, in his official capacity as Chair of the State Board of Elections*; STELLA ANDERSON*, in her official capacity as Secretary of the State Board of Elections*; STACY EGGERS IV, *in his official capacity as Member of the State Board of Elections*; JEFF CARMON III, *in his official capacity as Member of the State Board of Elections*; TOMMY TUCKER, *in his official capacity as Member of the State Board of Elections*; KAREN BRINSON BELL, *in her official capacity as Executive Director of the State Board of Elections*, Defendants-Respondents.	)	From Wake County No. 21 CVS 014476

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PETITION FOR DISCRETIONARY REVIEW PRIOR TO DETERMINATION BY THE COURT OF APPEALS

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TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to N.C.G.S. § 7A-31 and North Carolina Rule of Appellate Procedure 15(a), Petitioners North Carolina State Conference of the NAACP, Common Cause, Marilyn Harris, Gary Grant, Joyah Bulluck, and Thomasina Williams ("Petitioners"), respectfully petition the Supreme Court of North Carolina to certify for discretionary review the judgment of the Superior Court, entered on 3 December 2021, (1) granting Legislative Respondents' Motion to Dismiss Petitioners' action for Declaratory and Injunctive Relief, and (2) denying Petitioners' Motion for a Preliminary Injunction seeking to postpone the currently-scheduled March 2022 primary elections and related deadlines. Urgent review is necessary to provide an opportunity for fundamental constitutional issues arising as a result of the unlawful decennial redistricting process—orchestrated by Legislative Respondents in contravention of direction provided by this Court in prior decisions—to be timely adjudicated. Time is of the essence with the primary elections scheduled for March 8, 2022, and the associated elections deadlines fast-approaching.

Because the Superior Court's decision involves matters of significant public interest and legal principles of major significance to the jurisprudence of the State, and because delay will cause substantial and irreparable harm, Petitioners respectfully request that the North Carolina Supreme Court certify Petitioners' appeal for review prior to a determination by the Court of Appeals.

INTRODUCTION

In the last decade, one thing has been obvious: the courts have been the only way to force the Legislature to comply with state and federal law. Time and time again, the Legislature has cynically misinterpreted their duties in redistricting, often to the detriment of voters of color.[1] This decennial redistricting cycle is no exception. Long-established precedent of this Court is clear: state legislative districts "required by the VRA shall be formed prior to" all others to ensure compliance with the Supremacy Clauses in Article I, Sections 3 and 5 of our state Constitution. *Stephenson v. Bartlett*, 355 N.C. 354, 360, 562 S.E.2d 377, 383 (2002) ("*Stephenson I*"); *Stephenson v. Bartlett*, 357 N.C. 301, 305, 582 S.E.2d 247, 249-50 (2003) ("*Stephenson II*"). This Court has more recently reiterated that "the process established by this Court in *Stephenson I* and its progeny requires that, in establishing legislative districts, the General Assembly first must create all necessary VRA districts, single-county districts, and single counties containing multiple districts." *Dickson v. Rucho*, 368 N.C. 481, 532, 781 S.E.2d 404, 439 (2015), *vacated on other grounds*, 137 S. Ct. 2186 (2017). The General Assembly, however, has blatantly ignored these constitutional mandates.

In undertaking their constitutional duty to draw state Legislative districts, Defendants Respondents Berger, Moore, Hise, Daniel, Newton, and Hall's

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[1] *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455 (2017); *NAACP v. Lewis*, No. 18 CVS 2322, 2019 N.C. Super. LEXIS 56 (N.C. Super. Ct. Nov. 2, 2018); *Harper v. Lewis*, No. 5:19-CV-452-FL, 2019 U.S. Dist. LEXIS 182412 (E.D.N.C., Oct. 22, 2019); *Common Cause v. Lewis*, 956 F.3d 246 (4th Cir. 2020).

("Legislative Respondents") admit they did not allow the use of any racial data in drawing maps because, they erroneously contend, there is "no affirmative duty on the legislature to engage in any particular process to get a complaint VRA map." App. 51 (T p 51, lines 15-17); *see also* App. 49 (T p 49, lines 18-19) ("There's no requirement that we [the Legislature] inform ourselves of that data to comply with the VRA."); App. 49 (T p 50, lines 11-13) ("There's been no formal [analysis to determine whether the maps are VRA complaint] . . . the legislature hasn't had a hearing or done anything like that. They're not required to."). The record further reflects that Legislative Respondents intentionally and deliberately orchestrated a process that prohibited *any member* of the General Assembly from fulfilling the constitutional duty to ascertain what districts are "required by the VRA." Likewise, the Legislative Respondents' adopted criterion prohibiting *any* consideration of racial data precludes the ability of public to submit constructive comments concerning racial analysis because such information cannot be meaningfully considered by the members of the Senate Committee on Redistricting and Elections and the House Redistricting Committee ("Redistricting Committees"). In pursuing this process, the Legislative Respondents have harmed North Carolina voters, violated the North Carolina Constitution, and contravened the clear and direct precedent of this Court.

The Wake County Superior Court dismissed Petitioners' claims for declaratory relief and denied the preliminary injunction to delay the primary election and related deadlines, holding these claims moot because final state legislative maps were enacted after the filing of this action and holding that allowing Petitioners' claims to

proceed would violate the principle of separation of powers and was therefore outside of the subject matter jurisdiction of the trial court. The Superior Court's Order directly contravenes the directive of this Court in *Stephenson I* and *II* and has permitted an unprecedented and unwarranted narrowing of this Judiciary's sole duty to answer with finality "issues concerning the proper construction and application of . . . the Constitution of North Carolina . . . ." *Stephenson I*, 355 N.C. at 362, 562 S.E.2d at 384. The General Assembly's admitted and unprecedented disregard of this Court's express direction as to the requirements of the state Constitution in drawing state legislative maps, and the Superior Court's refusal to reach the merits of Petitioners' claim for declaratory judgment or take the minimum, reasonable steps necessary to protect constitutional rights guaranteed to the state's voters to allow for judicial review and remediation, require urgent review of this matter while there is still time to prevent irreparable harm in the upcoming primary elections. "[O]nce the election occurs, there can be no do-over and no redress." *Holmes v. Moore*, 270 N.C. App. 7, 35, 840 S.E.2d 244, 266 (2020) (internal citations omitted).

The Supreme Court took similar action after the trial court's decision in *Stephenson* twenty years ago, and the same considerations merit certifying Petitioners' appeal for review prior to a determination by the Court of Appeals here. *See Stephenson v. Bartlett*, 355 N.C. 279, 279-80, 560 S.E.2d 550 (2002) (26 February 2002 order of the Supreme Court of North Carolina suspending the Rules of Appellate Procedure and setting forth a briefing schedule for its direct review of the trial court's 20 February 2002 order "given the extraordinary nature of this civil action, in the

exercise of this Court's supervisory authority under Article IV of the Constitution of North Carolina and to expedite decision in the public interest and in the interest of the orderly administration of justice.").

Since the beginning of the redistricting process, Legislative Respondents have used unjustified procedural tactics to ensure their unconstitutional maps determine the state Legislative districts for the upcoming elections, including delaying convening the Redistricting Committees until August, implementing a confusing and uncertain public comment process, and delaying identifying final redistricting maps. All of this delay demonstrates Legislative Respondents' intent to avoid meaningful judicial review of their disregard of the redistricting process required by this Court. The candidate filing period—originally scheduled to open on 6 December 2021—was temporarily enjoined by the Court of Appeals in *North Carolina League of Conservation Voters v. Hall*, No. P21-525 (from Wake County, No. 21CVS015426) in a now-vacated order, causing uncertainty as to when filing will take place. Without this Court's immediate discretionary review, potential candidates will be forced to announce their intent to run for an election in districts drawn using an unconstitutional process implemented by Legislative Respondents.

The preliminary injunction delaying the elections will mitigate this harm by allowing candidates until February 2022 to file to run for office and enjoin primaries from proceeding until May 2022. Postponing these primary deadlines will allow time for adequate judicial review of Petitioners' claims and ensure a lawful redistricting process. Similar postponements and extensions to the primary schedule in North

Carolina have occurred in numerous past redistricting cycles, App. 67 (Affidavit of Gary Bartlett ("Bartlett Aff.") ¶ 11), and have never threatened to irreparably disrupt election administration, App. 87-88 (Kristen Brinson Bell Affidavit ("Bell Aff.") ¶ 22-23). Moreover, given the gross and obvious violations of *Stephenson* in the legislative process for redistricting, the fact that other redistricting cases are currently in front of the Court, and the pressing timeline due to the upcoming elections, this Court could, under its equitable authority, instruct the trial court to enter the preliminary injunction delaying the primaries and instruct the court to set an expedited schedule for an evidentiary hearing and review by this Court so as to fully resolve the matter before the 2022 elections (if the Court felt it could not do so on the record before it in the three cases in front of it).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

From the onset of this year's redistricting process, Legislative Respondents used unjustified procedural tactics to limit the time for judicial review of their actions. They chose not to delay the 2022 primaries and related deadlines even after, in February 2021, the Executive Director of the State Board of Elections recommended such a step given the anticipated delay in release of the 2020 decennial census data. *See* App. 98 (Klein Aff., Ex. C). Legislative Respondents further chose not to convene the Redistricting Committees or otherwise plan the redistricting process until shortly before the release of decennial census data in August 2021, and thereafter orchestrated a chaotic and unpredictable process for soliciting public comment and drawing and proposing draft maps. App. 224-235 (Compl. ¶¶ 47-72). All of this delay

has caused the limited time for judicial review of a redistricting process that, as set forth below, directly contravenes express direction from the Supreme Court of North Carolina in *Stephenson*.

When the Redistricting Committees first convened on 5 August 2021, Legislative Respondents proposed (and the Redistricting Committees later adopted) criteria for North Carolina State and House districts that *prohibits all use* of racial data in redistricting. App. 225, 228 (Compl. ¶¶ 49, 58); App. 120, 123 (Klein Aff., Exs. F, I). They continued to pursue this course following warnings from Petitioners' counsel and fellow legislators that such criteria would run afoul of the law. *See* App. 225-227 (Compl. ¶¶ 50-55); App. 256 (Affidavit of Christopher Shenton ("Shenton Aff.") ¶ 2 (public commentary by Allison J. Riggs that "there is apparently not a federal judge out there who agrees with this approach and we urge you to abandon that criteria."); ¶¶ 4-5 (questions by Sen. Blue as to how Voting Rights Act ("VRA") compliance would be accomplished without consideration of racial data); ¶ 6 (statements by Sen. Clark regarding concerns criteria would not comply with the VRA)). In addressing these questions, Legislative Respondents failed to explain how their adopted criteria could ensure compliance with the VRA, and indeed, erroneously represented that prior case law in North Carolina does not require the use of racial data, App. 226 (Compl. ¶¶ 51, 53, 55), App. 258 (Shenton Aff. ¶ 6), a legal position they have maintained in this action. App. 48 (T p 48, lines 4-5) ("We don't believe that [first considering racial data to know how to create a VRA district is] . . . what Stephenson requires."); App. 49 (T p 49, lines 18-19 ("There's no requirement that we

[the Legislature] inform ourselves of that data to comply with the VRA."); App. 51 (T p 51, lines 15-17) ("There's no affirmative duty on the legislature to engage in any particular process to get a complaint VRA map.").

After the Redistricting Committees adopted these redistricting criteria, Respondents Hise, Daniel, Newton, and Hall ("the Redistricting Chairs") further compounded the flaws in the process by announcing, on 5 October 2021, to both Redistricting Committees, that they would restrict consideration of Senate and House maps to those drawn using county clusters described in the academic paper *N.C. General Assembly County Clusterings from the 2020 Census* (the "Duke Academic Paper"), published on the Duke University website "Quantifying Gerrymandering." App. 229-230 (Compl. ¶¶ 61-63); App. 258-261 (Shenton Aff. ¶¶ 8-10, 12-13); App.104, 126, 145 (Klein Aff., Exs. D (Duke Academic Paper), K (Duke Senate Cluster), L (Duke House Clusters)). However, the authors of the Duke Academic Paper explicitly stated their county clusters did not take into account the first step required under *Stephenson,* stating that "[t]he one part of *Stephenson v. Bartlett* which this analysis does not reflect is compliance with the Voting Rights Act." App. 229 (Compl. ¶ 62); App. 259, 261 (Shenton Aff. ¶¶ 9, 13); App. 104 (Klein Aff. Ex. D). When asked how use of the mandated cluster maps could ensure compliance with the VRA, the Redistricting Chairs erroneously insisted that no further analysis or consideration of demographic data is legally required. App. 230, 231 (Compl. ¶¶ 64, 66); App. 259, 261, 262 (Shenton Aff. ¶¶ 10-11, 14, 16); *see also* App. 48 (T p 48, lines 4-5); App. 49 (T p 49, lines 18-19); App. 50 (T p 50, lines 11-13); App. 51 (T p 51, lines 15-17).

Three days after the proposed County Cluster Maps were publicly released, on 8 October 2021, counsel for Petitioners sent a letter to Legislative Respondents informing them that the criteria adopted and requirement members only use the Duke Academic Paper cluster options meant they were "Already Violating the *Stephenson* Instructions." App. 156 (Klein Aff., Ex. M (the "October 8 Letter")). The October 8 Letter also directed Legislative Respondents' attention to specific areas in North Carolina Senate and House cluster maps that required examination for VRA Compliance, and putting them "on notice for the need to perform [Racially Polarized Voting] analysis in certain regions of the state and the need to examine racial data to ensure VRA compliance." App. 156 (Klein Aff., Ex. M); App. 231 (Compl. ¶ 67). It further warned the Legislative Respondents of districts where Black voters were able to elect their candidate of choice with help of non-Black voters, and that a deliberate choice to destroy these districts would risk liability under the Fourteenth and Fifteenth Amendments of the U.S. Constitution due to the intentional destruction of effective crossover districts. App. 156 (Klein Aff., Ex. M at 5 (citing *Bartlett v. Strickland*, 556 U.S. 1, 24, 129 S. Ct. 1231, 1248-49, 173 L. Ed. 2d 173 (2009)).

Legislative Respondents refused to address any of these issues, and did not perform any Racially Polarized Voting or other analysis of racial data to ensure VRA compliance. App. 231 (Compl. ¶ 68). Petitioners sent a second letter on October 25, after a draft state Senate map was published on the General Assembly's website, noting the choice of clusters in this map raised serious legal concerns because, if adopted, it was likely to dilute voting power for Black voters in the Northeast region

of the state. App. 232 (Compl. ¶ 69); App. 164 (Klein Aff., Ex. N). The next day, Petitioner Common Cause provided data to Legislative Respondents indicating legally significant racially polarized voting in two proposed Senate Districts under this draft map, such that voters of color in these districts would not be able to elect their candidates of choice, demonstrating that effective crossover districts would be dismantled and that the compelling evidence presented proved the need for the Legislature to comply with the first step of *Stephenson*. App. 232 (Compl. ¶ 69); App. 167 (Klein Aff., Ex. O). Legislative Respondents refused to deviate from their plan to adopt maps using their legally deficient criteria.

With no schedule for completing the redistricting process made publicly available, and with the filing period for the primary elections rapidly approaching, Petitioners filed a Complaint for Declaratory Judgment and Injunctive Relief, and a Motion for Preliminary Injunction, on 29 October 2021. Although the Legislative Respondents had not set a deadline for the submission or enactment of district maps prior to Petitioners' filing, they hastily adopted and enacted state Senate and House maps four business days later, on 4 November 2021. App. 171, 187 (Klein Aff., Exs. P, S). In doing so, the Legislative Respondents rejected or tabled multiple amendments offered by other Senate and House legislators that were intended to require assessment and, as appropriate, to ameliorate the harm that would result to voters of color from the Legislative Respondents' improper redistricting process. App. 177-80, 192-204 (Klein Aff., Exs. P, S). During this process, Legislative Respondents continued to defend their actions by mischaracterizing the binding precedent set by

this Court. For example, in the meeting of the Senate Committee on Redistricting and Elections on November 2, Defendant Newton stated that "some have asked whether the *Stephenson* cases require that race be used in redistricting," and then sought to justify the Legislative Respondents' decision to prohibit use of racial data by asserting that subsequent case law held that use of racial data or analysis was not required and that *Stephenson* did not apply because Section 5 of the VRA is no longer enforceable. App. 263 (Shenton Aff. ¶ 17); *see also* App. 50 (T p 50, line 6 – p 51, line 22).

On November 5, Petitioners filed a Notice of Filing in support of their Motion for Preliminary Injunction with accompanying affidavits, including affidavits of Gary Bartlett, Chris Shenton, and Hilary Harris Klein. App. 63, 90, 255. On November 9, Legislative Respondents filed a Motion for Expedited Relief and a Motion to Transfer. And on November 10, Legislative Respondents filed a Motion to Dismiss. App. 279. Thereafter, the parties exchanged briefing on their motions in anticipation of a hearing before the trial court.

On November 30, Judge A. Graham Shirley held a hearing at Wake County Superior Court and heard oral arguments by the parties on Legislative Respondents' Motion to Dismiss and Petitioners' Motion for Preliminary Injunction, and entered an order in open court. On Friday, 3 December 2021, Judge Shirley issued a written Order granting Legislative Respondents' Motion to Dismiss and denying Petitioners' Motion for Preliminary Injunction. This Order made several erroneous conclusions of law:

***First*,** Judge Shirley dismissed the action as moot, due to the adoption of final maps after the complaint was filed, and for lack of subject matter jurisdiction because he found that "judicial intervention in the legislative process in the manner contemplated and requested by plaintiffs in this case would violate the principle of separation of powers pursuant to . . . the North Carolina Constitution, and as such a violation necessarily divests this Court of jurisdiction over the subject matter of Plaintiffs' complaint." App. 269 (Order at 3). Oddly, the Order fails to cite or analyze, in any manner, the Declaratory Judgment Act at the foundation of Petitions' claims. Further, Judge Shirley's holding disregards this Court's holding in *Hoke County Board of Education v. State*, which directed courts to "adopt and apply the broadened parameters of a declaratory judgment action that is premised on issues of great public interest" because where "inordinate numbers" of citizens are "wrongfully being denied their constitutional right," then "our states cannot risk further and continued damage," even if "the perfect civil action has proven elusive." *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 616, 599 S.E.2d 365, 377 (2004); *see also* N.C.G.S. § 1-253 (the court has the "power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed"); N.C.G.S. § 1-259 ("Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper."); *Augur v. Augur*, 356 N.C. 582, 589, 573 S.E.2d 125, 131 (2002) (The Declaratory Judgment Act is "to be liberally construed and administered," N.C.G.S. § 1-264, and courts have "no discretion to decline" a request for declaratory relief where "fundamental human rights are denied in violation of constitutional guarantees" and

legislative action is specifically challenged by persons directly affected by it.) (internal citation omitted).

It is within the Court's inherent power to provide the relief sought by Petitioners, including a declaration that Legislative Respondents have failed in their constitutional duties in redistricting, an order requiring them to do so, and injunctive relief delaying the primaries to protect Petitioners from irreparable harm. But Judge Shirley erroneously found such relief was not within his right to grant, ignoring this Court's direction and heeding to Legislative Respondents' deliberate efforts to avoid judicial review of their unlawful and discriminatory redistricting process by hastily enacting maps just four days after Petitioners filed their Complaint.

Contrary to Judge Shirley's holding that the court can only review "the end result" of the redistricting process, Order at 3, Petitioners have a right to declaratory and injunctive relief now based on Legislative Respondents' intentional and blatant refusal to adhere to this Court's instructions for drawing constitutional districts as set forth in *Stephenson*. Far from being moot, Petitioners' requested relief will still have a "practical effect" of affirming and protecting Petitioners' rights by lending certainty to Legislative Respondents' duties in adhering to the directives set forth in *Stephenson* and its progeny during the redistricting process, and permitting time for such duties to be fulfilled (or Petitioners' to further pursue protection of their constitutional rights) before irreparable harm to voters in the 2022 primary elections. *See Anderson v. N.C. State Bd. of Elections*, 248 N.C. App. 1, 8, 788 S.E.2d 179, 185 (2016). Such relief can benefit all residents of North Carolina by ensuring the General

Assembly's adherence to North Carolina Constitutional process requirements now and in future redistricting cycles.

Second, Judge Shirley erroneously denied Petitioners' request to enjoin Defendants the North Carolina State Board of Elections, Circosta, Anderson, Eggers, Carmon, Tucker, and Brinson Bell ("State Respondents") from administering the scheduled March primaries and the corresponding period of candidate filing before February. App. 286 (Order at 2). In denying the requested preliminary injunction, Judge Shirley improperly reasoned that as long as the redistricting maps have not been declared "unconstitutional or violative of Federal law," there is no harm to Petitioners to address in this action and no basis for the requested relief. App. 268-69 (Order at 2-3). In reaching this conclusion, Judge Shirley outright ignored the relevance of the Legislative Respondents' admission, during oral argument on 30 November 2021, that they had not followed the clear mandates in *Stephenson* on how to draw constitutional redistricting maps. App. 48 (T p 48, lines 4-5) ("We don't believe that [first considering racial data to know how to create a VRA district is] . . . what Stephenson requires."); App. 47 (T p 47, lines 14-16) ("So, the legislature, in drawing the districts, did not use the racial demographic data provided by the census"); App. 50 (T p 50, lines 11-13) ("There's been no formal [analysis to determine whether they are VRA complaint] . . . the legislature hasn't had a hearing or done anything like that. They're not required to.").

Judge Shirley also failed to acknowledge the irreparable harm that Petitioners properly pleaded they will suffer as a result of Legislative Respondents' actions if

their relief is not granted, including vote dilution and the infringement of Petitioners' fundamental right to vote on equal terms and to associate with candidates of their choice. Petitioners' Complaint described how the Senate and House clusters required by the Committee Charis result in a significant decrease in the percent of the Black Voting Age Population ("BVAP") in the new districts. *See* App. 231-235 (Compl. ¶¶ 67-71). For example, a cluster option in the Senate comprised of Warren, Halifax, Martin, Bertie, Northampton, Hertford, Gates, Camden, Currituck, and Tyrell counties has a BVAP of 42.33%; but the cluster selected by Legislative Respondents for inclusion in the Senate is comprised of Northampton, Hertford, Bertie, Gates, Perquimans, Pasquotank, Camden, Curritck, Tyrell, and Dare counties, which has a BVAP of only 29.49%. App. 232-235 (Compl. ¶ 71). Under the allegedly "race-blind" criteria adopted by the Legislative Respondents, this type of deleterious consequence on BVAP—and Black voters' ability to elect their candidate of choice—was prohibited from being considered by the Redistricting Committees.

***Third*,** Judge Shirley's Order also erroneously denied Petitioners' request to enjoin Legislative Respondents from undertaking a redistricting process that violates the procedures set forth in *Stephenson I*. He reasoned that there is no basis for such relief because Petitioners "essentially ask[] this Court to reverse actions which have already been taken by Legislative Respondents rather than prohibit Legislative Respondents from performing some action in the future." App. 268 (Order at 2). However, this ignores decades of jurisprudence supporting the authority conferred to courts by the Declaratory Judgment Act and that Legislative Respondents have

provided no reason (other than their own unwillingness) they would be unable to undertake the first step of *Stephenson* to cure their unconstitutional redistricting process and revise the enacted maps accordingly to prevent harm to voters in the upcoming primary elections. In fact, they have taken steps to make technical corrections as necessary following initial enactment and preclearance in years past. *See, e.g.*, 2011 N.C. Sess. Laws 2011-413 (S.B. 283), 2011-414 (S.B. 689), 2011-416 (H.B. 777) (technical corrections bills passed by the Legislature on November 7, 2011 during the 2010 redistricting cycle).

In seeking a Preliminary Injunction, Petitioners requested measures that would maintain the status quo and allow for the parties to act upon a declaration of the trial court to prevent irreparable harm to voters. The requested declaratory relief asking the trial court to require that the Legislative Respondents adhere to the process requirements in *Stephenson* does not require challenging the maps themselves. As the Legislative Respondents were warned during the public comment process, the redistricting process itself is unconstitutional; the Declaratory Judgment Act provides the court with the authority to declare so, separate and apart from ruling on the constitutionality of the maps. N.C.G.S. § 1-253 (the court has the "power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed"); N.C.G.S. § 1-259 ("Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper). Accordingly, although Petitioners did not pursue this aspect of relief that was denied on the preliminary

injunction, Petitioners ask this Court for the opportunity to have this matter adjudicated via the case-in-chief outside the context of the preliminary injunction.

On, 5 December 2021, the following business day after the Order was issued, Petitioners filed a Notice of Appeal to the North Carolina Court of Appeals. App. 271. On December 6, counsel for Petitioners met and conferred with counsel for Respondents. No resolution was reached at the meet and confer concerning this Petition.

REASONS WHY CERTIFICATION SHOULD ISSUE

Given the above discussion demonstrating how Legislative Respondents' violated the North Carolina Constitution by prohibiting the consideration of racial data via the redistricting criteria and requiring use of only those county cluster maps specified in the Duke Academic Paper, discretionary review is warranted and should be granted by this Court.

I. Legislative Respondents' Infringement on Petitioners' Constitutional Rights Is a Matter of Significant Public Interest.

The Court may grant discretionary review in cases where, as here, "[t]he subject matter of the appeal has significant public interest." N.C.G.S. § 7A-31(b)(1). The right to vote on equal terms and free from intentional discrimination is a "fundamental right." S*tephenson I*, 355 N.C. at 382, 562 S.E.2d at 396; *see also Common Cause v. Lewis*, No. 18 CVS 14001, 2019 N.C. Super. LEXIS 56, at *347 (N.C. Super. Ct. Sept. 3, 2019) ("It is well settled in this State that 'the right to vote on equal terms is a fundamental right.' These principles apply with full force in the redistricting context[.]") (internal citations and emphasis omitted); *Holmes*, 270 N.C.

App. at 14-15, 34, 840 S.E.2d at 253, 265 (2020) (overturning denial of preliminary injunction against voter ID law which likely impacted Black voters "right to participate in elections on an equal basis."). This right also extends to Petitioners' ability to elect their candidates of choice in electorally effective districts. *Common Cause*, 2019 N.C. Super. LEXIS 56, at *347. In North Carolina, the right of association is protected by the right "to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances." N.C. Const. art. I, § 12; *Feltman v. City of Wilson*, 238 N.C. App. 246, 253, 767 S.E.2d 615, 620 (N.C. Ct. App. 2014) (holding that in North Carolina the right to assembly encompasses the right of association). Legislative Respondents' unlawful redistricting process, including their adoption of criteria that prohibited all use of racial data in redistricting, threatens the rights of Petitioners and other North Carolina voters of color. As such, Petitioners' constitutional challenge to Legislative Respondents' unlawful redistricting process, is of significant public interest.

This Court has previously certified cases for discretionary review prior to a determination by the Court of Appeals where, as here, the matters involved redistricting or election laws of significant public interest. *See*, *e.g.*, *Stephenson I*, 355 N.C. 354 , 562 S.E.2d 377 (involving constitutionality of state legislative redistricting plan); *James v. Bartlett*, 359 N.C. 260, 607 S.E.2d 638 (2005) (involving question of out-of-precinct provisional ballots). The question here mirrors the questions in *Stephenson I* and *Stephenson II*, where Legislative Respondents undertook a

redistricting process that violated the North Carolina Constitution and would almost certainly violate the VRA. As discussed above, in Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, and in the Complaint, Legislative Respondents' refusal to adhere to this Court's express directions in *Stephenson I* and *II* as to the requirements of a constitutional redistricting process will dilute the strength of Petitioners Harris, Grant, Bulluck, and Williams' votes, as well as the votes of members and voters served by Petitioners North Carolina State Conference of the NAACP and Common Cause. The clusters required by the Legislative Respondents result in a significant decrease in the percent of Black Voting Age Population "BVAP" in each new district. *See* App. 232 (Compl. ¶ 71) (alleging that many of the cluster choices convert districts to below 40% BVAP). These decreases will prevent Black voters the opportunity to elect candidates of their choice. *See* App. 232-235 (Compl. ¶¶ 71-72). Under the unlawful "race-blind" criteria adopted by the Legislative Respondents, however, the deleterious consequences on BVAP could not be directly considered by the Redistricting Committees.

This matter also implicates serious issues of separation of powers, and the deliberate actions of legislators to orchestrate a redistricting process that ignores express requirements of the North Carolina Constitution as stated by this Court. This issue is a matter of significant public interest as well and, as described below, a legal principle of major significance as well. This Court is in the best position to immediately evaluate Legislative Respondents'—and the Superior Court's—refusal to acknowledge that their dereliction of duties required by our state's Constitution in

the redistricting *process*, separate and apart from unlawful enacted maps, is in and of itself a constitutional violation warranting the preliminary injunction that Petitioners seek where it will cause harm to voters, as shown here. This redistricting cycle, and the future of North Carolina's democracy, depend upon this Court's discretionary review of this matter of significant public interest.

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

Where the Legislature has flagrantly ignored the explicit instructions from this Court on how the redistricting process is supposed to be conducted in order to comply with the state Constitution, it is necessary that the judiciary act to resolve the dispute. Here, contrary to what the Superior Court indicated, separation of powers actually requires the Judiciary to act in a manner that preserves the important role it serves in enforcing constitutional rights. When Petitioners filed this suit, the Declaratory Judgment Act was a viable and appropriate tool for enforcement of those rights and it remains so today.

Without judicial intervention, the Legislature's actions and the decision below render this Court's dictate in Stephenson nothing more than dicta. That cannot be tolerated. The North Carolina Constitution requires the General Assembly to revise state legislative districts at the first regular session convened following the federal decennial census. N.C. Const. art. II, §§ 3, 5. The Constitution also enumerates additional redistricting terms, including requiring members of each chamber to represent, as nearly as possible, an equal number of inhabitants, that districts include contiguous territory, and that "no county shall be divided" (the "Whole County

Provision."). *Id.* These requirements had to be reconciled with federal law pursuant to the Supremacy Clauses of North Carolina's Constitution, which provide that the rights of the people of North Carolina "shall be exercised in pursuance of law and consistently with the Constitution of the United States," N.C. Const. art. I, § 3, and prohibit any law in North Carolina from contravening the Federal Constitution. N.C. Const. art. I, § 5. Among the federal terms thereby incorporated into North Carolina redistricting is a need to comply with the one-person one-vote requirements under the Fourteenth Amendment and the Voting Rights Act, as amended and as proscribed under the Fifteenth Amendment. *Stephenson I*, 355 N.C. at 363-64, 562 S.E.2d at 384-85 (2002).

In *Stephenson v. Bartlett*, this Court harmonized the various North Carolina Constitutional requirements imposed on the redistricting process by developing a methodology for grouping counties together into "clusters" that it held would minimize the splitting of counties, in recognition of the Whole County Provision, while satisfying one-person one-vote requirements. *Stephenson I*, 355 N.C. 354, 562 S.E.2d 377 (2002); *Stephenson II*, 357 N.C. 301, 582 S.E.2d 247 (2003). In doing so, this Court expressly mandated that, "to ensure full compliance with federal law, 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. As a result, any and all districts that are required under the VRA—which requires that districts be drawn without the intent or effect of depriving protected voters of an equal opportunity to elect their candidates of choice—must be drawn first. Only after an analysis is

performed to ascertain what districts are compelled by the VRA, and those districts are drawn, may any work be done to draw clustered districts that harmonize and maximize compliance with North Carolina's Whole County Provision and equal protection guarantees of population equality.

The trial court in *Stephenson* subsequently instructed that VRA districts should be formed where, "due to demographic changes in population there exists the required [*Thornburg v. Gingles,* 478 U.S. 30, 50-51, 106 S. Ct. 2752, 2766 (1986)] preconditions"—a process that was also affirmed by this Court. *Stephenson II,* 357 N.C. at 307, 314, 582 S.E.2d at 251, 254. Accordingly, to comply with *Stephenson,* the Legislature needed to evaluate demographic changes to determine whether there exists the required *Gingles* preconditions. This determination includes, at the least, considering racial data and, where legislators and members of the public have indicated that there may be VRA concerns, conducting a regionally-focused Racially Polarized Voting study to determine if there is legally significant racially polarized voting. *See, e.g.*, *Thornburg*, 478 U.S. at 55-58, 106 S. Ct. at 2768-70 (1986). However, Legislative Respondents intentionally rejected this Court's direction as set out in *Stephenson I* and *II*, and the result is an unconstitutional redistricting process that violates Petitioners and Black voters' fundamental rights guaranteed by the North Carolina Constitution.

Further, the Legislative Respondents leveraged the Census Bureau's delay in releasing data to limit opportunities for public comment or judicial review over the inherently illegal approach to redistricting. Following the Census Bureau's February

2021 warning that the release of redistricting data would be delayed by the COVID-19 pandemic, North Carolina State Board of Elections Executive Director Karen Brinson Bell advised the House Elections Law and Campaign Finance Reform Committee that the delay would require an election schedule change due to the time required to prepare for candidate filing and ballot styles. App. 235 (Compl. ¶ 74). Director Brinson Bell advised the Committee to move the March 2022 primary to a May 3 primary, July 12 second primary, and November 8 general election. *Id.*; App. 98 (Klein Aff., Ex. C). In recognition of the consequences of the Census delay would have on redistricting, the General Assembly voted to extend the schedule for impacted municipal elections. App. 236 (Compl. ¶ 75); *see* S.B. 722, S.L. 2021-56 (2021). Yet, the General Assembly failed to follow Director Brinson Bell's recommendation to reschedule the state-wide March 2022 primaries to May 3. App. 236 (Compl. ¶ 75).

Instead of heeding Director Brinson Bell's advice, the Legislative Respondents orchestrated a rushed and chaotic redistricting process and the March 2022 primary date has remained in place. At the onset, the Legislative Respondents failed to convene any meetings of the Redistricting Committees to plan for the 2021 redistricting until the eve of Census data's release in August 2021. App. 237 (Compl. ¶ 78). In doing so, they failed to take any of the many available steps over the summer and before the release of census data to minimize the risk of consequences of delay, such as setting a schedule for the redistricting process, planning and noticing opportunities for public comment, and adopting lawful redistricting criteria. *Id.*

These tactics left legislators and the public in the dark, causing confusion and obstructing opportunity for meaningful public comment. App. 237 (Compl. ¶ 77). As a result, the deadlines associated with the March 2022 primaries are fast approaching.[2]

Denial of the express request from Director Brinson Bell to push back the primaries to May, App. 235 (Compl. ¶ 74); App. 98 (Klein Aff. Ex. C), and the Legislative Respondents' failure to plan a timely redistricting process, indicates an intentional strategy of delay by running out the clock despite the fast-approaching 2022 election deadlines. Without this Court's immediate certification, Legislative Respondents will continue to escape judicial review of the allegedly "race-blind" criteria they have adopted. The risk of allowing Legislative Respondents' unlawful strategy to continue would set the dangerous precedent that process does not matter provided that the outcome, here the maps themselves, might be later demonstrated to be constitutional. This in turn would allow Legislative Respondents to force elections under any maps they choose, without consideration for the case law in this state or constitutional mandates, if they time enactment of new districts to occur immediately before candidate filing. Petitioners, however, filed their Complaint to *prevent* the enactment of illegal maps based upon Legislative Respondents' unconstitutional process based on the Court's authority under the Declaratory

[2] Just today, on 6 December 2021, the Court of Appeals granted a motion for temporary stay enjoining the opening of the candidate-filing period for the 2022 primary elections for Congress, the North Carolina Senate, and the North Carolina House of Representative pending the Court of Appeal's ruling on the plaintiffs' petition for writ of supersedeas or prohibition filed in that matter. *N.C. League of Conservation Voters, Inc. v. Hall*, No. P21-525 (N.C. App. Dec. 6, 2021). The Court of Appeals then vacated that order hours later.

Judgment Act and its duty to state what the Constitution requires. The redistricting *process* and its Constitutional requirements, as set forth by this Court in *Stephenson*, are of major significance, therefore, to the jurisprudence of North Carolina, and accordingly, certification should issue.

III. Absent Certification, Delay Will Cause Substantial and Irreparable Harm to Voters.

The Court may also grant review where, as here, "[d]elay in final adjudication is likely to result from failure to certify and thereby cause substantial harm." N.C.G.S. § 7A-31(b)(3). Petitioners have alleged that Legislative Respondents' unlawful redistricting process flagrantly violates the North Carolina Constitution, sets a historical precedent that endorses the gross disrespect for the mandates issued by this Court, a co-equal branch, and threatens to cause irreparable harm to their fundamental rights to vote and associate. Certifying this appeal for immediate review is necessary to prevent irreparable harm to the fundamental rights of Petitioners and other voters of color across the state. Given the uncertainty associated with the opening of candidate filing, the scheduled March 2022 primaries and the related deadlines, an immediate appeal is the only way that Petitioners can ensure, with minimal disruption to election administration, that their claims receive judicial consideration before candidates must announce their intent to run for an election in districts drawn using an unconstitutional process implemented by Legislative Respondents.

In cases like this, North Carolina courts have found a preliminary injunction warranted to ensure the smooth administration of elections. *Holmes*, 270 N.C. App.

at 15, 34, 840 S.E.2d at 253-54, 265 (overturning denial of preliminary injunction against voter ID law which likely impacted Black citizens' "right to participate in elections on an equal basis" and was likely to increase "voter confusion"); *Crookston v. Johnson*, 841 F.3d 396, 399 (6th Cir. 2016) (considering the importance of "holding orderly elections" in determining whether to grant a preliminary injunction, and explaining that such injunctions should be requested early, before the training of poll workers has occurred). Certifying this appeal for immediate review is necessary to prevent harm to voters which is irreversible once the election occurs. *See Holmes*, 270 N.C. App. at 35, 840 S.E.2d at 266 ("The need for immediate relief is especially important . . . given the fact that once the election occurs, there can be no do-over and no redress.") (internal citations omitted).

Director Brinson Bell notified the General Assembly in February 2020 that there is a "2-month process for geocode changes for filing and ballot styles." App. 98 (Klein Aff., Ex. C); *see also* Affidavit of Karen Brinson Bell ¶ 17, *Common Cause v. Lewis* (Notice of Filing, Bell Aff., Oct. 4, 2019)[3] (stating that the State Board of Elections requires 63-71 days for administrative processing before in-person voting for primaries can begin). More recently, Director Brinson Bell indicated that 38-42 days are required to geocode and prepare ballots, and under the circumstances that Petitioners seek here, the first primary would need to occur by May 12 to avoid disrupting the elections. App. 87-88 (Bell Aff. ¶ 22-23). Former Executive Director of

[3] *Available at* https://www.documentcloud.org/documents/6458305-2019-10-04-Notice-of-Filing-Affidavit-of-Bell.html (last accessed Dec. 6, 2021).

the State Board of Elections Gary Bartlett further attests to the many time-sensitive administrative tasks required to prepare for primary elections, including district assignment, preparing and mailing of absentee ballots, and voter education. *See generally* App. 63 (Bartlett Aff.). In particular, Mr. Bartlett describes the importance of educating voters in a redistricting cycle because voters are often subject to new districts, where one's candidate of choice is no longer located. *Id.* ¶ 27). Providing adequate information about election changes, new district assignments, and candidates running for office in those new districts is an arduous, yet imperative, task for the Board of Elections. *Id.* Legislative Respondents deliberately chose to oversee a chaotic and delayed redistricting process that has already significantly shortened the time to administer the upcoming elections. To avoid the harm that is certain to result from this process, and ensure elections are administered as smoothly as possible under the circumstances, immediate review of Judge Shirley's Order by this Court is necessary.

Immediate review is necessary to ensure time for Legislative Respondents to undertake the required analysis of racial data this redistricting cycle before the 2022 primaries, and without significant disruption to election administration next year. Absent review now, voters will be consigned to participating in 2022 primary elections using flawed maps resulting from an unlawful process without the chance for judicial review of either, and future redistricting cycles required under North Carolina's Constitution will be haunted by this uncertainty. *See* N.C. Const. art. II, §§ 3, 5. The preliminary injunction that Petitioners seek would avoid this irreparable

harm that would follow from administering elections before judicial review of this process is possible. The requested two-month delay in primaries—similar to the delays in the 1990s, 2002, and 2004 to account for preclearance and litigation delays, *see* App. 67 (Bartlett Aff. ¶ 11)—will allow for protection of Petitioners' rights, and a fulsome judicial review of Legislative Respondents' unconstitutional process.

ISSUES TO BE BRIEFED

In the event the Court allows this petition for discretionary review, Petitioners intends to present the following issues in its brief for review:

1. Whether the Superior Court erred in dismissing Petitioners' Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure.
2. Whether the Superior Court erred in denying Petitioners' Motion for Preliminary Injunction and refusing to preliminarily enjoin the March 2022 state legislative primaries and related deadlines, including the candidate filing period beginning on 6 December 2021.

In the alternative, should this Court conclude that the violations of the state Constitution that defense counsel admitted in open court, among the other points made in this Petition, are sufficient grounds for delaying the primary, it could equitably do so and remand to the trial court with instructions to enter the injunction delaying the primary and to conduct an expedited evidentiary hearing that would allow to hear this matter slightly later without causing irreparable harm to Petitioners or disrupting the administration of the election next year.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant this Petition and certify Petitioners' appeal for discretionary review prior to a determination by the Court of Appeals.

Respectfully submitted, this the 6th day of December, 2021.

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. 56700
Katelin@scsj.org

SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 W. Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3909
Facsimile: 919-323-3942

Counsel for Plaintiffs-Petitioners

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
**Pro Hac Vice* motion filed contemporaneously with this Petition pursuant to N.C.R. App. P. 33(d)

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

Counsel for Plaintiffs-Petitioners North Carolina State Conference of the NAACP and Common Cause

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure, counsel for Petitioners certifies that the foregoing brief, which is prepared using a 12-point proportionally spaced font with serifs, is less than 8,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendices) as reported by the word-processing software.

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

CERTIFICATE OF SERVICE

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

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

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-Respondents

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
mBraden@bakerlaw.com
kmcknight@bakerlaw.com
rraile@bakerlaw.com

BAKER HOSTETLER LLP
1050 Connecticut Ave NW
Suite 1100
Washington, DC 20036

Counsel for Legislative Defendants-Respondents

This, the 6th day of December, 2021

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