STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21 CVS 015426
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, et al., REBECCA HARPER, et al., Plaintiffs, vs. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al., Defendants.	*Consolidated with* 21 CVS 500085

MEMORANDUM REGARDING REMEDIAL MAPS AND RELATED MATERIALS

The North Carolina Supreme Court's Opinions on February 14, 2022 and February 4, 2022 raise unprecedented questions in this State about constitutional order, separation of powers, and the rule of law. While North Carolina appellate courts have inserted themselves into the redistricting process in the past, they have always done so using objective, measurable, and plainly textually-grounded standards, such as maintaining the integrity of county lines or avoiding race discrimination. While Legislative Defendants were ordered to go back to the drawing board, and to run mathematical tests that allegedly measure the permissible partisanship of the districts, the North Carolina Supreme Court still failed to address the seminal question of "how much partisanship is too much?"[1] Legislative Defendants engaged in a herculean effort to comply with

[1] In fact, the North Carolina Supreme Court specifically held that it did not "believe it prudent or necessary" to identify a standard to "conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Harper v. Hall*, 2022-NCSC-17 (Feb. 14, 2022), ¶163.

the Order, as set forth below. That effort was made more difficult by the unprecedented level of judicial management of legislative affairs mandated by the judgment.[2]

On February 16, 2022, the House passed a new House plan (HB980; SL2022-4), which was ratified the next day by the Senate on February 17, 2022. Also on February 17, 2022, the General Assembly passed new Senate and Congressional Plans (SB 744; SL2022-2) and (SB 745; SL2022-3). Those plans, and the process that produced them, comply with the law and the North Carolina Supreme Court's orders. This filing addresses Paragraphs 3-9 of the North Carolina Supreme Court's February 4, 2022 Order and this Court's February 8, 2022, and February 16, 2022 orders request for an array of information regarding the new plans. Pursuant to the Orders the filing is accompanied with transcripts[3] and links to videos of the redistricting hearings and floor debates, and the "stat pack" for the plans. Expert reports by Dr. Jeffrey Lewis and Dr. Michael Barber are also included.

This filing is also accompanied by maps and charts reflecting, among other things, the configurations and amendments considered and the record showing the individuals involved with the process. These items were primarily prepared by non-partisan Central Staff of the General

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[2] The justiciability problems with the Court's asserted right to manage, let alone oversee, the General Assembly's internal affairs are well documented in precedent. *See, e.g.*, *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 285 (2015); *Alexander v. Pharr*, 176 N.C. 699, 108 S.E. 8 (1920) (per curium); *In re Jud. Conduct Comm.*, 751 A.2d 514, 516 (N.H. 2000); *De Vesa v. Dorsey*, 634 A.2d 493, 497 (N.J. 1993); *Nixon v. United States*, 506 U.S. 224 (1993); *Barry v. U.S. ex rel. Cunningham*, 279 U.S. 597, 620 (1929).

[3] The General Assembly does not have an in-house court reporting service and does not generally create transcripts of committee hearings or floor debates. The General Assembly retained court reporting services in order to comply with the Court's order. Given extremely truncated time that the General Assembly had to not only pass plans, but explain and produce documentation of the same, not all transcripts are available. Additional transcripts will be provided to the Court upon receipt.

Assembly. These items are detailed in the notice submitted contemporaneously with this memorandum.

Legislative Defendants represent that the criteria governing the process are those neutral and traditional redistricting criteria adopted by the Joint Redistricting Committees on August 12, 2021 (LDTX 15), unless the criteria conflicted with the Orders issued by the North Carolina Supreme Court. In some instances the General Assembly was required to subvert traditional redistricting criteria such as limiting splits of VTDs or compactness to comply with the North Carolina Supreme Court's Opinion regarding achieving more purportedly Democratic leaning districts and to improve on the mathematical metrics the Court prefers. Pursuant to both the North Carolina Supreme Court's Order of February 4, 2022 and this Court's February 8, 2022 Order, this memorandum explains the new redistricting plans, the process of their enactment, why they comply with the criteria and governing law, the persons involved in creating and drafting them, and alternatives considered.

The districting maps created by the process described below only replace the maps the North Carolina Supreme Court held unconstitutional subject to the approval of this Court and the North Carolina Supreme Court. Respectfully, this Court should enter an order approving these plans, and allow the electoral process to move forward without any further delay.

Legal Standard

The Court has before it three acts of the General Assembly. The Court must presume them to be constitutional. *Wayne Cnty. Citizens Ass'n for Better Tax Control v. Wayne Cnty. Bd. of Comm'rs*, 328 N.C. 24, 399 S.E.2d 311, 315 (1991). *See also* Trial Court Order 11 January 2022, COL ¶21[4] ("The Constitution is a restriction of powers and those powers not surrendered are

[4] Throughout this Memorandum, Legislative Defendants' will cite to specific Conclusions of Law (COL) or Findings of Fact (FOF) from the Trial Court's 11 January 2022 Order. The North

reserved to the people to be exercised through their representatives in the General Assembly; therefore so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial decision"); COL ¶23 ("Declaring as unconstitutional, an act of the branch of government that represents the people is a task that is not taken lightly. There is a strong presumption that enactments of the General Assembly are constitutional."). That presumption applies in full force, even though the acts were enacted to remedy prior redistricting acts the Court invalidated. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324–25 (2018).

"It is not the function of the judiciary to express the will of the people or to right perceived wrongs allowed by laws that public sentiment deems unwise or ill-advised" (COL ¶22). Thus, the Court's role is limited to assessing the acts' compliance with legal standards and efficacy in remedying the supposed legal violations. *See Stephenson v. Bartlett*, 357 N.C. 301, 314, 582 S.E.2d 247, 254 (2003). The Court is bound to "follow the policies and preferences" of the General Assembly, without clear proof of a legal violation. *White v. Weiser*, 412 U.S. 783, 795 (1973). The Court's role is not to engage in policy-making by comparing the enacted maps with others that Plaintiffs opine might be "more fair" or "optimized" in some manner. Therefore, the Court's role here is not to substitute its view of the best way to redistrict or the best map, but to ensure compliance with legal principles. COL ¶22 ("Whether an act of the General Assembly is wise or unwise, the Court can give no opinion. Our province is to expound the Constitution and laws as they are made, and not to make them"). As explained below, the legality of the proposed Remedial Legislative and Congressional plans is unimpeachable.

Overview of the Redistricting Process

The Remedial Legislative and Congressional plans share the same general process.

Carolina Supreme Court held that the trial court's findings were not clearly erroneous and adopted them in full. *Harper v. Hall*, 2022-NCSC-17, ¶2 (Feb. 4, 2022).

First, to comply with the spirit of the North Carolina Supreme Court's order that there were state-wide constitutional infirmities, no chamber started from the previously enacted plans. *Harper v. Hall,* 2022 NCSC-17 ¶162.

The House started from scratch, using only the existing county groups as their basemap. This means that the only districts from the enacted plan that were transferred over to the Remedial plan were the 14 districts that are single district county groupings.

The Senate also chose to start from scratch, even altering two county groupings to adopt the groupings for Senate Districts 1 and 2 that were preferred by Common Cause Plaintiffs. Apart from the alterations to those two county groupings, the remaining county groupings remained the same. As a result 13 wholly-contained single district county groupings from the enacted plan were transferred over to the remedial plan with the revised county groupings. In all other respects, the Senate began drafting the map entirely anew.

For these reasons, the Senate Redistricting Committee, which first drafted the ultimately passed Congressional plan, also started with a blank slate.

Each Committee made the decision they thought best to account for the truncated period of time, and because there was no uniform legally permissible alternative basemap to begin from. To be sure, completely re-drawing nearly all legislative and congressional districts in this state from scratch is a colossal task, but in an effort to comply with the North Carolina Supreme Court's orders that the issues in the previously enacted map were statewide, the General Assembly felt this choice complied best the North Carolina Supreme Court's Order and Opinion.

Second, each chamber proceeded to draw new districts and make adjustments tailored to legitimate criteria and with the goal of creating districts throughout the state to comply with the North Carolina Supreme Court's order of February 4, 2022 at Paragraphs 4-6 and the North

Carolina Supreme Court's order of February 14, 2022. As understood by the General Assembly, this required the use of partisan election data, where none had been considered previously (FOF ¶86), to intentionally create more Democratic districts in the House, Senate, and Congressional maps. To achieve this task, the General Assembly loaded partisan election data into Maptitude to view the projected effect on partisanship that resulted from changes to district lines. An explanation of how this done is submitted to the Court contemporaneously in the form of an Affidavit from Central Staff Member, Raleigh Myers. The General Assembly chose to rely on Plaintiffs' expert Dr. Mattingly and chose the set of elections Dr. Mattingly used to analyze the previously Enacted Plans' county groups, which were also approved by this Court.[5]

Each chamber also proceeded to make adjustments to "improve" the scores of the mathematical tests the General Assembly considered using Dr. Mattingly's partisan election choices. The General Assembly primarily relied upon the Mean-Median and the Efficiency Gap tests. These mathematical tests were chosen because they have been peer-reviewed in numerous articles by numerous scholars, and because there is some (but not uniform) agreement among scholars regarding thresholds for measuring partisanship.[6] For example it is widely considered by

[5] See FOF¶239 for discussion of these elections and methodology. The elections used by Dr. Mattingly were Lt. Gov 2016, President 2016, Commissioner of Agriculture 2020, Treasurer 2020, Lt. Gov. 2020, US Senate 2020, Commissioner of Labor 2020, President 2020, Attorney General 2020, Auditor 2020, Secretary of State 2020, Governor 2020.

[6] The North Carolina Supreme Court also references a "close-votes, close-seats" analysis allegedly performed by Dr. Duchin in this case. This methodology appears to be something performed only by Dr. Duchin and has not been subjected to the type of repetitive peer review as the other methodologies. In fact, a search of Westlaw reveals only this Court's opinion referencing this test, a Google search reveals no scholarly articles, nor does a search of HeinOnline, reveal any scholarly literature. In contrast, a search for "efficiency gap" produces 439 hits on HeinOnline. The same search produces 22 case citations in Westlaw and 268 hits for Secondary Sources, as well as numerous hits and scholarly work on Google. Despite this lack of peer review, Dr. Barber, has attempted to recreate Dr. Duchin's methodology in his new report on the Remedial plans. As the

academics that a mean- median as close to zero as possible, but under .01/-.01 is "presumptively constitutional." *See Harper v. Hall,* 2022 NCSC-17 ¶166. On the efficiency gap, scholars including NCLCV's Dr. Duchin have opined that anything below a -.08 is presumptively legal[7] while Dr. Jackman, used as an expert in *Gill v. Whitford*, and *Common Cause v. Rucho*, opined that anything below -.07 was constitutional. The North Carolina Supreme Court adopted Dr. Jackman's threshold. *Id.* at ¶167. The General Assembly achieved those threshold for all Remedial plans. Using Dr. Mattingly's choice of elections discussed above, the Previously Enacted Plans scored as follows:[8]

Test	**House**	**Senate**	**Congress**
Mean Median	-3.36%	-3.49%	-5.97%
Efficiency Gap	-7.16%	-8.04%	-19.51%

All Remedial plan scores comply with the Court's Opinion.

The Remedial House plan proposed by the House Committee on Redistricting was ultimately amended by 6 amendments offered by Democratic Representatives. The Remedial plan, largely the result of bipartisan compromise, passed the House on the evening of February 16, 2022 with overwhelming bipartisan support in a 115-5 vote. The Remedial House plan passed the Senate

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Court can see, the remedial plans are comply under this metric as well. (Barber Report p. 12-14; 23-24; 33-34)

[7] *See* DeFord and Duchin, *Redistricting Reform in Virginia: Districting Criteria in Context,* Virginia Policy Review, Volume XII, Issue II, Spring 2019, https://mggg.org/VA-criteria.pdf p. 14 ("the authors present *EG=0* as ideal, while proposing a magnitude of over .08 as part of a legal test for detecting gerrymanders.").

[8] These calculations are comparable to mean-median score in Dr. Magleby's expert report. Dr. Magleby reports a mean median of -.04 for the North Carolina House (FOF¶209); -.0204 for the North Carolina Senate (PX1483 p 20); and -.055 for Congress (PX1483 p 25). The slight difference between the numbers above and Dr. Magleby's calculations can likely be attributed to the different elections he and Dr. Mattingly used in their Expert Reports.

Committee on Redistricting and Elections without objection, and was ratified after it passed the Senate with on February 17.

The Remedial Senate plan proposed by the Senate Committee on Redistricting and Elections was adopted by the Senate Committee on February 16, 2022, and passed into law on February 17, 2022. The Remedial Congressional plan proposed by the Senate Committee on Redistricting and elections was adopted by the Senate Committee on February 17, 2022, and passed into law on February 17, 2022. While the House drafted a proposed Congressional plan, this plan was never formally proposed in Committee and never received a vote.

I. The General Assembly's Approach Is Lawful and a Reasonable Response to the Court's Decree, and The Remedial Plans Cure any Constitutional Deficiencies in the Enacted Plan.

Consistent with the General Assembly's broad discretionary powers to create legislative districts, the General Assembly altered the base maps to comply with the North Carolina Supreme Court's Order to draw more purportedly Democratic leaning districts or to otherwise make the remedial plans perform well on the metrics endorsed by the North Carolina Supreme Court. Other changes were made to preserve communities of interest or incumbency and to maintain respect for neutral criteria, such as reducing split VTDs.

A. The Remedial House Plan is Constitutional.

Shortly after the North Carolina Supreme Court's opinion on February 4, 2022, Speaker Moore reached out to Minority Leader Reives, and began a bipartisan dialogue about how to comply with the order, and what specific areas of the state could see significant alteration in districts to comply. This bipartisan dialogue continued throughout the entire process of drawing the Remedial House plan, and was praised by Minority Leader Reives on the House Floor when he urged passage of the bill on February 16, 2022. Ultimately HB980 passed the House with a vote of 115-5, passed the Senate Committee on Elections and Redistricting unanimously, and passed

the Senate on February 17, 2022. Such bipartisan support is rare in redistricting matters in this state and speaks to the strong endorsement of the plan by both parties.

In the House, 14 of the districts could not be altered due to the fact that these are mandated single district county groupings. Other than the preservation of these mandated 14 districts, the House elected to draw the remainder of the remedial plan from scratch in compliance with the Criteria and with the North Carolina Supreme Court's orders. When the criteria conflicted with the Orders of the North Carolina Supreme Court, such as in the use of election data, the Orders prevailed. In scenarios where there was any ambiguity, higher weight was given to the North Carolina Supreme Courts Orders. In some scenarios municipalities or VTDs were split to achieve scores within the ranges the Court desired on the efficiency gap and mean median. Incumbency was considered evenly. Incumbents who announced retirement or their intention to seek another office were not considered as "incumbents."[9] The only discretionary double bunking in the House map, pairs two Republican members. There was no discretionary double bunking of Democratic members.[10]

On February 16, 2022 the House Redistricting Committee met. During this meeting, Representative Hall proposed a Remedial House Map (the "House Committee Map"). Representative Hall testified that in drawing the House Committee Map they complied with the Court's order to "give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan." In drafting this proposed plan, Representative Hall testified that

[9] Upon information and belief the following Representatives are either retiring or not running for re-election to the NC House of Representatives: Representatives Adcock, Ager, Fisher, Gailliard, Hannig, Hunt, Insko, McElraft, McNeill, Moffitt, Pittman, R. Smith, K. Smith Szoka, Turner, Zachary.

[10] There are a few other members that are double bunked solely as a result of the mandatory county groupings, where the House had no discretion to un-bunk these members.

they used election data from 12 statewide races, from 2016 and 2020, that were utilized by the plaintiffs' expert, Dr. Mattingly.

Under the House Committee Map, Governor Cooper would have won 63 House districts. Former President Trump would have won 62 House districts. This represents a stark change from the previously enacted plan, where Governor Cooper would have won 58 House districts, and former President Trump would have won 70 House districts.

In explaining the House Committee Map, Representative Hall noted that he believed this map met the criteria set forth by the North Carolina Supreme Court, and specifically that it scored well under the Efficiency Gap and the Mean Median analysis.

Representative Hall also said that in drawing the House Committee Map, great pains were taken to address the Court's finding that the enacted map exhibited a "selective failure to preserve municipalities in the House map . . . based solely on considerations of partisan advantage." The enacted map split 81 municipalities. The House Committee Map proposed by Representative Hall contained only 49 splits of municipalities involving population. Representative Hall also testified that the House Committee Map prioritized keeping districts compact. Specifically, Representative Hall testified that the House Committee Map improved the compactness of the map overall as compared to the enacted map, using both the Reock and Polsby-Popper metric analysis.

Representative Hall also noted for the Committee that the North Carolina Supreme Court adopted the trial court's finding of fact 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" and that Plaintiffs' own expert, Dr. Duchin found no evidence of legally significant racially polarized voting.

Representative Hall testified that while the map was re-drawn on a state-wide level, the following significant changes were made to comply with the North Carolina Supreme Court's Order:

- Buncombe County. In Buncombe County the House Committee Map changed the enacted plan from 1 Republican and 2 Democratic districts, to 3 Democratic districts that split no municipalities except for Asheville, which must be split because of the city's sprawling geography throughout Buncombe County.

- Pitt County. In Pitt County the House Committee Map created two Democratic districts, a change from the previous 1-1 Democratic/Republican split in the enacted map. Winterville and ECU were kept whole, where the enacted map had previously split those communities.

- Guilford County. In Guilford County all six districts in the House Committee Map were won by President Biden and Governor Cooper. This created more Democratic leaning districts than the enacted plan. The House Committee Map also kept Summerfield whole, where the enacted plan did not.

- Cumberland County. The House Committee Map created compact districts in Cumberland County that kept Hope Mills whole, where the enacted plan had split Hope Mills. The House Committee Map offered three solid Democratic districts and one competitive district.

- Mecklenburg County. In Mecklenburg County, districts were drawn to be more Democratic. President Biden and Governor Cooper won all 13 districts under this district configuration. Senator Hall testified that the House Committee Map split no municipalities other than Charlotte and Huntersville, which must be split.

- New Hanover County. In New Hanover County, an additional competitive district was drawn, based primarily in Wilmington.

- Cabarrus County. In Cabarrus County, an additional competitive district won by Governor Cooper was drawn.

- Robeson County. In Robeson County one of the districts was drawn to drastically improve the competitiveness over the districts in the enacted plan.

- Wake County. Representative Reives had significant input in drafting Wake County. The House Committee map kept Morrisville whole and unsplit Rolesville as compared to the enacted plan. Governor Cooper won all 13 districts in Wake County under the House Committee Map.

After Representative Hall presented the House Committee Map, bipartisan debate ensued. Representative Harrison opined that she wished they'd had more time to analyze the Court's February 14, 2022 order and draw the maps. Representative Hawkins asked about how the proposed Durham County districts were drawn, specifically questioning communities of interests. Representative Hall responded that they were drawn to benefit Democratic voters in compliance with the Court's order. Representative Hall opined that because of the political lean under Dr. Mattingly's set of elections that it was likely that Representative Hawkins would do well in the upcoming election, to which Representative Hawkins retorted that he would likely do well in any district-- supporting the idea that candidates in elections matter. Representative Brockman asked a question about the splitting of Jamestown; however, Representative Hall pointed out that the Jamestown split was a zero population split, meaning that there was no voter population in the small section that was split.

Representative Harrison also asked about the letter received late on February 15, 2022 from the Southern Coalition of Social Justice and whether the *Gingles* criteria were met for the districts identified in that letter from Plaintiffs' counsel. Representative Hall responded that the letter did not propose any majority-minority districts based on a compact minority population, and that the proposed districts closely resembled those drawn in 2011 that were struck down as racial gerrymanders. Representative Hall also questioned whether the intent behind Plaintiffs' counsel's letter was to lobby for the drawing of crossover districts using racial data, which is prohibited by *Bartlett,* unless there is evidence of legally significant racially polarized voting, which is not present here.

After the House Redistricting Committee went into recess, the House Minority Leader, Representative Reives, approached House Republican Leadership and offered a compromise that

built on previous bipartisan discussion and negotiation. Minority Leader Reives asked that certain already Democratic leaning districts in Wake, Mecklenburg, and Buncombe counties be made more Democratic leaning, and that an additional district in Cabarrus County be made more Democratic leaning. Representative Reives drew these amendments. Leadership for both parties conferred and agreed to this compromise proposed by the Minority Leader.

When the House convened shortly after 8:00 pm on February 16, Minority Leader Reives offered four amendments to effectuate these changes. Speaking in support of these amendments, both Minority Leader Reives and Representative Hall stated that this was a bipartisan compromise agreed upon by leaders of both parties and asked for bipartisan support. Each amendment offered by Minority Leader Revies was overwhelmingly adopted with nearly unanimous bipartisan support. These amendments had the effect of adding, on net another district that was won by Democrats in the composite score, and shifting the map from 62 Trump-won seats to 61 Trump-won seats.

Representative Meyer and Representative Hawkins each offered additional amendments on the floor. Representative Meyer asked that two precincts in Orange County be swapped because he said it would keep Carrboro whole (although it would not, in fact do that), and Representative Hawkins asked for some adjustments to Durham County to better follow educational district lines. Despite the fact that neither amendment was part of the larger compromise, Representative Hall asked for bipartisan support for these amendments in the spirit of compromise. Both passed with nearly unanimous support.

Representative Harrison also offered an amendment, asking the House to adopt districts based on the Southern Coalition of Social Justice's districts for Wayne County. Representative Harrison opined that these districts were drawn for racial reasons because she believed all the

Gingles preconditions were met. Rep. Hall opposed this amendment citing the reports of Dr. Duchin and Dr. Lewis, and the Court's finding that there was no evidence of legally significant racially polarized voting in North Carolina, a finding adopted by the North Carolina Supreme Court. In addition, the amendment, for no discernable legal or statistical reason, switched the county grouping from Wayne-Duplin to Wayne-Sampson, breaking up the natural rural communities of interest of Sampson and Bladen counties and combining coastal suburban Pender County with small, rural Bladen County. In Onslow County, the amendment created an additional artificially Democratic district in heavily Republican Onslow County by combining the largely non-voting population of Camp Lejeune with the sparse Democratic-leaning portions of Onslow County, despite the fact that these changes had nothing to do with for Representative Harrison's purported concerns with Wayne County. Her amendment would have double bunked Republican Representatives Carson Smith and William Brisson, while the remedial version of these counties double bunks no members who are planning to run for reelection to the North Carolina House. Democratic Representative Raymond Smith has already filed to run for the newly open state Senate seat containing Wayne County. Representative Harrison's amendment was voted down by the House in a bipartisan vote, with Rep, Abe Jones (D-Wake) joining all Republicans in opposition.

When he rose to debate the final bill, Minority Leader Reives stated of the negotiation that "no one came out of this happy" but that the parties had come "to an agreement that we could all live with." Minority Leader Reives commended members of both parties for continuing to speak with each other to work out a compromise, which is what the General Assembly is "supposed to be doing." Minority Leader Reives stated that while he didn't think the bill was perfect, that "this is what was asked of us, and we did it." Minority Leader Reives asked members to put aside their

personal choices about redistricting reform, like forming a Commission and vote for the bill, because that is not "what [the General Assembly] is here to do" right now. Of the disagreement on the Representative Harrison Amendment, Minority Leader Reives emphasized this was a purely legal disagreement, not a partisan one. Minority Leader Reives urged for the passage of the bill.

HB 980 passed the House with overwhelming bipartisan support by a vote of 115-5. The Remedial House plan improves on the enacted plan in numerous significant ways as explained above and also complies with the North Carolina Supreme Court's guidance on Efficiency Gap and Mean-Median Metrics. Specifically, the Remedial House plan has an Efficiency Gap of -.84% and a Mean-Median of -.7%. We have been unable to find a legislative plan passed anywhere else in the country with a lower efficiency gap.

The House Remedial plan clearly improves on the enacted plan in all respects, including compactness and splits, as shown in the statpacks and legislative debate, and is the result of bipartisan compromise. The House Remedial plan should be upheld and elections should be ordered to go forward under these maps by the trial court, and the North Carolina Supreme Court, if necessary.

B. The Remedial Senate Plan is Constitutional.

The Remedial Senate plan proposed by Legislative Defendants is constitutional by any measure provided by the Supreme Court's Order. Though through no lack of effort and good faith on the part of Republican Senate leadership, this plan unfortunately did not enjoy the same bipartisan support reached in the House. Because this Court's Order asks the Legislative Defendants to detail the mapmaking process, an explanation for how the Remedial Map arrived at this Court is necessary here.

Shortly after the North Carolina Supreme Court's February 4, 2022 order, Republican Senate leadership began discussions with Senate Minority Leader Blue and his staff in an effort to reach a compromise. Senators Berger, Blue and their respective Staff met on February 8 and 9th to discuss the best approach for a collaborative map drawing effort. Senator Blue agreed to work with Republicans in an effort to draw a compromise remedial map. Senator Berger and Senator Blue also agreed that it was necessary to use political data in map drawing to properly comply with the Court Order, and agreed that it would not be feasible to draw in a public committee setting because of the time constraints. Senator Berger and Senator Blue also released as joint statement on February 9, 2022, committing to work together "in the hopes to of reaching a negotiated end product." https://twitter.com/MichaelWNCN/status/1491527110804049921.

During their meetings on February 8th and 9th, Senator Berger proposed that Senator Blue and any designees from the Senate Democratic Caucus sit down together with Republican Redistricting and Elections Committee Chairs at a single computer terminal, and redraw the contested areas of the Senate map together. But after a drawing room was made available to both parties to use together on February 10th, the Minority Leader informed Republican Senate leadership through staff that the Democrats were not willing to draw jointly, but that Democrats instead wanted to draw separately and then discuss the individual county-grouping decisions with Republican Redistricting and Elections Chair Senator Ralph Hise. While Republican leadership had no objection to that approach, they continued to offer for Senate Democrats to come in and sit with Republican Committee members to draw district by district, or county group by county group.

But Senate Democrats never took advantage of this offer. Instead, on Monday, February 14, the Minority Leader and Staff informed Republican leadership that they had a statewide map to propose, which included a redraw of all of the county groupings subject to this litigation. That

statewide proposal was not drawn on a General Assembly-provided terminal that had been set up days earlier, but was apparently developed off-site, brought to the General Assembly on a flashdrive. However, the Democratic Leader would not share his draft statewide map unless the Republican Senate Committee Chairs agreed to exchange a draft map prepared by Republicans. The Senate Committee Chairs agreed and provided Democratic leadership with access to a map prepared by the Republican Senate Committee Chairs, and the Democratic Leader's staff then brought the flashdrive containing the Democratic map to the Legislative Building and loaded into the General Assembly-provided computer terminals so it could be shared with the Republican Senate Committee Chairs. *See* Senate Offer to Senator Blue included in Submission. Legislative Defendants have no knowledge of where the Democratic statewide Senate map was prepared, or who participated in the process of developing the proposed map.

On February 15, at the request of Republican Leadership, Senator Berger and his staff met with Senator Blue and his staff to discuss the two maps. During this meeting, Senator Berger offered Senator Blue the opportunity to re-draw Mecklenburg County to his preferences and all of Wake County, except for the Granville-based north Wake district, and expressed his willingness to negotiate with him on other groupings. Senator Berger suggested that Senator Blue meet Senators Daniel and Newton, two of the three Senate Committee Chairs, for joint drawing later that afternoon. Senator Blue initially agreed, but called later that afternoon and again refused to sit down with Senators Newton and Daniel at a joint terminal to negotiate changes to the map in all groupings.

With the deadline to submit a map to this Court now two days away, Senate Republicans proposed and passed the Remedial Senate Plan in the Senate Committee on February 16th. Early on the morning of February 17th, Senator Berger called Senator Blue and made one last attempt

to reach a compromise. Senator Berger offered Senator Blue and his caucus the opportunity to draw all of the districts contained in Mecklenburg County, all of the districts in the Wake County-Granville County grouping, and also offered to change the few precincts in New Hanover County back to where they were assigned in the Enacted Senate plan. Senator Blue rejected the offer. Again, in attempt to find a compromise, Senators Daniel, Newton, and Hise, the Senate Committee Chairs, emailed Senator Blue reiterating the offer. See Exhibit 1 to Memorandum. Senator Blue responded saying that there would only be agreement if Senate Republicans accepted the Democrats' original draws (from the Monday flash drive) in Buncombe-Henderson, Forsyth-Yadkin and Guilford-Rockingham.

Thus, after 8 days of negotiations, Democrats refused repeated offers to draw together and insisted they would only support their original statewide map, drawn by Democrats off-site. Indeed, later that day, Senator Blue offered SBR22-8, the Democrats' statewide plan. A majority of the Senate voted it down because it did not comply with the Supreme Court's Order. It had many flaws, and here are a few. Senator Blue's' map included a long 'finger' from the Henderson County line into downtown Asheville. The map double-bunked Senator Krawiec with Senator Lowe, even though that move was avoidable and unnecessary in drawing a compact and more competitive set of districts in Forsyth County, as the Supreme Court ordered. Senator Blue also insisted on drawing Senator Berger into a district won by Joe Biden in 2020, even though the most common outcome in the Guilford-Rockingham county grouping, according to the Plaintiffs' own expert, was two Democratic seats and one Republican seat.

Though regretfully without the support of Senate Democrats, the Senate Remedial Plan made constitutionally significant changes to the enacted plans. The Senate changed the county groupings in the Northeastern part of the state (Senate Districts 1 and 2) that Plaintiff-Common

Cause addressed in their complaint. (FOF ¶295, 296). While Legislative Defendants maintain that the previous choice of county groups for this region was perfectly legal, these groupings were adopted in the spirit of compromise and to create a more Democratic leaning county grouping. (FOF¶297-298). The remainder of the county groupings for the Senate remained the same as the enacted plan. Because the remainder of the county-groupings remained the same, 13 single county grouping districts from the enacted plan were transferred to the remedial plan. The Senate had no discretion to change these single county grouping districts. In all other respects, the Senate drew entirely new districts from scratch in compliance with the criteria and with the North Carolina Supreme Court's orders. In drawing the remedial plans, the Senate complied with the criteria passed by the House and Senate Redistricting Committees (LDTX15) unless it conflicted with the North Carolina Supreme Court's Orders. In scenarios where there was any ambiguity, higher weight was given to the North Carolina Supreme Courts Orders.

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

Importantly, Senator Newton also testified about the competitive nature of the remedial plan. The proposed remedial map included 10 districts that were within 10 points in the 2020

presidential race – meaning 10 competitive districts – and eight within a range of 47 to 53 percent for the Republican vote share in the 2020 presidential race. Four districts are 49-49 or 50-48 in favor of one side or the other. Senator Newton also testified that in the enacted Senate map from 2020, Governor Cooper would have won 23 of the districts. In the proposed remedial Senate map, Cooper would have won 25 districts. One stark example of the remedial plan's competitiveness can be seen in the Guilford-Rockingham grouping, where one political observer has noted that SD-26, home to President Pro Tem, Senator Berger, moved from a historically safe a Republican seat to a "substantially more competitive" district. The same observer went so far to say that Senator Berger is a "political loser" under the remedial plan compared to other members who came out with more favorable districts. **See Exhibit 2**. No majority in the General Assembly bent on entrenching itself would take the steps the Legislative Defendants did here. Senator Newton also testified that in the previously enacted Senate map, they had worked hard to keep municipalities whole, which resulted in 19 split precincts. However, since the plaintiffs' expert, Dr. Mattingly, testified that in his opinion, municipalities were only kept whole in the Senate map to gain partisan advantage, Senator Newton testified that in the proposed remedial map they prioritized compliance with the North Carolina Supreme Court's order – using mean-median and efficiency gap standards – keeping precincts whole and prioritizing competitiveness, and compactness over keeping municipalities whole. As a result, Senator Newton testified that the proposed remedial map, reduced split VTDs statewide from 19 to 3. Senator Newton further explained that all three of these split VTDs occurred in Wake County because the population deviation in the Wake-Granville county grouping provides little flexibility.

Senator Newton testified that incumbency was considered and that no Senators are double-bunked with other members, other than those who are paired together due to the *Stephenson* county

groupings criteria.[11] Those who had announced retirement or announced a run for another office, like Senator Clark were not considered "incumbents." Senator Newton confirmed there were no Democratic members double-bunked with other incumbents.

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

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

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

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

- In the Forsyth-Stokes county grouping, Senator Newton testified that SD-31 and SD-32 were drawn to respect member residences, and that Senator Krawiec lives in SD-31 and Senator Lowe lives in SD-32. Senator Newton testified that in the enacted map, they had attempted to keep as much of Winston-Salem whole as possible, but in the proposed remedial map, they attempted to draw two compact districts and meet the Court's statewide guidance for partisan fairness. Senator Newton testified that they considered the Democrats' preferred alternate grouping for Forsyth County that pairs it with Yadkin instead of Stokes. In evaluating that configuration, Senator Newton testified that the resulting districts – SD-31, SD-32, and SD-36 in Alexander, Wilkes, Surry, and Stokes counties – would have been less compact. Senator Newton also noted that Yadkin county in the alternate pairing is more Republican than Stokes county, and that they were

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

concerned about complying with the Court's order on partisanship if the county grouping that was more Republican was picked, over one that was less Republican.

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

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

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

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

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

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

Democrats offered numerous amendments moments before the full Senate was scheduled to debate and vote SB 744. Each was tabled. Some of the amendments were particularly strange given the Supreme Court's Order. Senator Garrett, for example, offered an amendment SBR22-10 that double-bunked himself with Senator Gladys Robinson in an effort to secure three safe Democratic seats in a grouping that voted 42% Republican (and also happens to contain the President Pro Tempore of the Senate).This is all despite the fact that Dr. Mattingly's ensembles never showed all of the districts in this grouping to be all Democratic leaning. Other amendments attempted to pair Forsyth county in a county group with Yadkin county, seeking a county grouping that was more republican than the county grouping in the enacted or remedial plan, and ignoring this Court's and the North Carolina Supreme Court's criticisms of the Senate picking county groupings in the Northeastern portion of the state that were more Republican than the alternative. Senator Blue offered SBR22-7, an amendment that cracks Asheville by pairing Buncombe and Henderson, which is another example of a districting decision that would give Democrats 100% of the seats in that pairing. Thus, Democratic Senators proposed amendments that under Plaintiffs' experts' definitions, were outliers. Other amendments with similar flaws were tabled.

The proposed Remedial Senate Plan was passed without amendment. Later that day on February 17, 2022, the plan passed the House.

With its remedial plan, the Senate took seriously the task of complying with the Supreme Court's directives. The Remedial Senate Plan is well within the North Carolina Supreme Court's guidance on presumptively constitutional districts, with an efficiency gap of -3.97% and a mean-

median of -.65%. For these reasons, and others shown in the legislative debates and materials submitted to the court, the Senate Remedial plan should be upheld and elections should be ordered to go forward under these maps by the trial court, and the North Carolina Supreme Court, if necessary.

C. The Remedial Congressional Plan is Constitutional.

In order to comply with the North Carolina Supreme Court's Order, the Senate chose to abandon the previously enacted plan given the findings that there were statewide issues with the previously enacted Congressional plan.[12] Like the legislative maps, the Remedial Congressional plan, SB 745, began from a blank slate. The Senate Committee complied with the August 12th Joint Adopted Criteria, unless those criteria conflicted with the Orders in this case. Importantly, the Senate strove to achieve efficiency gap and mean-median scores within the range suggested by the North Carolina Supreme Court. In fact, in an effort to improve these scores, the Congressional plan was not released until February 17, 2022. An earlier version was originally released on February 16, but the Senate Committee displaced that version in effort to come up with an improved map. Incumbency was considered, and no incumbents were double bunked, but not at the expense of drawing compact and compliant districts.[13]

On the morning of February 17, 2022, the Senate Committee on Redistricting and Elections convened to discuss a proposed Congressional plan. Senator Daniel introduced the proposed plan, and confirmed it was drawn to comply with the North Carolina Supreme Court's order. Senator

[12] The House also drew a congressional plan; however, it was never taken up in Committee or received a vote. As a result, the process described here is the Senate process. In compliance with this Court's February 8, 2022 order a copy of the draft House congressional plan is also being submitted today to the Court.

[13] Upon information and belief, the following Congressional members are not seeking re-election: Congressmen Price, Butterfield, and Budd and as such were not treated as "incumbents".

Daniel testified that the map contains 4 districts that he believed would be some of the most highly competitive in the country. In support of this assertion Senator Daniel pointed out that redistricting expert Dave Wasserman reported that only 19 congressional districts have been drawn in the country with a 2020 presidential election difference of less than 5%. Senator Daniel also stated that the proposed Congressional plan complied with the North Carolina Supreme Court's guidance on the efficiency gap and the mean-median tests.

Senator Daniel then explained the rational for drawing each Congressional district as follows:

- District 1. District 1 remained a district that is rooted in mostly rural counties in Northeastern North Carolina. Senator Daniel testified that the General Assembly had consistently been told during this process that it is important to keep the counties forming the belt along the northern border of the state together, and that District 1 adhered to that. There is no incumbent in this district as Representative Butterfield has announced his intention to retire.

- District 2. District 2 was drawn wholly within Wake County adhering to the original criteria. Unlike the previously enacted map, Senator Daniel pointed out that Wake County was split only once in the proposed map. Senator Daniel also testified that District 2 has a single incumbent in it and she has announced her intention to seek re-election this year.

- District 3. District 3 was drawn to take create a district with much of eastern North Carolina as possible, including the majority of the state's coastline and counties with close proximity to the coast. Senator Daniel testified that district 3 contains one incumbent.

- District 4. District 4 was drawn to contain all of Caswell, Durham, Orange and Person counties and most of Alamance County and Granville County. Senator Daniel testified that this district configuration formed a highly compact district in the northern central counties in the state.

- District 5. District 5 is based in the northwestern corner of North Carolina and is made up of six whole counties. Those counties are Alleghany, Ashe, Forsyth, Stokes, Surry, Watauga and Wilkes. Most of Rockingham County and a portion of Yadkin County make up the rest of the district. Senator Daniel testified that there is only one incumbent in the district.

- District 6. District 6 was drawn to contain all of Chatham, Harnett, Lee and Randolph counties. District 6 also contains most of Guilford County and parts of Alamance and

Rockingham counties. Senator Daniel testified that this district contains one incumbent and will be one of the most politically competitive Congressional districts in the country.

- District 7. District 7 was drawn to be based in southeastern NC to contain the rural counties south of Harnett County and to join them to the remaining coastal counties. Proposed District 7 all of Bladen, Brunswick, Cumberland and New Hanover counties and a portion of Columbus County. Senator Daniel testified that this district contains one incumbent and will also be one of the most politically competitive Congressional districts in the country.

- District 8. District 8 was drawn to mostly contain the counties and cities located between the Triad and Charlotte. It contains all of Cabarrus County and portions of Davidson, Rowan and Guilford counties. Senator Daniel testified that this district is home to one incumbent.

- District 9. District 9 was drawn to contain 9 whole counties: Anson, Hoke, Montgomery, Moore, Richmond, Robeson, Scotland, Stanly and Union counties. District 9 also contains portions of Columbus and Davidson counties. Senator Daniel testified that there are no incumbents in this district.

- District 10. District 10 is district based in western North Carolina stretching from Forsyth County west into the mountains. It keeps 8 counties whole (Alexander, Avery, Burke, Caldwell, Catawba, Davie, Iredell and Lincoln). It also contains parts of McDowell, Rowan and Yadkin counties. Senator Daniel testified that there is one incumbent in the district.

- District 11. District 11 was drawn to be a district based on North Carolina mountains. It contains the whole of the 14 westernmost counties in NC. It also contains parts of McDowell and Rutherford counties. Senator Daniel testified that there is one incumbent currently living in the district.

- District 12. District 12 was drawn to contain the northeastern section of Mecklenburg County, including the majority of Charlotte. Senator Daniel testified that the areas in and around Charlotte are too large to be wholly contained in one Congressional district, and therefore had to be split. Unlike the previously enacted plan, Senator Daniel testified that Mecklenburg County is split only one way in this map. Senator Daniel also testified that there is currently one incumbent living in District 12.

- District 13. District 13 was drawn as the new, open seat created as a result of North Carolina receiving an additional seat in Congress as a result of the 2020 Census. This district contains all of Duplin, Johnston, and Sampson counties and parts of Wake and Wayne counties. Senator Daniel testified that he believed this will be one of the most highly competitive Congressional districts in the country.

- District 14. District 14 was drawn to contain the remainder of Mecklenburg County and stretch west across the southern edge of the state into Rutherford County taking in all of Cleveland and Gaston counties. It is a compact district with only one incumbent. Senator

Daniel also expressed his opinion that District 14 would among the most politically competitive Congressional districts anywhere in the United States.

When asked about the 15 splits in the proposed Remedial Plan, Senator Daniel stated that the additional split was necessary to comply with the Court's order on partisanship metrics. The plan proposed by Senator Daniel passed the Senate Committee on Redistricting and Elections. Later on February 17, 2022, this plan was proposed to the full Senate. One amendment, a statewide plan drawn by Senator Clark was offered, but the amendment was tabled.

Ultimately, the Senate passed SB 745, and it was enacted after the House passed the Remedial Congressional plan later that day. The Remedial Congressional plan scored well-within the Court's guidance presumptively constitutional districts, with an efficiency gap score of -5.29% and a mean-median Score of -.61%. In addition, there is perhaps no more competitive congressional plan in the nation than the one offered here. For these reasons, and others shown in the legislative debates and materials submitted to the court, the Congressional Remedial plan should be upheld and elections should be ordered to go forward under these maps by the trial court, and the North Carolina Supreme Court, if necessary.

D. Partisan Fairness Analysis

Pursuant to the North Carolina Supreme Court's Order and Paragraph 2(e) of this Court's February 8, 2022 order, the General Assembly scored the remedial plans using the efficiency gap and mean-median tests. As discussed above, these two tests were chosen, in part, because of the volume of peer reviewed material on the subject. On February 14, 2022 the Court issued suggested thresholds for these two tests, opining that experts on the efficiency gap often used 7% as a threshold for determining whether plans favor one party or another. *Harper v. Hall,* 2022-NCSC-17, ¶167. The court also opined that a mean-median difference of 1% or less would indicate a plan is presumptively constitutional. *Id.* at ¶166. The Court also mentioned partisan symmetry analysis

and a "close-votes, close-seats analysis" but did not provide guidance on presumptively constitutional thresholds for these metrics.

As discussed above, Legislative Defendants enacted remedial Congressional, Senate, and House of Representatives plans on February 16th and 17th. Legislative Defendants' expert, Dr. Michael Barber, has conducted a mean-median analysis, an efficiency gap analysis, and a partisan symmetry analysis of each of the remedial plans.[14] In summary, each of these analyses indicate that there is a significant likelihood that the remedial Congressional, Senate, and House plans will give the voters of all political parties substantially equal opportunity to translate votes into seats across each respective plan. *See Harper v. Hall*, 2022-NCSC-17, ¶163 (Feb. 14, 2022).

Specifically, Dr. Barber's mean-median analysis of the remedial Congressional plan resulted in a mean-median of -.61%. This is less than the 1% threshold standard cited in this Court's opinion, meaning that the mean-median analysis indicates that the plan is presumptively constitutional. *Harper v. Hall*, 2022-NCSC-17, ¶166 (Feb. 14, 2022). Likewise, Dr. Barber's efficiency gap analysis of the remedial Congressional plan found an efficiency gap score of -5.29%. This is less than the 7% threshold cited in the North Carolina Supreme Court's opinion, meaning that the efficiency gap analysis indicates that the plan is presumptively constitutional. *Harper v. Hall*, 2022-NCSC-17, ¶167 (Feb. 14, 2022). Additionally, Dr. Barber's partisan symmetry analysis of the remedial Congressional plan shows a small vote bias for 50% of the seats of .6%. This means that if Democrats win 50.6% of the state wide they would win 50% of the

[14] As stated in FN 6 *supra*, the "close-votes-close-seats" analysis is a fairly new metric. Dr. Barber stated in his report that he was not aware of any published work by Dr. Duchin, or anyone else, that laid out the definition of this test. However, drawing upon Dr. Duchin's reports in this matter and a Pennsylvania redistricting case, Dr. Barber was able to conduct an analysis that he believes closely replicates Dr. Duchin's new metric. Under this analysis the Remedial Congressional, Senate, and House plans produced a majoritarian outcome in 11/12 elections considered, a significant improvement over the enacted plans. (Barber Representative p. 13, 24, 34).

Congressional seats. Dr. Barber opines that this means the map is responsive and symmetric. Accordingly, a combination of the metrics identified by the North Carolina Supreme Court demonstrates that the remedial Congressional plan is constitutional.

Dr. Barber's mean-median analysis of the remedial Senate plan resulted in a mean-median of -.65% This is less than the 1% threshold standard cited in this Court's opinion, meaning that the mean-median analysis indicates that the plan is presumptively constitutional. *Harper v. Hall*, 2022-NCSC-17, ¶166 (Feb. 14, 2022). Likewise, Dr. Barber's efficiency gap analysis of the remedial Senate plan found an efficiency gap score of -3.97%. This is less than the 7% threshold cited in this Court's opinion, meaning that the efficiency gap analysis indicates that the plan is presumptively constitutional. *Harper v. Hall*, 2022-NCSC-17, ¶167 (Feb. 14, 2022). Additionally Dr. Barber's analysis of the remedial Senate plan shows a vote bias for 50% of the seats of exactly 0%. This means that if Democrats win 50% of the state wide they would win 50% of the Senate seats. This is clearly symmetric. Under all of the metrics identified by the North Carolina Supreme Court, the Remedial Senate plan is constitutional.

Dr. Barber's mean-median analysis of the remedial House plan resulted in a mean-median of -.7%. This is less than the 1% threshold standard cited in this Court's opinion, meaning that the mean-median analysis indicates that the plan is presumptively constitutional. *Harper v. Hall*, 2022-NCSC-17, ¶166 (Feb. 14, 2022). Likewise, Dr. Barber's efficiency gap analysis of the remedial House plan resulted in -.84%. This is less than the 7% threshold cited in this Court's opinion, meaning that the efficiency gap analysis indicates that the plan is presumptively constitutional. *Harper v. Hall*, 2022-NCSC-17, ¶167 (Feb. 14, 2022). And in fact, is perhaps the lowest measure of efficiency gap in any legislatively drawn plan that Legislative Defendants are aware of. Additionally, Dr. Barber's partisan symmetry analysis of the remedial House of Representatives

plan shows a small vote bias for 50% of the seats of -.2%. This means that if Democrats win 49.8% of the state wide vote they would win 50% of the House seats. This too, is clearly symmetrical. Under all of the metrics identified by the North Carolina Supreme Court, the Remedial Senate plan is constitutional.

E. Any Deminimis Partisan Skew Can be Explained by North Carolina's Political Geography.

Plaintiffs' and Legislative Defendants' experts mostly agree that North Carolina's political geography naturally results in state legislative and Congressional maps leaning Republican. For example, Drs. Magleby and Chen admit that their simulated plans show a natural statewide Republican lean. (Magleby Depo. 48:6–16 ("So based on the simulations, we know what the electoral geography of North Carolina would suggest or would indicate that a fair map ought to look like. In a place like North Carolina, that means that Democrats are at a natural disadvantage."); Chen Depo 112:17–114:5 (Dr. Chen admits that a majority of his simulated plans produced a mean-median difference that slightly favors Republicans); Tr. 50:2–12 (Dr. Chen admits that 59.6% of his computer simulated Congressional plans draw nine Republican districts)). Drs. Cooper and Taylor confirm that the migration of Democrats to cities results in natural clustering of Democrats in a few urban districts and a spread-out Republican electorate across the state. (Tr. 120:24-121:18; 500:18-502:24). Dr. Barber further provides that the natural clustering of Democrats in North Carolina cities and the Northeastern part of the state leads to natural disadvantages for Democrats—especially when drawing compact, contiguous districts, and abiding by North Carolina's county grouping requirements. (Tr. 616:21-617:8).[15]

[15] It is hard to understand how a Court could conclude that geography does not favor Republicans in North Carolina following a visual review of the maps prepared by Mr. Trende, and Dr. Taylor showing the counties in North Carolina carried by each presidential candidate in the last few presidential election cycles. This analysis shows that North Carolina's political geography has

While the remedial districts have a low, and in some instances nearly non-existent partisan skew, any remaining partisan skew can be attributed to the political geography of North Carolina and the lack of discretion given that the General Assembly could not change 14 House Districts and 15 Senate districts due to single district county grouping pods.

F. The General Assembly Was Not Presented With Information to Provide a Strong Basis in Evidence To Consider Racial Data

Requiring the General Assembly to perform a racial polarization analysis in order to draw influence or crossover districts violates the Fourteenth Amendment to the United States Constitution.[16]

1. Using race to draw districts violates the Fourteenth Amendment absent proof of a compelling governmental interest.

It was undisputed that, at the time the General Assembly enacted the 2021 plans, there was no evidence that black voters required a majority black district to protect the State from liability under § 2 of the Voting Rights Act ("VRA"). Any interpretation of the North Carolina Constitution

become decidedly more clustered and more Republican over the past 30 years. Dr. Taylor analyzed the counties won in the Clinton/Bush 1992 presidential election. His analysis showed that former President Clinton carried over 40 North Carolina counties in that election. (LDTX108 at p 39). By 2012, Mr. Trende found that only 30 counties voted for former President Obama in the Obama/Romney presidential election. (LDTX 108 at p 8). This represents a loss of over 10 counties in terms of democratic vote share in 20 years. This trend continued as 76 counties voted for former President Trump in the 2016 presidential election and 75 counties voted for him in the 2020 presidential election. *Id.* This means in the last presidential election, only 25 counties in North Carolina voted for President Biden, a loss of 5 counties in terms of democratic vote share over the last 10 years. *Id.* Dr. Taylor independently confirmed this analysis as well noting that in 1992 Forsyth and Mecklenburg counties voted for former President Bush, who also narrowly lost Wake County. In contrast, former President Trump was defeated in Mecklenburg and Wake counties by approximately 30 points. (LDTX108 at p 39). This clearly shows a trend toward political clustering with democratic voters tending to congregate in urban areas, while the more rural areas of the state become more republican.

[16] Dr. Lewis has also conducted an abbreviated analysis on the Remedial Plans and has concluded that all three remedial plans provide African American Voters with proportional opportunity to elect their candidates of choice. Dr. Lewis' report on the Remedial Plans is submitted to the Court with the other required materials.

that would require the General Assembly to conduct a statistical polarization analysis to draw districts at a racial target that is less than 50% of the Black Voting Age Population ("BVAP") would require the State to engage in illegal racial gerrymandering in violation of the Fourteenth Amendment of the United States Constitution.

The United States Supreme Court first recognized a claim for racial gerrymandering in *Shaw v. Reno*, 509 U.S. 63, 649 (1993). The *Shaw* plaintiffs challenged North Carolina's infamous I-85, Twelfth Congressional District. *Id.* at 635–36. This district was enacted by the General Assembly in an attempt to obtain preclearance of its 1992 Congressional Plan under § 5 of the VRA. *Id.* The United States Supreme Court reversed the district court's dismissal of the plaintiffs' case. *Id.* at 657–58. In doing so, it held that plaintiffs had stated a claim under the Fourteenth Amendment by alleging that the Twelfth District "cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id*. at 649. The Supreme Court subsequently clarified that "[a] plaintiff pursuing a racial gerrymandering claim must show that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Alabama Legis. Black Caucus v. Alabama*, 575 U.S. 254, 272 (2015) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

Assuming a plaintiff satisfies their burden of proof explained in *Miller*, state legislatures can defend the use of race in the drawing of districts if "its redistricting plan was in pursuit of a compelling state interest" and provided "its districting legislation is narrowly tailored to achieve [that] compelling interest." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (quoting *Miller*, 515 U.S. at 920) (alteration in original). The United States Supreme Court has "long assumed that one compelling interest [that can justify the predominant use of race in the drawing of districts] is

complying with operative provisions of the [VRA]." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (citing *Hunt*, 517 U.S. at 908). To date, the United States Supreme Court has not identified any other compelling governmental interest that might justify separating voters into different districts because of their race.

For a legislature to legally draw districts based upon race it must have evidence of the same three threshold conditions that a plaintiff must demonstrate to prove a claim under § 2. These include evidence that (1) a "'minority group' [is] 'sufficiently large and geographically compact to constitute a majority' in some reasonably configured legislative district"; (2) "the minority group must be 'politically cohesive'"; and (3) a "district's white majority must vote 'sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.'" *Cooper*, 137 S. Ct. at 1470 (citing *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986)).

Proof of the *Gingles* threshold conditions show that "'the minority [group] has the potential to elect a representative of its own choice' in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn because it is 'submerge[ed] in a larger white voting population'" *Id.* (citing *Growe v. Emison*, 507 U.S. 25, 40 (1993)) (alteration in original). Only when a legislature has evidence showing it has "good reason to think that all the '*Gingles* preconditions' are met" does the legislature have "good reason to believe that Section 2 requires drawing a majority-minority district. . . . But if not, then not." *Id.* (citing *Bush v. Vera*, 517 U.S. 952, 978 (1996) (plurality)).

The United States Supreme Court has provided guidance on the first of the *Gingles* threshold conditions in two important cases, *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006), and *Bartlett v. Strickland*, 556 U.S. 1 (2009). To understand these two decisions, it is important to define three different terms used by the courts to describe election

districts "in relation to the requirements of the Voting Rights Act." *Bartlett*, 556 U.S. at 13. In "majority-minority" districts, "a minority group composes a numerical, working majority of the voting-age population." *Id.* There is no dispute that § 2 can require the creation of this type of district. *Id.* "At the other end of the spectrum" are "influence" districts. "in which the minority group can influence the outcome of an election[.]" *Id*. Finally, "crossover" districts are districts "in which the minority group is less than a majority of the population, but is potentially large enough to elect its candidate of choice with the help of voters who are members of the white majority and who cross over to support the minority's preferred candidate." *Bartlett*, 556 U.S. at 13 (internal citation omitted).

The issue in both *LULAC* and *Bartlett* was whether § 2 justifies a state legislature's decision to draw race-based districts with a targeted minority population of less than 50%. In *LULAC*, the Court held that § 2 does not justify a state's use of race to create influence districts. *LULAC*, 548 U.S. at 445. The Court warned that interpreting § 2 as requiring legislatures to adopt influence districts "would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *LULAC*, 548 U.S. at 445–46.

Subsequently, in *Bartlett*, the Court was called upon to decide whether § 2 could be used by a state to justify using race to draw crossover districts. The Defendants-Petitioners in *Bartlett* argued that crossover districts satisfy the first *Gingles* condition because they allow the minority group to elect their candidate of choice and are therefore "'effective minority districts.'" *Id.* at 14.[17] The *Bartlett* Court rejected this proposition holding that § 2 only authorizes state legislatures to use race to draw districts where a geographically compact minority group constitutes an actual

[17] This is the same term used by Dr. Duchin to describe districts she believes should be drawn with a 25% BVAP. (PX150 p 11).

majority of the voters. *Id.* at 14–18. Reaffirming its warning in *LULAC*, the Court stated "[to] the extent there is any doubt about whether § 2 calls for the majority-minority rule, we resolve that doubt by avoiding serious constitutional concerns under the Equal Protection Clause." *Id.* at 21.

After the decisions in *LULAC* and *Bartlett*, there can be no dispute that a legislature cannot use race to draw districts absent evidence of a geographically compact minority group that would constitute an actual majority in a single member district. *See Cooper,* 137 S. Ct. at 1464.

The Supreme Court has also provided guidance to state legislatures on the third *Gingles* condition, i.e., that a state cannot draw districts on the basis of race unless it has evidence that the white majority is voting sufficiently in a bloc to usually defeat the minority's preferred candidate. This concept is called "legally significant racially polarized voting." *Gingles*, 478 U.S. at 52-55. Statistically significant "racially polarized voting" occurs whenever "there is a 'consistent relationship between [the] race of the voter and the way in which the voter votes.'" *Gingles*, 478 U.S. at 53 n.21. The mere existence of a correlation between a person's race and how they vote is not enough to satisfy the third threshold condition. Instead, the legislature must have evidence of "legally significant racially polarized voting." *Id*. at 55. This occurs only when "less than 50% of white voters cast a ballot for the black candidate.'" *Id.* Thus, the legislature can only draw a majority black district under § 2 where there is proof that the white majority usually votes as a bloc to defeat the minority's preferred candidate. *Cooper*, 137 S. Ct. at 1470; *Covington v. North Carolina*, 316 F.R.D. 117, 167 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017) (Mem.).

2. There was no basis in evidence or under the Fourteenth Amendment for the General Assembly to conduct a polarization analysis for the purposes of drawing crossover or influence districts.

At the time districts were enacted in 2021 the General Assembly lacked "good reasons" to conclude that it could lawfully use race to draw districts needed to protect the State from § 2

liability. *See Cooper*, 137 S. Ct. at 1463–64. In 2011, the General Assembly intentionally drew one majority-minority congressional district based upon race (the First Congressional District) and twenty-eight (28) legislative districts based upon race. *See Cooper v. Harris,* 137 S. Ct. 1455, 1468 (2017); *Covington v. North Carolina*, 316 F.R.D. 117, 128 (M.D.N.C. 2016). In both instances, the General Assembly relied upon two expert reports showing the preference of "statistically significant" racially polarized voting ("RPV") as grounds for establishing the third *Gingles* threshold condition. *Cooper*, 137 S. Ct. at 1471 n.5; *Covington,* 316 F.R.D. at 169–71. But in both *Cooper* and *Covington*, the Supreme Court held that mere statistically significant RPV did not satisfy the requirement that a state can only justify § 2 majority-minority districts when there is evidence of legally significant RPV. *Cooper*, 137 S. Ct. at 1470, 1471 n.5; *Covington v. North Carolina*, 316 F.R.D. 117, 169 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211 (2017) (Mem.). In both *Cooper* and *Covington*, the State did not produce any evidence of legally significant RPV, and no such evidence was ever presented by the plaintiffs. *See Cooper*, 137 S. Ct. at 1471 n. 5; *Covington v. North Carolina*, 283 F. Supp. 3d 410, 414 (2018). In fact, plaintiffs offered experts in both cases who opined that North Carolina legislative districts did not need to be drawn at a majority-minority level for black voters to have an equal opportunity to elect their candidates of choice. *Covington*, 316 F.R.D. at 128; *Harris v. McCrory*, 159 F. Supp. 3d 600, 624 (M.D.N.C. 2016).

The General Assembly responded to *Cooper* and *Covington* by enacting a new congressional plan in 2016 and new legislative plans in 2017. *Covington*, 316 F.R.D. at 177; *Harris*, 159 F. Supp. 3d at 604. (*See* LDTX32, 38, 43). In both instances, the General Assembly prohibited the consideration of race in the drawing of new districts. *Cooper*, 137 S.Ct. at 1476–77; *Covington v. North Carolina*, 283 F. Supp. 3d 410, 418 (2018). Thereafter, the *Covington* district

court found that the 2017 plans "failed to remedy the racial gerrymanders" under the 2011 plan. *Covington v. North Carolina*, 2018 WL 604732 * 2 (M.D.N.C. 2018). The districts in question were Senate Districts 21 and 28 and House Districts 21 and 57. *Id.* These districts were then slightly modified by a special master appointed by the district court. *Covington v. North Carolina*, 283 F. Supp. 3d at 435, 458. In all four instances, the remedial districts drawn by the Special Master contained a lower percentage of BVAP than the corresponding districts enacted by the General Assembly in 2017. *Covington*, 2018 WL 604732, *10.

In the general election of 2018, under the 2016 Congressional Plan, two African Americans were elected to serve as members of Congress, or the same number of African Americans who had been elected since 1992.[18] Under the modified 2017 legislative plans, 10 African American candidates were elected to the State Senate and 26 African Americans were elected to the State House.[19] The number of African Americans elected to the General Assembly in 2018, under a plan that did not use race to draw districts, was roughly proportional to the percentage of North Carolina's BVAP of 20%. See *Estimates of the Voting Age Population for 2020,* 86 Fed. Reg. 24379, 24379-80 (May 6, 2021); *see also Johnson v. DeGrandy*, 512 U.S. 997, 1013–15 (1993) (plan did not dilute vote of racial minority where it obtained rough proportionality in the number of districts in which it had an equal opportunity to elect its candidate of choice). Neither of the two congressional districts in which a black member of Congress was elected was majority black

[18] *November 06, 2018 General Election Results by Contest*, North Carolina State Board of Elections https://s3.amazonaws.com/dl.ncsbe.gov/State_Board_Meeting_Docs/2018-11-27/Canvass/State%20Composite%20Abstract%20Report%20-%20Contest.pdf .

[19] North Carolina Senate Demographics, 154th Session, 2019-2020 (Oct. 15, 2020) https://ncleg.gov/DocumentSites/HouseDocuments/2019-2020%20Session/2019%20Demographics.pdf ;
North Carolina House of Representatives Demographics, 154th Session, 2019-2020 (Oct. 15, 2020), https://ncleg.gov/DocumentSites/HouseDocuments/2019-2020%20Session/2019%20Demographics.pdf

district. (LDTX33). And only two of the 37 districts in which African Americans were elected to the legislature were majority African American. (LDTX 109).

The pattern of African Americans being elected to districts that were not based upon race or racial targets, continued during the general election of 2020. Prior to the 2020 general election, a three-judge panel found that the 2017 legislative plans and the 2016 congressional plan contained political gerrymanders in violation of the North Carolina Constitution. *See Common Cause v. Lewis*, 2019 WL 4569584 (Wake Cnty. Super. Ct. 2019) (final judgment invalidating 2017 legislative plans); *Harper v. Lewis*, No. 18 CVS 014001 (Wake Cnty. Super. Ct. Nov. 13, 2018) (preliminary injunction of 2016 congressional plan). In both cases, the Superior Court gave the General Assembly an opportunity to revise the congressional and legislative plans. The Superior Court ultimately approved the revised 2019 senate and house plans and the revised 2020 congressional plan. *Harper v. Lewis*, No. 18 CVS 014001 (Wake Cnty. Super. Ct. Nov. 13, 2018). In *Common Cause*, the Superior Court also issued a supplemental opinion adopting the opinions of plaintiffs' experts that the *Gingles* threshold conditions were not met in any of the areas of the state that included challenged legislative districts. *Common Cause*, 2019 WL 4569584, at *131.

Thereafter, in the general election of 2020, African Americans again achieved rough proportionality in the General Assembly, with the election of 11 black senators and 24 black representatives.[20]

[20] North Carolina General Assembly 2021 Senate Demographics (Jan. 12. 2021), https://ncleg.gov/DocumentSites/SenateDocuments/2021-2022%20Session/2021%20Senate%20Demographics.pdf ; North Carolina House of Representative Demographics, 155th Session, 2021-2022 (February 1, 2022), https://ncleg.gov/DocumentSites/HouseDocuments/2021-2022%20Session/2021%20Demographics.pdf .

This history of litigation, dating back to the days of *Shaw v. Reno*, the results of the 2018 and 2020 general elections, prior expert reports submitted by plaintiffs, and the Superior Court's supplemental opinion in *Common Cause* regarding the absence of the *Gingles* threshold conditions, provided more than good reasons for the General Assembly not to use race during the drawing of the 2021 districts.[21] Moreover, during the legislative process in 2021, no one came forward with any reliable contrary evidence of the *Gingles* threshold conditions despite the legislative leaders' invitation for such evidence. (LDTX84 p. 11; T. 794:4-9; 754:6-14).

Plaintiff-Intervenor Common Cause has attempted to make much of two letters submitted by their counsel during the legislative process of enacting the previous redistricting plans. (PX1412–13). Neither letter contains an expert's statistical polarization analysis. Regardless the analysis provided by Common Cause confirmed the absence of the existence of legally significant racially polarized voting. Nor do the letters indicate an area of the state where a compact majority black population had been submerged or cracked into majority white districts. Nor do the letters complain that the proposed districts would eliminate a majority black district because none existed under the 2020 legislative plan. Instead, Common Cause's complaint was that three African American incumbents had been placed in districts with a slightly lower BVAP than the percentage found in their 2019 legislative districts.

[21] The evidence showing the lack of legally significant racially polarized voting is as least as persuasive as the opinion testimony relied upon by Virginia in *Bethune-Hill* to justify using race to draw a majority black district and is the functional equivalent of a statistical study showing the absence of legally significant racially polarized voting.

3. The evidence presented at trial confirms the absence of evidence needed to justify using race to draw districts.

There was ample statistical polarization evidence presented at trial demonstrating that majority minority districts are completely unnecessary in North Carolina for African Americans to have an equal opportunity to elect their candidates of choice.

First, Plaintiffs' expert Dr. Moon Duchin's testimony was largely based on the "Optimized Maps" offered by the North Carolina League of Conservation Voters. (LDTX 157). The main focus of Dr. Duchin's first report was to compare the alleged political fairness of the 2021 plans versus the NCLCV plans relying mainly on a symmetry standard. (PX150). Dr. Duchin then produced her version of a polarization analysis to determine what would constitute an "effective" district for "Black voters." (PX150). To make this determination, Dr. Duchin selected only eight elections for her study—four Democratic statewide primaries and four statewide general elections. She did not study the results of any legislative race to determine the existence of legally significant racially polarized voting. She then identified proposed districts in the 2021 enacted plans or the NCLCV plans were that "effective black" districts: (1) by identifying all districts that include at least 25% BVAP; and (2) examining the results in each district for the eight state-wide elections selected by Dr. Duchin, to determine whether the black-favored candidate prevailed in at least 6 of the 8 elections she selected. (*Id.*)[22]

[22] The VRA does not guarantee success for a minority candidate—only that the minority group have equal opportunity to elect their candidate of choice. *DeGrandy*, 512 U.S. at 1013–15. In light of this legal requirement, it seems highly arbitrary that Dr. Duchin would require the black favored candidate to prevail in 75% of the elections she tested as opposed to 50%. Further, if we presume that polarized voting existed in the statewide general elections won by Republicans and selected by Dr. Duchin, it is certainly not irrational to conclude that in those elections the white majority defeated the candidate preferred by African Americans But Dr. Duchin provided no evidence that legally significant racially polarized voting was present in the Democratic primaries she selected. Dr. Duchin's decision to use four Democratic primaries (out of total of only eight

The test adopted by Dr. Duchin, by its plain terms, demonstrates that districts with 50% BVAP are not required to be an effective black district. In fact, at trial, Dr. Duchin admitted that she was not "offering an opinion in this case that black voters require a district anywhere in the State of North Carolina with at least 50% BVAP…"(T. 475:10-23). Instead, Dr. Duchin advocated that the Court require the state to adopt the NCLCV legislative plans which would provide 48 "effective black" districts. This equates to 29% of the General Assembly districts, or nearly 10% higher than the of BVAP in the state (20%). This means that the percentage of black effective districts created by the Hirsch Algorithm is disproportionate to North Carolina's BVAP under the 2020 census. Plaintiffs' polarization expert has therefore admitted that the NCLCV Plaintiffs are asking the court to order the General Assembly to use race to draw crossover and influence districts at BVAP percentages that are lower than 50%. But § 2 "does not impose on those who draw election districts a duty to give minority voters the most potential, or best potential, to elect a candidate by attracting crossover voters." *Bartlett*, 556 U.S. at 15.[23]

It is no wonder that Dr. Duchin identified effective black districts in the NCLCV plans in percentages that exceed the percent of BVAP in the state. Samuel Hirsch, the person who developed the algorithm used to draw the NCLCV's plans, admitted that his algorithm was designed to create more "minority electoral opportunity" districts. (Tr. 804). But Hirsh also testified that under his algorithm "no racial group should have a larger share of districts where it is likely to be able to nominate and elect a preferred candidate compared to the group's percentage of the adult citizen population." (Tr. 808). This admission by Hirsch, and Dr. Duchin's report, demonstrate the NCLCV plans were intentionally designed to maximize the number of effective

elections studied) without explaining whether legally significant racially polarized voting was present in any of the four primaries, raises serious issues regarding the credibility of her report.

[23] Ironically, Dr. Duchin's report demonstrates the illegality of the plans she supports.

black districts. This, in turn resulted in a new plan that will elect African Americans to a higher percentage of the districts than their percentage in the State's voting age population. Any decision by the court to impose districts derived from the NCLCV plans would clearly constitute a violation of the Fourteenth Amendment.

In addition to Dr. Duchin's report, the comprehensive statistical polarization report offered at trial by Dr. Lewis, an expert for the Legislative Defendants, confirms the absence of legally significant racially polarized voting in North Carolina. Unlike the eight elections selected by Dr. Duchin, Dr. Lewis studied the polarization rates for hundreds of elections including primary elections and general elections. (LDTX 109, Tables 1-4). Using Dr. Duchin's test for effective black districts as applied to the more extensive study performed by Dr. Lewis, the 2021 enacted plans had many more "effective black districts" than the number projected by Dr. Duchin. While Dr. Duchin reported only two effective black congressional districts under her study, Dr. Lewis's report indicated at least three effective black congressional districts. (Compare PX150 at 12 with LDTX 109 at 6). While Dr. Duchin predicted only eight effective State Senate seats, Dr. Lewis reported a total of twelve effective black districts. (*Id*.). Finally, while Dr. Duchin identified twenty-four (24) effective black districts in the 2021 enacted plans, Dr. Lewis reported the existence of 31 effective districts. (*Id*.).

Dr. Lewis also reported a higher number of effective districts if the Duchin formula was changed to include districts where the black preferred statewide candidate prevailed in a lower percentage (66%) of the statewide elections studied by Dr. Lewis, as compared to the percentage required by Dr. Duchin (75%). At trial, Dr. Lewis clarified his report by testifying that none of the districts he studied "appear[ed] to require larger than a 50% percent of the district to be minority in order to win 50% of the vote" and that because of the voting strength of African

Americans in Democratic primaries, in "most cases" the candidate preferred by black voters can win any district that can be won by a Democratic candidate. (Tr. 579-80; 581-82). Dr. Lewis was hired by the Legislative Defendants and his report more than satisfies any requirement mandated by the North Carolina Supreme Court that the General Assembly conduct a statistical polarization analysis.

The evidence before the General Assembly when it enacted the 2021 plans, and the evidence available today to the General Assembly – including the polarization reports by Dr. Duchin and Dr. Lewis—clearly demonstrate that nowhere in the State is there evidence of legally significant racially polarized voting. In addition, no one has identified a geographically compact minority population that has been submerged into a majority white district. Clearly, the General Assembly was correct in its initial judgment that consideration of race in the drawing of districts is unnecessary and that doing so will subject the State to liability under the Fourteenth Amendment.

4. The 11th Hour "Analysis" Sent by Counsel for Common Cause is Unpersuasive and Seeks to Require the General Assembly to Draw Crossover districts in violation of federal law.

Common Cause argues that the North Carolina Constitution requires that the General Assembly use race to draw crossover districts, not because of a judgment in favor of a plaintiff in a § 2 lawsuit, but instead because of eleventh hour submissions purporting to show a vote dilution claim through "demonstrative" majority black districts. This is a clearly erroneous. Any order from the Superior Court, or the North Carolina Supreme Court, requiring the General Assembly to draw districts based upon race, as argued by the Common Cause, will violate the Fourteenth Amendment.

First, we are aware of no decision by any court compelling a legislature to use race to draw districts during the legislature's legislative deliberations or prior to the resolution of an actual

lawsuit challenging an enacted plan or districts under § 2 of the VRA. Common Cause is grossly misconstruing *Stephenson I* if they believe any court can compel a legislature to classify its citizens based upon race before any such legislation is enacted. Instead, the remedy for any failure to use race in the drawing of districts is a § 2 lawsuit where the normal rules of civil procedure and burdens of proof will apply, and which will require plaintiffs to prove to a judge following discovery and cross examination that race-based districts are necessary to protect minority voters from vote dilution. To date, none of the Plaintiffs, including Common Cause, have alleged a claim under § 2.

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

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

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

While Common Cause has made no § 2 claims in their pleadings, even assuming they had raised such claims, no court would even consider imposing § 2 districts based solely on the evidence proffered by Common Cause. Based upon the record before the court, any order imposing race-based districts at this stage could easily subject the state to liability for drawing racial gerrymanders. In contrast, Common Cause will not be left without a remedy should the court decline its invitation to impose race-based districts. Common Cause will have every right to file a new lawsuit alleging violations of § 2 which the State will then be able to fully litigate and refute before a court of law.[24]

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

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

The Common Cause submission starts with proposed "demonstrative" majority black districts purportedly offered to meet all of the *Gingles* requirements. The two Common Cause

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

Demonstrative districts are designated as Demonstrative HD 10 and to Demonstrative SD 4. Pictures of both demonstrative districts are embedded below:

Figure 1: HD10 *Gingles I* VRA Demonstrative

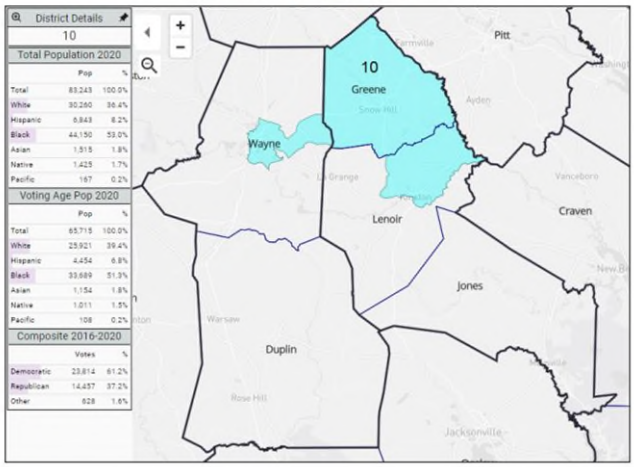
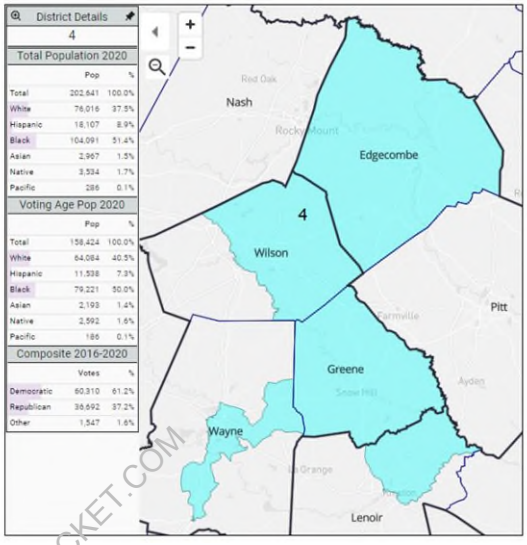
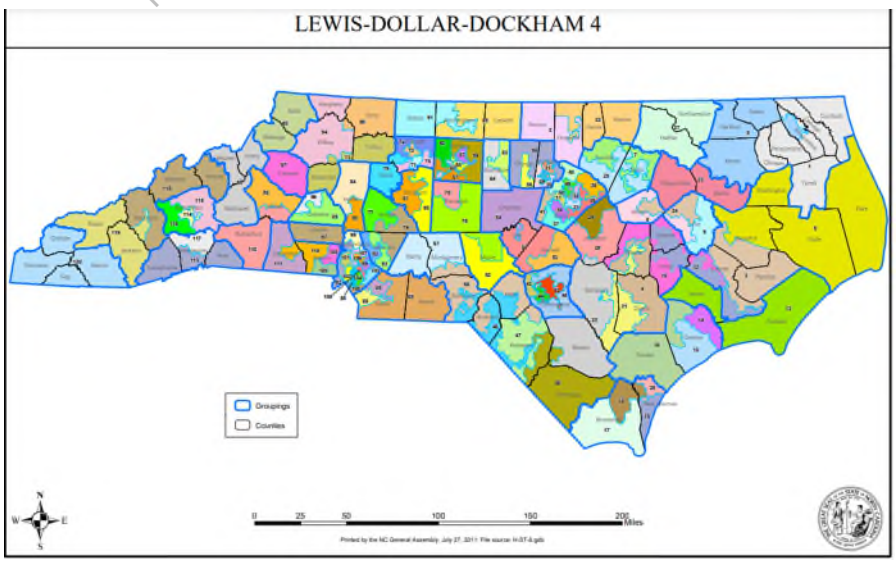
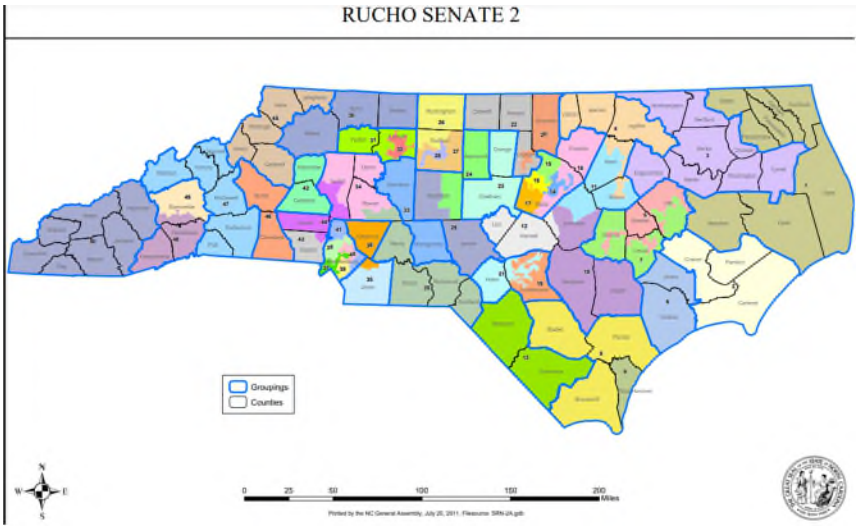


Figure 3: SD4 VRA *Gingles* I Demonstrative



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





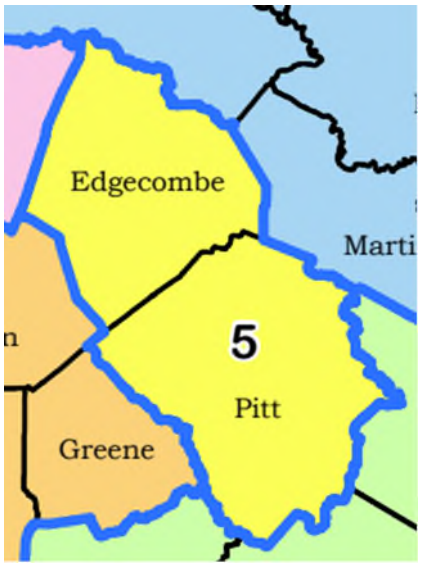
Common Cause Demonstrative HD 10 and SD 4 are both multi-county districts. A comparison of the Common Cause demonstrative districts with the illegal 2011 districts shows that both demonstratives closely resemble several multi-county districts declared unconstitutional in *Covington*. These include but are not limited to including: 2011 HD 5, 24, 32, and 2011 SD 4, 5. Like the districts found to be illegal in *Covington*, neither of the Common Cause demonstrative districts are based upon a reasonably compact black population. At a minimum, given the appearances of the Common Cause districts, the General Assembly would have more than ample reasons to believe that adopting either district will not protect the state from § 2 liability and instead will invite lawsuits challenging the demonstrative districts as racial gerrymanders. If the districts found to be illegal racial gerrymanders in the 2011 plans continue to be illegal, it is impossible to distinguish those districts from the Common Cause Demonstrative HD 10 and SD 4.

Second, the evidence submitted by Common Cause does not indicate the presence of the third *Gingles* threshold condition, i.e., that a § 2 plaintiff must show the presence of legally significant racially polarized voting. The Common Cause demonstrative districts are both majority black. Thus, neither of them shows a district or districts where the white majority has consistently

voted to defeat the minority group's preferred candidate of choice. There is no "white majority" in either district. At best, all that the Common Cause analysis arguably shows is the presence of statistically significant racially polarized voting within the confines of a hypothetical majority black district.

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

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



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

The next problem with the Common Cause submission is the bizarre distinctions found in their "demonstrative districts" as compared to their proposed "remedial districts." In both instances, Common Cause argues that the presence of a hypothetical majority black district requires the state to draw a remedial crossover district in the place of the proposed majority black district. A copy of the Common Cause Remedial HD 10 and SD 4 are below.

Figure 1: HD10 *Gingles I* VRA Demonstrative

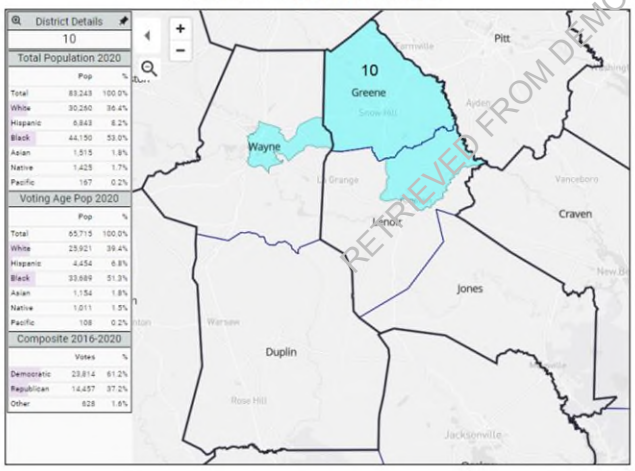
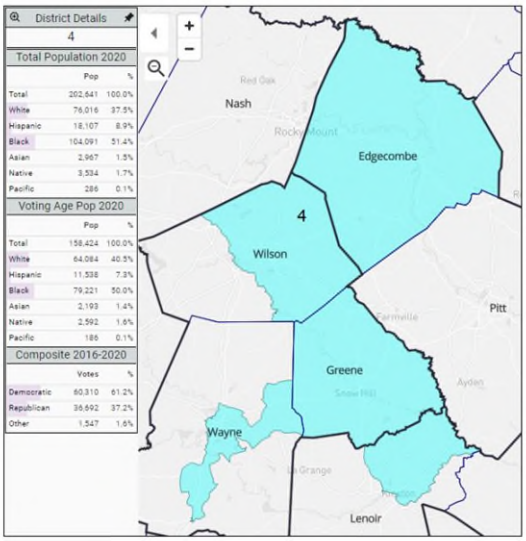


Figure 3: SD4 VRA *Gingles* I Demonstrative



The glaring illogic associated with the Common Cause proposal is that their "remedy" would only provide a remedy for some but not all of the voters who reside in the demonstratives. Compare Common Cause Demonstrative HD 10 with Remedial SD 10 and Demonstrative SD 10

with Remedial SD 4. In both instances, the proposed Common Cause remedial districts only include portions of their demonstrative districts. Also, in both instances, the remedial districts include population that was not included in the demonstrative districts. As to those voters, there is no proof that they are victims of vote dilution. The remedy proposed by Common Cause therefore violates the basic principle that the remedial district adopted to redress vote dilution must include the voters who actually suffered "vote dilution injuries." *Shaw II*, 517 U.S. at 916.

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

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

crossover district. There is no basis for including Pitt County in a remedial district purportedly designed to remedy vote dilution in 5 different counties.

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

The Common Cause proposed configuration for Remedial SD 4 exposes their true intentions. If the court orders the state to adopt Common Cause's proposed remedial SD 4, the state would also be required to change the county groups involving Edgecombe, Wilson, Pitt, Greene, and Wayne. This in turn would result in the state also being required to adopt Common Cause's proposed reconfiguration of SD 5. (See above Common Cause Remedial SD 4 map).

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

districts where they have an equal opportunity to elect their candidate. See *Johnson v. De Grandy*, 512 U.S. 997, 1013-15 (1994).

II. Statement Regarding Redistricting Participants

Pursuant to Paragraph 3(c) of the Court's order of February 8, 2022, Legislative Defendants provide the following information about "participants involved in the process of drawing and enacting the Remedial Maps."

First, *all* members had a role in enacting legislation, *all* members had a right to participate within the confines of legislative procedure, and *all* members enjoy immunity and privilege for their legislative actions, unless they waive immunity or privilege. It should also go without saying that members of the Senate and House committees responsible for redistricting had more involvement than other legislators in the process. The membership of the General Assembly and its committees is public information.

Second, Legislative Defendants have provided charts identifying the names of legislative members and staff associated with drawing efforts. Those that offered amendments are shown on the amendments themselves and identified in the Legislative Record. Legislative Defendants incorporate these by reference here. As to any Amendments offered by Democratic members, Legislative Defendants cannot say for certain who assisted in the drawing of these amendments. As stated above, the proposed plans offered by Senator Blue were not drawn in the General Assembly, and any number of third parties could have been involved in that effort.

Third, as to non-legislative participants, Legislative Defendants confirm that Dr. Mattingly, whose county groupings were adopted in the base map, and whose election choices were selected for the purposes of the required scoring was certainly involved. Legislative Defendants can also confirm that non-partisan central staff members assisted in the creation of amendments, and they

are identified in the charts submitted to the Court. Legislative Defendants were also assisted by employed and outside legal counsel, whose roles were restricted to providing legal advice. Logistical support was provided by various members of Central Staff and committee staff. Central Staff has listed all members and staff directly involved in the drafting of districts.

Exclusively through counsel, Legislative Defendants also relied for very limited purposes on experts called in this case and their non-testifying experts, Clark Bensen, and Sean Trende. Trende provided mean-median and efficiency gap scores of districts to ensure that the proposed plans were within accepted compliance for these tests. Legislative Defendants relied on Dr. Lewis to conduct a Racially Polarized Voting Analysis for both the 2021 and the 2022 districts that the Legislative Defendants also relied upon. Dr. Barber conducted a final scoring and analysis of the remedial districting plans, and provided other information for this Court regarding the percentage of BVAP in districts that have elected Black candidates.

Legislative Defendants employed no other agent, such as a map-drawing consultant.

Legislative Defendants can also confirm that numerous members of the press and public attended and (presumably) watched proceedings. And it is simply impossible to account for all their actions or identify all involved. There were many other members of the public going in and out through the proceedings, and meetings, and Legislative Defendants were incapable of monitoring their actions or intentions.

To the extent the Court or objectors raise discrete concerns or questions, Legislative Defendants will do their best to respond and, if necessary, gather facts to respond.

III. Statement Regarding Alternative Maps

Pursuant to Paragraph 3(a) of the Court's order of February 8, 2022, Legislative Defendants provide the following information about "alternative maps considered" by the committees or the General Assembly.

Several amendments were proposed to county groupings and are discussed above.

Additionally, as discussed above, there was a House draft of a Congressional Plan that was never voted on, and a draft Congressional plan from the Senate that was never voted on, but was discussed. Legislative Defendants do not believe these plans were ever formally "considered" by the Redistricting Committees or the full General Assembly, but out of an abundance of caution, these plans are submitted to the Court with this filing. Additionally drafts by Senator Blue and Senator Clark on Senate and Congressional maps used in negotiation and certainly relied upon by them in Committee and on the Floor. While these are likely to be the same as the amendments they each proposed, out of an abundance of caution, these materials are also submitted to the Court.

Should the Court be concerned with any specific proposal, Legislative Defendants will do their best to respond and, if necessary, gather facts to respond.

IV. Conclusion

Questions of redistricting reform have proven difficult to solve and have divided reasonable minds—a point that should be readily apparent from the fact that three members of the North Carolina Supreme Court dissented from the majority opinion in this case; and that the North Carolina Supreme Court has yet to issue a justiciable manageable test on the subject. The North Carolina general public is similarly divided in this case.

Legislative Defendants—as elected officials who represent the General Assembly itself before the Court—have made attempts to enact new plans that comply with the North Carolina

Supreme Court's opinion. Legislative Defendants respectfully request that this Court honor that choice.

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

/s/ Phillip J. Strach

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