

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

NORTH CAROLINA LEAGUE OF
CONSERVATION VOTERS, INC., *et al.*,

Plaintiffs

and

COMMON CAUSE,
Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL, in his
official capacity as Chair of the House Standing
Committee on Redistricting, *et al.*
Defendants.

Case No. 21 CVS 015426

REBECCA HARPER, *et al.*,
Plaintiffs

v.

REPRESENTATIVE DESTIN HALL, in his
official capacity as Chair of the House Standing
Committee on Redistricting, *et al.*
Defendants.

Case No. 21 CVS 500085

PLAINTIFF COMMON CAUSE'S PROPOSED REMEDIAL DISTRICTS

Pursuant to the North Carolina Supreme Court's February 4, 2022 Order and this Court's February 8, 2022 Order on the Submission of Remedial Plans, Common Cause provides herein proposed remedial districts for one state House of Representatives and one state Senate district. Plaintiff Common Cause is not submitting any full maps.

The two districts proposed by Common Cause are necessary to ensure compliance with state Constitutional law by drawing districts required by the Voting Rights Act (VRA) prior to all others. *See Stephenson v. Bartlett*, 355 N.C. 354, 383 (2002) (“[T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts.”). The North Carolina Supreme Court reiterated the importance of assessing whether districts are required by the VRA, and specified that this is a requirement as a matter of state law.

In its February 4, 2022 Order, the North Carolina Supreme Court stated:

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.

Order at 8, Case No. 413PA21 (N.C. Feb. 4, 2022). In its February 14, 2022 Opinion, the North Carolina Supreme Court stated:

Notably, 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.

Opinion at ¶ 214, Case No. 413PA21 (N.C. Feb. 14, 2022) (emphasis added). Accordingly, Plaintiff Common Cause respectfully submits for the Court two remedial district proposals – House District 10 and Senate District 4 – that are required to prevent unlawful vote dilution, as indicated by the Racially Polarized Voting (RPV) studies for these areas. Appended to this submission are supporting documentation, including an **Affidavit of demographer Christopher Ketchie (“Ketchie Aff.”)**, the RPV studies showing legally significant racially polarized voting in the areas around House District 10 (**Ketchie Exhibit 1**) and Senate District 4 (**Ketchie Exhibit 3**) in the 2021 Enacted Maps that were struck down, RPV studies showing that the proposed

remedial districts are narrowly tailored to prevent unlawful vote dilution in these areas (**Ketchie Exhibits 2 and 4**), and the block assignment files for the proposed remedial districts (**Ketchie Exhibits 5 and 6**).

I. Voting Rights Act Obligations in North Carolina State Redistricting

Federal and state precedent instruct how to identify and how to prevent vote dilution in state legislative redistricting, and support that the remedial districts proposed herein are required under federal statutory **and, independently**, under state Constitutional law.

Vote dilution inconsistent with Section 2 of the Voting Rights Act occurs if,

based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State 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 v. Bartlett*, 355 N.C. 354, 363 (2002) (citing the VRA and *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986)).

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 it is politically cohesive”; and third, “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; *see also Bartlett v. Strickland*, 556 U.S. 1, 11–12 (2009).

The analysis of whether the three *Gingles* criteria are met is district-specific. *See Covington v. North Carolina*, 316 F.R.D. 117, 173 (M.D.N.C. 2016) (finding the General Assembly had failed to substantiate drawing purported VRA remedial districts because “none of the evidence Defendants have cited--without additional proof and district-specific analysis--can constitute a strong basis in evidence demonstrating that any of the challenged districts were reasonably necessary as drawn to avoid a Section 2 violation” where “evidence regarding *Gingles*’ third factor in any particular district is sparse to non-existent.”), *summarily aff’d*, 137 S. Ct. 2211 (2017); *id.* at 174 (“[W]hen drawing the challenged districts, Defendants made no district-specific assessment regarding the third *Gingles* factor (as properly understood).”). As shown below in **Figures 1 and 3**, the areas of House District 10 and Senate District 4 have Black voting age populations (BVAPs) that are sufficiently large and geographically compact to constitute a majority in a single-member district. Furthermore, the RPV analyses appended to this motion in **Ketchie Exhibits 1 and 3** are district-specific and demonstrate that racially polarized voting in the areas of House District 10 and Senate District 4 is legally significant.¹

Similarly, 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, “VRA districts” should

¹ The demographic possibilities here and in the *Pender County* case are distinguishing. In *Pender County v. Bartlett*, 361 N.C. 491, 506–07 (2007), *aff’d Bartlett v. Strickland*, 556 U.S. 1 (2009), the North Carolina Supreme Court determined that neither a remedial majority-minority district in the larger Pender County region nor a crossover House district could be drawn in Pender County without crossing a county line. Based on the area demographics, there was no way to draw a district in which Black voters constituted a numerical majority. *Id.* It was therefore impossible to satisfy the first *Gingles* prong, and the Whole County Provision controlled the shape of the district that encompassed Pender County. *Id.* at 507. In contrast, as shown below, it is possible to draw the remedial districts discussed in this letter in areas of North Carolina that meet all three *Gingles* criteria today, which necessitates the creation of districts that allow minority voters to elect their candidates of choice.

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 application of the VRA is consistent with both the plain text of Section 2 – which nowhere requires majority-minority districts to achieve equal “opportunity” to elect candidates of choice – and applicable precedent, which supports this jurisdictionally-sensitive approach rather than a uniform 50%+1 BVAP population requirement *for remedy* (as opposed to establishing liability). *See, e.g., Bartlett v. Strickland*, 556 U.S. 1, 23 (2009) (“[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.”); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 429 (2006) (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).²

Plaintiff Common Cause, through counsel, alerted the Legislative Defendants via correspondence on February 15, 2022 of the need to create the two remedial districts proposed herein. During the legislative process for enacting remedial plans, the Legislative Defendants indicated they had relied upon two misreadings of applicable law in determining that no remedial districts are required to comply with North Carolina law or to avoid vote dilution. First, they appeared to rely upon a state-wide conclusion that there is no legally significant racially polarized

² *See also 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.”). Importantly, these cases have provided further clarity on the requirements of Section 2 remedial districts after the 2002 *Stephenson* decision which, in dicta (as the issue of what specific remedial VRA districts would be required was not directly before the court) implied that Section 2 compels the creation of majority-minority districts alone. *See Stephenson*, 355 N.C. at 403.

voting in North Carolina as a whole. As discussed above, this is not the correct analysis, which requires a district-specific examination of racially polarized voting, which was provided to Legislative Defendants in the February 14, 2022 letter and appended to this submission for House District 10 and Senate District 4. Second, Legislative Defendants incorrectly contend that drawing a remedial crossover district would be illegal under *Bartlett v. Strickland*, 556 U.S. 1 (2009). This is a plain misreading of *Bartlett v. Strickland*, which held instead that cross-over 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?”), but specifically endorsed their use as remedy districts. *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.”). Here, as shown below, there exists geographically compact BVAP in the areas of House District 10 and Senate District 4 to satisfy *Gingles I* and Plaintiff Common Cause has proposed narrowly tailored remedies.

As set forth below and in the attached Exhibits, the *Gingles* criteria are met in the areas of House District 10 and Senate District 4. Furthermore, evidence submitted at trial in this matter, and credited by this Court, show that by a totality of the circumstances a failure to include VRA 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, Plaintiff Common Cause’s expert Dr. Jim Leloudis testified as to the history of official voting-related discrimination in North Carolina, PX1486 Leloudis Report at 19-21, 33-34, 38-39, 49-52, 58-60, 62-66, how Black voters have borne the effects of discrimination in the areas of education,

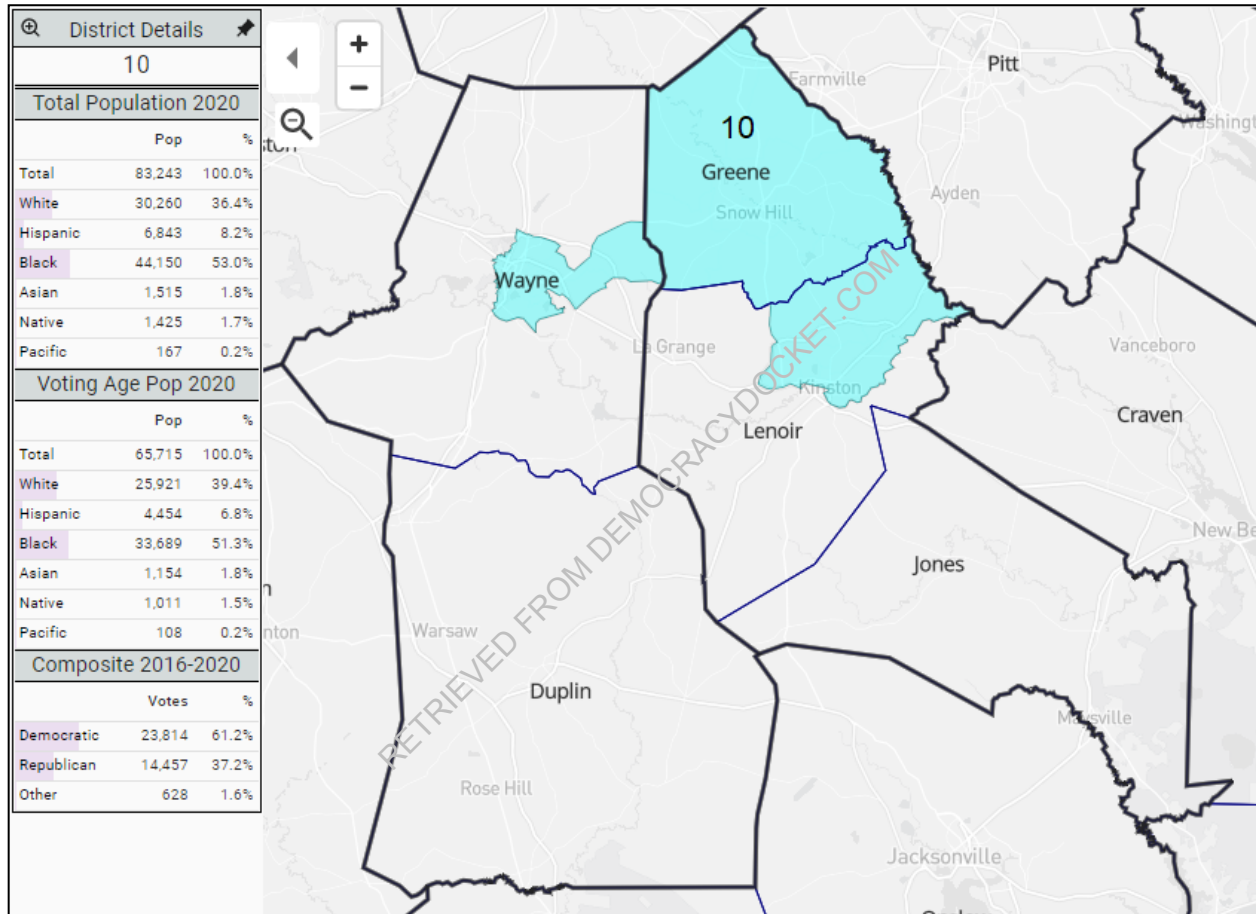
employment, and health, hindering their ability to participate in the political process, *id.* at 11-12, 21-24, 39-44, 47-48, 66-69, the use of overt and subtle racial appeals in political campaigns, *id.* at 11, 15-17 34-35, 54-56, 60-61, and the limited extent to which Black candidates have been successfully elected to public office. *Id.* at 32-34, 63. This Court credited Dr. Leloudis’s testimony in its January 11, 2022 Judgment. *See* Judgment p 189 (¶¶ 578-82). These findings are further consistent with recent holdings in by 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 (2020) (citing *McCrory* and summarizing the discriminatory history of photo ID laws in North Carolina to find that the “historical context in which S.B. 824 was enacted provides support for Plaintiffs’ Discriminatory-Intent Claim.”).

The remedial districts proposed herein in **Figures 2 and 4** (and block assignment files **Ketchie Exhibits 5 and 6**) appropriately harmonize the need to protect Black voters with state constitutional requirements and will prevent violations of Section 2 in North Carolina’s remedial state legislative maps, and should therefore be adopted by the Court to ensure remedial maps comply with state Constitutional requirements in redistricting. Moreover, because districts are ones in which Black voters prefer Democratic candidates, these districts are independently required by the *Harper* Supreme Court decision to remedy the extreme partisan gerrymandering in the 2021 Enacted Maps, as the creation of these districts will further remedy the disparities statewide of the ability of Democratic voters to coalesce to elect their candidates of choice.

II. Proposed House District 10 Remedial District

There exists a sufficiently large and geographically compact population of Black voting-age-population in Greene, Lenoir, and Wayne counties to constitute a majority in a single-member House District, as shown by the following “*Gingles I*” demonstrative map (Figure 1)³:

Figure 1: HD10 *Gingles I* Demonstrative



The RPV analysis attached as **Ketchie Exhibit 1** indicates that Black voters are politically cohesive in the Wayne County precincts utilized by the General Assembly when enacting S.L. 2021-175. For example, the Ecological Regression data for four state-wide races in 2016 and 2020 indicate that candidates of choice for Black voters received 100% of the support from Black voters.

³ See also Ketchie Aff. ¶ 5 (describing method for identifying *Gingles I* demonstrative districts).

See **Ketchie Exhibit 1**. The support calculated by the King's Iterative Ecological Inference and the RxC Ecological Inference similarly show support above 95% in all elections. In each of these elections analyzed, the Black-preferred candidate is also a Democrat.

The data in **Ketchie Exhibit 1** also demonstrate that there is racially polarized voting in this area, such that the white majority vote sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate, i.e., that racially polarized voting is significant in this area. See Exhibit (last column).⁴ In contrast to the legislature's inadequate (and outdated) RPV analysis from the 2011 redistricting cycle, this RPV analysis properly addresses the third prong of *Gingles* – whether the RPV is legally significant. Accordingly, the second and third *Gingles* preconditions are also satisfied.

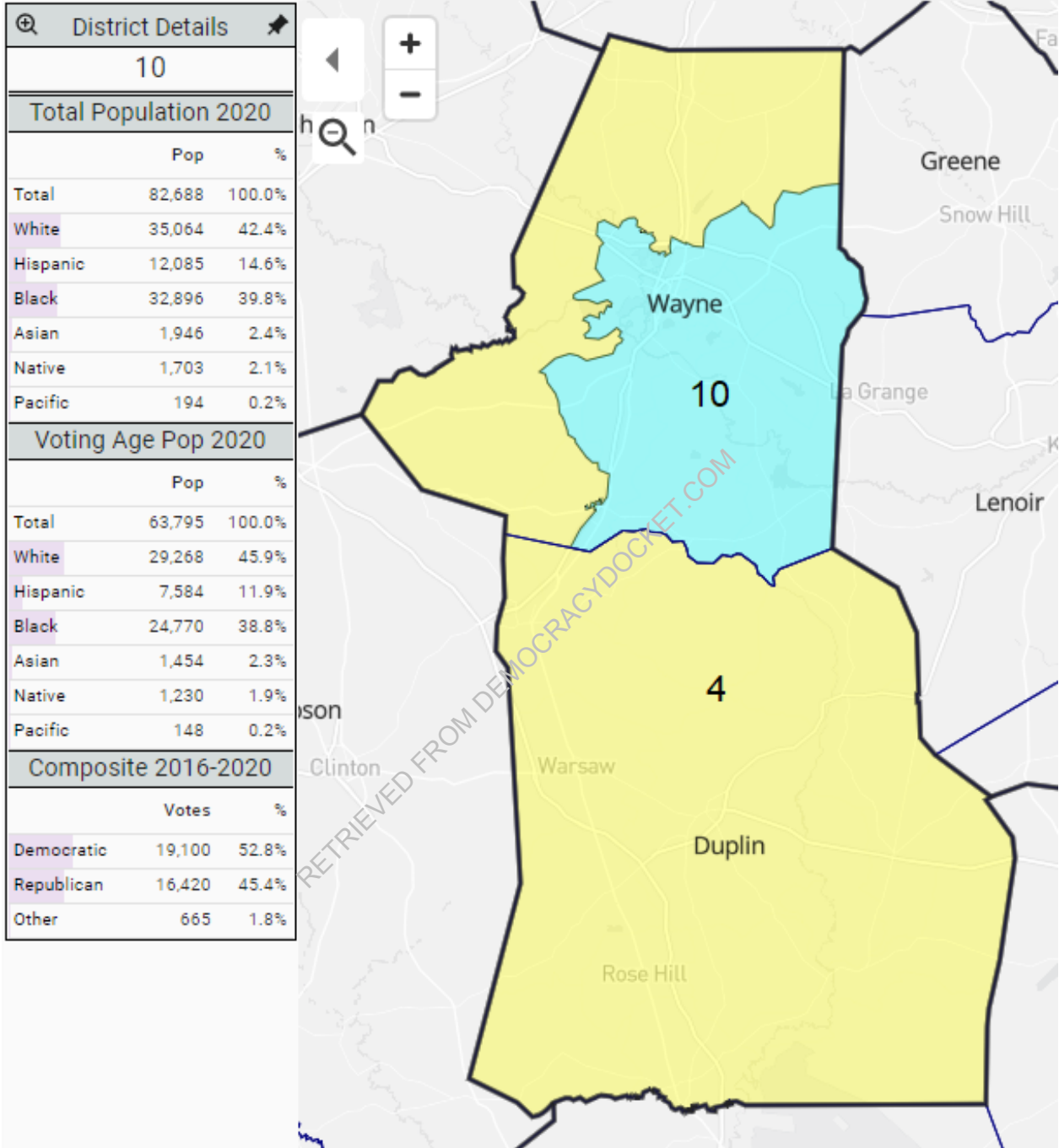
To prevent unlawful vote dilution in violation of Section 2 of the Voting Rights Act, the remedial House map must include a district in this area that will ensure the election of a state representative in this area is equally open to participation by Black voters. Such a remedial district is provided below (Figure 2)⁵:

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⁴ This analysis is also consistent with the conclusions of Dr. Lewis offered by Legislative Defendants for this area. See LDTX109 Lewis Rebuttal Report, Ex. B, Table 1; see also Lewis Deposition 70:3-71:2.

⁵ See also Ketchie Aff. ¶ 11 (describing drafting of VRA remedial districts).

Figure 2: HD10 Remedial District



This House District 10 remedial district contains 38.8% BVAP, which is sufficient for Black voters to have an equal opportunity to elect candidates of choice, as shown by the RPV data provided in **Ketchie Exhibit 2**.⁶ This remedial district has the advantage of not requiring any change to the county clustering, obviating any argument that the Whole County provision is in conflict with the need to provide a racially equitable remedy to the harm wrought on Black voters by the 2021 Enacted Map.

There are independent state constitutional grounds for requiring these districts. In its February 14, 2022 Opinion, the North Carolina Supreme Court made clear that partisan fairness and compliance with the state constitutional prohibition on partisan gerrymandering can be measured on a statewide basis, and that the 2021 Enacted Maps were deemed unconstitutional on that basis. *See* NCSC Opinion at p. 105. The Court also made clear, in footnote 14, that single districts can constitute partisan gerrymanders. Furthermore, in each of the districts described below, the racially polarized voting studies show that Black voters overwhelmingly prefer Democratic candidates. Thus, the creation of these two additional Democratic districts is likely necessary to ensure that the metrics pointed out by the courts reflect statewide partisan fairness.

III. Proposed Senate District 4 Remedial District

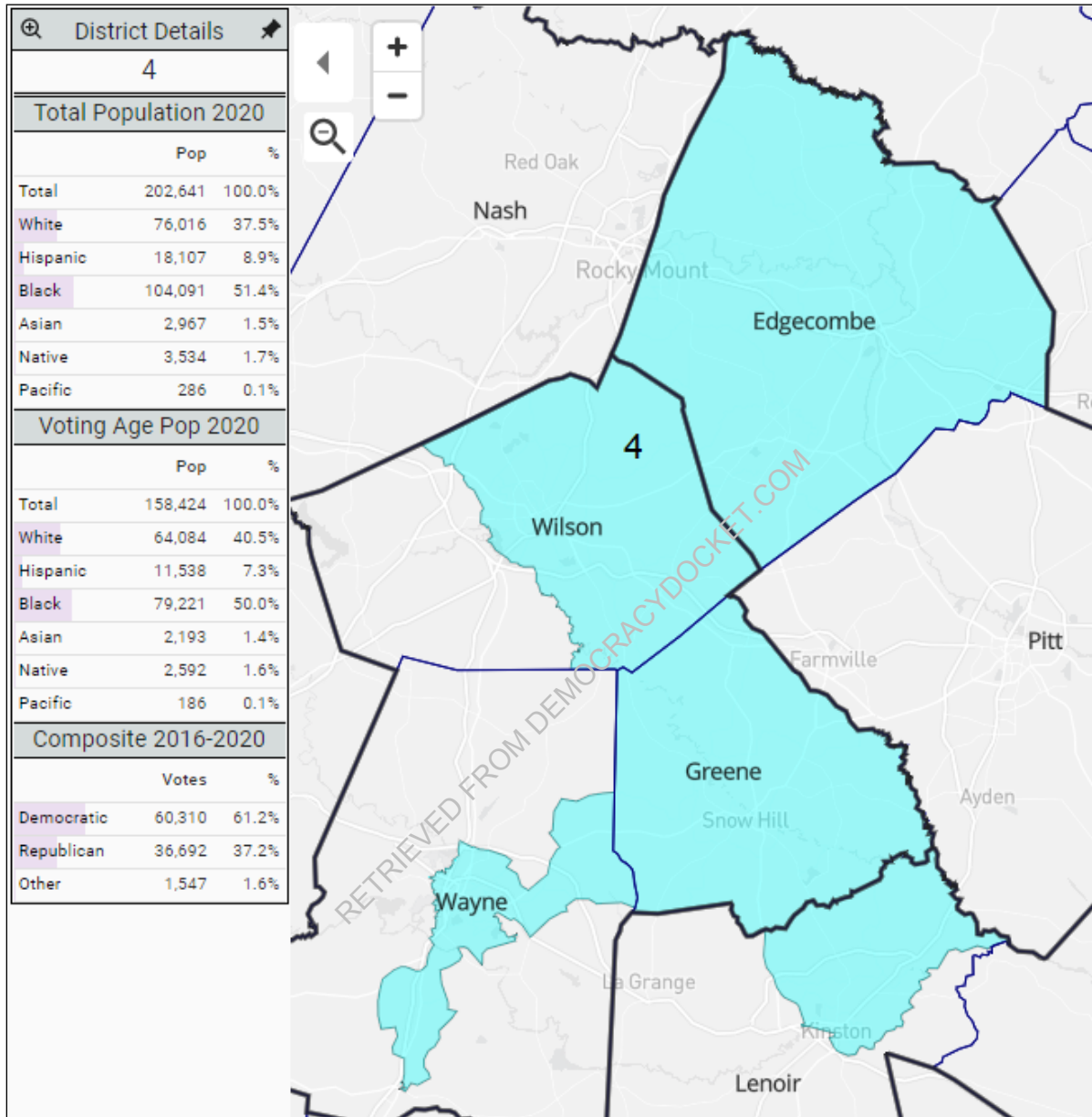
There is a sufficiently large and geographically compact BVAP in the counties east of Raleigh to constitute a majority in a single-member Senate District, as shown by the following “*Gingles I*” demonstrative map (Figure 3)⁷:

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⁶ This analysis is further consistent with Dr. Lewis’s opinion that at least 38% BVAP would be required in this area to provide a Black opportunity district. *See* LDTX109 Lewis Rebuttal Report at Table 1 p. 5 (line “LD21-010”).

⁷ *See also* Ketchie Aff. ¶ 5 (describing identification of *Gingles I* demonstrative districts).

Figure 3: SD4 *Gingles I* Demonstrative



Furthermore, the RPV analysis attached as **Ketchie Exhibit 3** to this letter indicates that Black voters are politically cohesive in Greene, Wayne, and Wilson counties, which are the three counties in this area set forth in the Senate Cluster options utilized by the General Assembly when enacting S.L. 2021-173.

The data in **Ketchie Exhibit 3** also demonstrate that there is racially polarized voting in this area, such that the white majority vote sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate, i.e., that racially polarized voting is significant in this area.⁸ In contrast to the Legislature's inadequate (and outdated) RPV analysis from the 2011 redistricting cycle, this RPV analysis properly addresses the third prong of *Gingles* – whether the RPV is legally significant. Accordingly, the second and third *Gingles* preconditions are also satisfied.

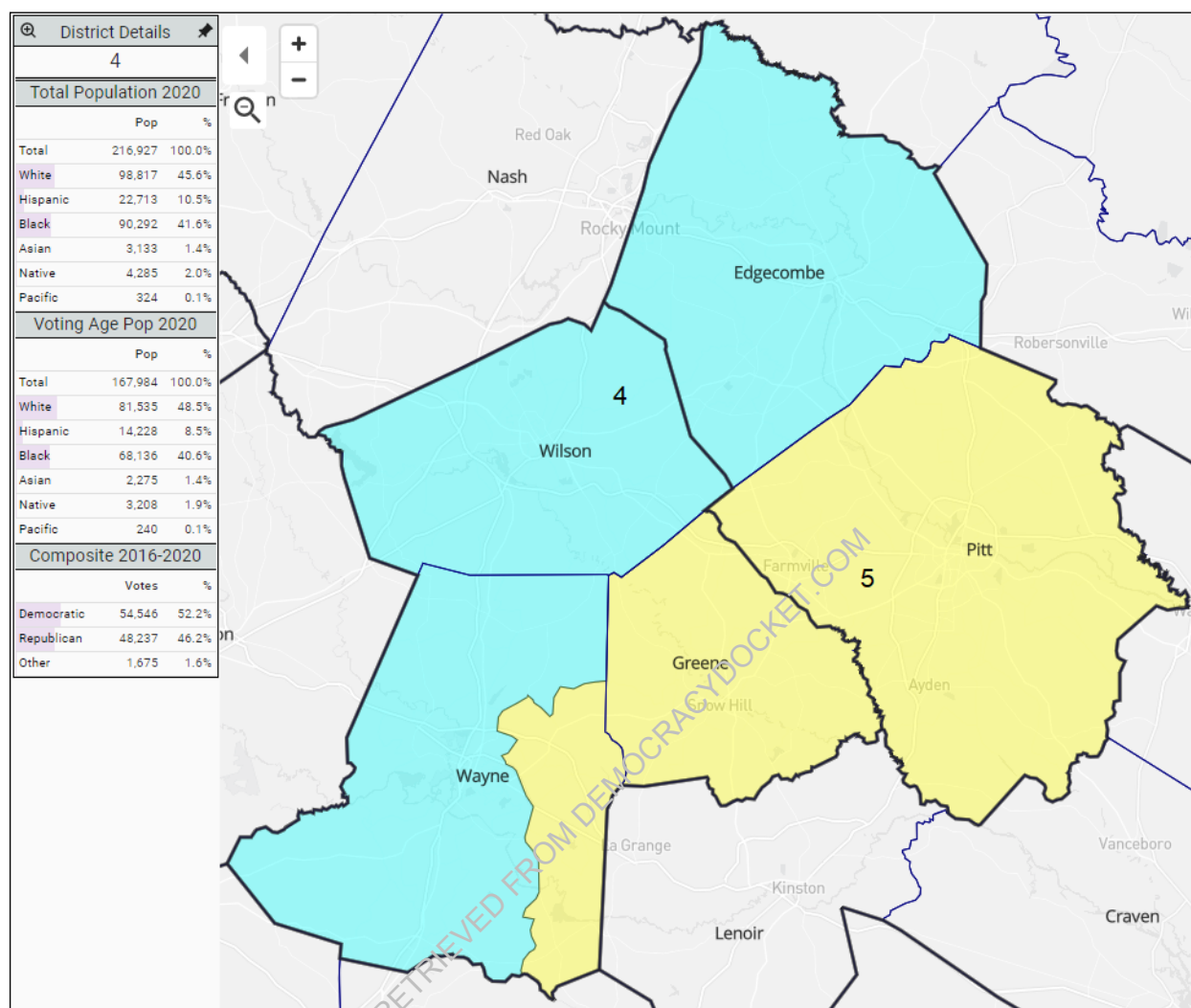
Thus, to prevent unlawful vote dilution in violation of Section 2 of the Voting Rights Act, the General Assembly must draw a district in this area that will ensure the process for electing a state Senator to represent this area is equally open to participation by Black voters. Such a remedial district is provided below (Figure 4)⁹:

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⁸ This analysis is also consistent with the conclusions of Dr. Lewis offered by Legislative Defendants. *See* T3 589:9–590:11 (Lewis) (“Q. Okay. And if we go across the row, the Black-preferred candidate win rate [in SD4] dropped to zero, correct? A. Correct.”).

⁹ *See also* Ketchie Aff. ¶ 11 (describing drawing of proposed remedial VRA districts).

Figure 4: SD4 Remedial District



This Senate District 4 remedial district contains 40.6% BVAP, which is sufficient for Black voters to have an equal opportunity to elect candidates of choice, as shown by the RPV data provided for this district in **Ketchie Exhibit 4**.¹⁰

While this remedial district does require the grouping of a single-district, two county cluster and a single-district, three county cluster to create a two-district, five county grouping, the

¹⁰ This analysis is further consistent with Dr. Lewis's opinion that at least 37% BVAP would be required in this area to provide a Black opportunity district. See T3 590:12–16 (Lewis): ("Q. Because given the level of white crossover voting, if you look at your last column, the district there needed to be 37 percent BVAP for a Black-preferred candidate to win, isn't that right? A. Typically, yes.").

effect on the overall map is limited to these two clusters. Similarly to House District 10, the drawing of this state Senate district is likely to ensure that the map, measured statewide, provides partisan fairness. The RPV analysis provided in **Ketchie Exhibit 4** demonstrates that Black voters in this area prefer Democratic candidates. This provides an independent basis under state constitutional law, notwithstanding VRA compliance, for implementing this remedy. Moreover, the slight modification of the *Stephenson* county clustering produced by the settled algorithm is necessary to ensure that a map is drawn consistent with the North Carolina Supreme Court's ruling under the state Constitution's Equal Protection Clause, Free Elections Clause, Freedom of Speech Clause, and Freedom of Assembly Clause, and this proposed remedial district harmonizes and balances compliance with the differing requirements under the different state constitutional provisions applicable (whole county provision versus equal protection clause, free elections clause, freedom of speech clause, and freedom of assembly clause).

IV. Explanation and Information Required by February 8 and February 16, 2022 Orders

Pursuant to the Supreme Court's February 4, 2022 Order and Paragraphs 2 and 3 of this Court's February 8, 2022 Order, Plaintiff Common Cause provides the following additional information (to supplement the above explanation) regarding the proposed remedial districts described herein:

1. *The identity of all participants involved in the process of drawing the Proposed Remedial Plans submitted to the Court.*

These two proposed remedial districts were drawn by Christopher Ketchie, Demographer and Data Analyst with the Southern Coalition for Social Justice, in consultation with Plaintiffs' Counsel Allison J. Riggs and Hilary Harris Klein. Ketchie Aff. ¶¶ 3–4.

2. *A description of and explanation for choice of base map to begin the redrawing process and any alternative maps considered.*

No base map was used for the drawing of these remedial districts, however the Duke Academic Clusters were used to inform the drawing of remedial districts that would be narrowly tailored and harmonize the VRA required remedial district with the Whole-County Provision set forth in Article II, Sections 3(3) and 5(3) of the North Carolina Constitution. Ketchie Aff. ¶ 11.

3. *The extent to which partisan considerations and election results data were a factor in the drawing of the Proposed Remedial Plans, and whether the mapmaker adhered to traditional neutral districting criteria and an explanation as to how the mapmaker did so without subordinating them to partisan criteria.*

Partisan considerations and election data were not used in the drawing of the proposed remedial districts. Instead, remedial districts were constructed to ensure adequate BVAP populations in the areas in which the *Gingles I* criteria were met, based upon expert testimony disclosed in this matter and elicited at trial and as described above, as well as ensuring equal population for district size, including how remaining districts in a given cluster would be impacted. Ketchie Aff. ¶ 11. Mr. Ketchie also prioritized harmonizing the remedial district with the Whole-County Provision by minimizing the number of county-clusters traversed in the remedial districts. Ketchie Aff. ¶ 11. Mr. Ketchie then considered minimizing county splits and traversals, minimizing splits of community related boundaries such as municipalities and precincts, and maximizing compactness. Ketchie Aff. ¶ 11. Following the initial draft remedial district, Mr. Ketchie conducted the RPV studies set forth in **Ketchie Exhibits 2 and 4** to ensure the remedial districts would assure Black voters an equal opportunity to elect candidates of choice. Ketchie Aff. ¶ 12. Election data was part of that RPV study, but it was conducted after the drawing of the district lines.

4. *Whether the mapmaker considered incumbency protection.*

Incumbency protection was not considered in the drafting of the proposed remedial districts. Ketchie Aff. ¶ 12.

5. *Partisan Skew, methods of evaluating partisan fairness, and other statistical metrics of translating votes into seats across a plan.*

As these are proposed single districts and not state-wide maps, the state-wide partisan metrics were not evaluated or generated for these proposed remedial districts. However, as set forth above, partisan metrics and specifically racially polarized voting analyses set forth in **Ketchie Exhibits 2 and 4** were utilized to ensure that the proposed remedial districts will provide Black voters with equal opportunity to elect their candidates of choice.

6. *Additional information for use by Special Masters*

Pursuant to Paragraph 2 of the Court's February 16, 2022 Order Appointing Special Masters, Plaintiff Common Cause has further provided the block equivalency files (**Ketchie Exhibits 5 and 6**), ESRI shapefiles for the proposed districts (**Ketchie Exhibits 7 and 8**), color maps of the proposed districts in PDF format as provided in pages 10 and 14 of this submission, population totals and deviations for each remedial district based on the 2020 Census P.L. 94-171 dataset (**Ketchie Exhibits 9 and 10**), "stat pack" equivalents for the districts (**Ketchie Exhibits 11 and 12**), as well as a description of the criteria and process for drawing the remedial districts in the paragraph 12 of the **Ketchie Affidavit**.

V. Conclusion

For the reasons stated above, the remedial districts proposed by Plaintiff Common Cause are necessary to ensure no unlawful vote dilution for North Carolina's Black voters, and that the

remedial maps fully comply with federal and state Constitutional law as well as the orders and findings of the Supreme Court of North Carolina and this Court.

Respectfully submitted, this the 18th day of February, 2022.



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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day submitted a copy of the foregoing document and appended Exhibits in the above titled action by mail and/or electronic mail, in the manner requested, to the following parties:

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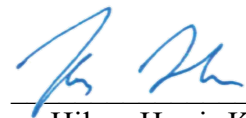
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This the 18th day of February, 2022.

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