STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 015426, 21 CVS 500085

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, et al.,

Plaintiffs,

COMMON CAUSE,

Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL, et al.

Defendants.

REBECCA HARPER, et al.,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, et al.

Defendants.

MOTION FOR LEAVE TO FILE AMICUS BRIEF OF GOVERNOR ROY COOPER AND ATTORNEY GENERAL JOSH STEIN

Governor Roy Cooper and Attorney General Joshua H. Stein respectfully seek leave under Civil Rule 7(b) to file the attached amicus brief. As shown below, Governor Cooper and Attorney General Stein have weighty interests in these cases, and the Court may benefit from hearing their views.

These cases address issues that are fundamental to our democracy. Our constitution is based on the principle that political power must be "vested in and derived from the people" and that our government must be "founded upon their will only." N.C. Const. art. I, § 2. Protecting

these principles, our Supreme Court has held that partisan gerrymandering violates multiple specific provisions in our constitution and invalidated the districting plans that the General Assembly enacted last year. That holding will have no meaning, however, unless the new plans enacted by the General Assembly remedy the constitutional violations that the Supreme Court identified.

Given the profound importance of the issues in these cases for the governance of our State, the Governor and the Attorney General have strong interests in being heard here.

The Governor is the State's chief executive, and he bears primary responsibility for enforcing our State's laws. N.C. Const. art. III, §§ 1, 5(4). He also plays a key role in the legislative process—proposing legislation and, when appropriate, exercising the veto. *Id.* art. II, § 22; *see id.* art. III, §§ 1, 5(2)-(4). Because gerrymandered districts affect the Governor's authority in each of these respects, he has a strong interest in being heard in these cases.

The Attorney General is our State's chief legal officer, and he is charged with defending our constitution and the rights that it guarantees to the sovereign people. *Martin v. Thornburg*, 320 N.C. 533, 546, 359 S.E.2d 472, 479 (1987); *Tice v. Dep't of Transp.*, 67 N.C. App. 48, 52, 312 S.E.2d 241, 244 (1984). In keeping with this constitutional role, section 1-260 of our General Statutes provides that whenever a statute "is alleged to be unconstitutional, the Attorney General of the State shall . . . be entitled to be heard." N.C. Gen. Stat. § 1-260. Because partisan gerrymandering violates the right of the sovereign people to govern themselves, the Attorney General has a strong interest in being heard in these cases.

Amici's views will assist this Court in at least two important ways. First, because the Governor and the Attorney General are elected to represent all the people of our State, they are well situated to advocate for the interests of all voters. Second, by virtue of their constitutional

roles and experiences in office, both are well versed in the rights that our state constitution protects—and how best to remedy violations of those rights.

As the accompanying amicus brief shows, the Governor and the Attorney General respectfully ask this Court to adopt a remedial districting plan that cures the constitutional violations identified by the Supreme Court, and to ensure that our State has fair and competitive elections that are responsive to the popular will for the rest of this decade.

CONCLUSION

Governor Cooper and Attorney General Stein respectfully request that the Court consider the attached amicus brief.

Respectfully submitted,

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This 21st day of February, 2022.

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AMICUS BRIEF OF GOVERNOR ROY COOPER AND ATTORNEY GENERAL JOSH STEIN

INTRODUCTION

As our Supreme Court has declared, the people of our state have a constitutional right to "substantially equal voting power." *Harper v. Hall*, 2022-NCSC-17, ¶ 7. To vindicate this fundamental constitutional right, the legislature must be "elected from districts that provide one person's vote with substantially the same power as every other person's vote." *Id.* ¶ 4. And it is this Court's "solemn duty" to enforce this right "using the available judicially manageable standards." *Id.* ¶ 6.

The Supreme Court has described a variety of metrics that could be used to measure and cure violations of this right. As described below, and in plaintiffs' submissions as well, the legislature's remedial congressional and Senate plans do not adequately comply with these metrics. They therefore do not remedy the constitutional violations that our Supreme Court identified.

But these metrics should not overshadow the broader constitutional principles that this Court is tasked with applying. For a districting plan to guarantee "substantially equal voting power," the plan must allow voters the equal ability to translate votes into legislative seats. And crucially, to be equal, voting power must be *symmetrical*. A districting plan is constitutional only if supporters of both parties have a substantially equal ability to translate their votes into legislative seats, across a range of electoral scenarios. For this reason, a districting plan would not comply with the constitution if it asymmetrically allowed only a favored party to translate a bare majority of support into a legislative supermajority or, in the case of the congressional plan, a substantial majority of seats. *See id.* ¶ 167 (stating that "the magnitude of the winner's bonus should be approximately the same for both parties") (citation omitted).

Yet the enacted remedial plans do just that. That is, the plans allow a favored party—and only a favored party—to exercise supermajority control in the Senate and obtain a significant majority of congressional seats when they receive a narrow majority of the votes. Conversely, even if the disfavored party receives a significant majority of the votes, it will almost always be prevented from exercising control in the Senate (let alone supermajority control) and also cannot obtain a significant majority of congressional seats. This result violates our constitution's "fundamental principle of democratic and political equality." *Id.* ¶ 130. Put more plainly, plans with this feature do not comply with the Supreme Court's order in this case.

In addition to ordering plans that fully comply with the Supreme Court's order, this Court should also make clear that any remedy it orders spans the full decade. Although a state statute purports to limit the ability of courts to remedy constitutional violations to a single election cycle, that statute violates our state constitution in multiple ways.

Governor Cooper and Attorney General Stein respectfully request that this Court ensure that our state's elections are held under free, fair, and equal districts that fully—and finally—remedy the constitutional violations identified by our Supreme Court.[1]

ARGUMENT

I. Districting Plans That Deny Voters Substantially Equal Voting Power Must Satisfy Strict Scrutiny.

In our Supreme Court's recent decision in this case, the Court held that under the free elections, equal protection, free speech, and assembly clauses, voters have a right to "substantially equal voting power." 2022-NCSC-17, ¶ 179. When districting plans burden that right, they are subject to strict scrutiny and will be upheld only if they are narrowly tailored to advance a compelling government interest. *Id.* ¶ 181.

Specifically, the right to substantially equal voting power is burdened when a districting plan "diminishes or dilutes a voter's opportunity to aggregate with likeminded voters to elect a governing majority." *Id.* ¶ 160. While plans need not guarantee perfect proportional representation, voters only have substantially equal voting power when "there is a significant likelihood that [a] districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across" an entire plan. *Id.* ¶ 163. Plans, in other words, must create "a level playing field for all voters." *Id.* ¶ 164.

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[1] The Attorney General has recused himself from representing the State Board of Elections, its members, or any of the other parties in these cases.

In its decision, the Supreme Court declined to identify "an exhaustive set of metrics" that courts should use to assess whether voters have substantially equal voting power. *Id.* ¶ 163. Nor did it establish "precise mathematical thresholds" that plans must always satisfy. *Id.* Because the plans enacted by the legislative majority in November 2021 manifestly and intentionally denied voters equal voting power, reaching those issues was unnecessary to rule that those plans were unconstitutional. *See id.* ¶¶ 194, 204, 212. The Court left the task of developing more specific guideposts to courts reviewing future plans. *Id.* ¶ 163. The Court nonetheless observed that "there are multiple reliable ways" of testing whether plans deny voters substantially equal voting power, such as "mean-median difference analysis," "efficiency gap analysis," "close-votes, close-seats analysis," and "partisan symmetry analysis." *Id.*

Median-mean difference analysis compares a party's average vote share across all districts statewide with a party's vote share in a plan's median district. *Id.* ¶¶ 55, 166. The vote share in a plan's median district is especially important, because to obtain a majority of seats, a party would almost certainly need to win the median district. When the mean and median diverge—as would occur, for example, when a party receives 51% of the statewide vote but only wins 49% in the median district—disfavored voters lack substantially equal voting power, because they are unable to translate a majority of votes into a majority of seats. Accordingly, the Supreme Court suggested that courts could possibly conclude that any newly enacted plan whose mean-median difference does not approach "zero" presumptively invalid, triggering strict scrutiny. *Id.* ¶ 166.

Efficiency-gap analysis, in turn, measures the extent to which certain of a party's voters are "packed" into a few districts, where their candidates win by large margins, while the party's remaining voters are "cracked" across a greater number of districts, where their candidates lose

by narrow margins. This packing and cracking causes parties to "waste" votes. For example, the *Common Cause* court observed that in a prior districting plan, the General Assembly had ensured that the disfavored party wasted votes in Wilmington's Senate districts, by carving a notch into the city that removed that party's voters "from a highly competitive district . . . where their votes could make a difference" and that instead placed them into a safe district for the other party. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *53 (N.C. Super. Ct. Sept. 3, 2019). Efficiency-gap analysis quantifies the effect of this practice, showing the difference between the parties' wasted votes, divided by the total number of votes cast.

Likewise, the Supreme Court also suggested that a "close-votes, close-seats" analysis could provide guidance to courts. Under that analysis, an "electoral climate with a roughly 50-50 split in partisan preference should produce a roughly 50-50 representational split," so that "a party or group with more than half of the votes should be able to secure more than half of the seats." 2022-NCSC-17, ¶ 50. The Court suggested that under such an analysis, if a plan often allowed only the favored party to obtain a majority of seats in close elections using a simple overlay method, then such a plan could be unconstitutional and should be carefully scrutinized. *Id.* ¶ 165.

The Supreme Court further suggested that "partisan symmetry" is relevant to assessing whether a plan burdens voters' right to substantially equal voting power. *Id.* ¶ 163. In other words, as voting preferences shift and the vote for different parties rises and falls, plans should not asymmetrically make it easier for only one party to obtain a majority or supermajority of seats, but rather treat both parties symmetrically. Thus, like the Court held, "voters are entitled to have substantially the same opportunity to electing a supermajority or majority of

representatives as the voters of the opposing party would be afforded if they comprised [the same] percent of the statewide vote share in that same election." *Id.* ¶ 169.

Ultimately, however, because districting plans can discriminate against voters in different ways and accordingly a "plan's discriminatory effect" can be proven using a variety of methods, the Supreme Court did not adopt any one specific metric to assess future plans. *Id.* Instead, it held that courts should view each districting plan across various dimensions to ensure that there is "a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan." *Id.* ¶ 163.

If a plan does not protect voters' constitutional right to substantially equal voting power, then the plan is subject to strict scrutiny and can survive only if it is narrowly tailored to advance a compelling interest. *Id.* ¶ 181. Compelling interests in this context can include compliance with "neutral districting criteria," such as the rules in our state constitution that prioritize the preservation of county boundaries in drawing legislative districts. *Id.* ¶ 170. To be narrowly tailored to satisfy those criteria, however, plans must be "carefully calibrated" to achieve them. *Id.* ¶ 195. For example, plans are not narrowly tailored if they subordinate "neutral criteria . . . in favor of partisan advantage," as would occur if traditional criteria were applied "selectively." *Id.* ¶¶ 45, 195.

Likewise, if a court is presented with two plans that both satisfy neutral criteria but diverge in how well they allow voters to translate votes into seats, then the plan that performed less well could not survive strict scrutiny. That is because to survive strict scrutiny, the government must choose the least restrictive means of achieving its compelling interests. *See, e.g.*, *State v. Bishop*, 368 N.C. 869, 877, 787 S.E.2d 814, 820 (2016) (applying strict scrutiny to law that burdened expressive rights). Thus, when an alternative plan imposes meaningfully

lesser burdens on the rights of voters than an enacted plan while still complying with neutral redistricting criteria, the enacted plan would fail narrow tailoring. To survive strict scrutiny, then, any "meaningful partisan skew" in a plan must "necessarily result[ ]" from the application of neutral districting criteria to "North Carolina's unique political geography," not from a mapdrawer's decisions. 2022-NCSC-17, ¶ 163.

So, in sum, if districting plans deny voters substantially equal voting power, then plans must face strict scrutiny. And they can only survive that scrutiny if they are narrowly tailored to achieve a compelling interest.

II. This Court Should Not Adopt the Remedial Senate and Congressional Plans Enacted by the General Assembly.

Last week, the General Assembly enacted new districting plans to replace the plans that the Supreme Court held unconstitutional. For state House districts, the majority and minority parties came to an agreement on a remedial plan, which was enacted with bipartisan support. *See* Act of Feb. 17, 2022, S.L. 2022-4. For state Senate and congressional districts, however, remedial plans were enacted without any support from the disfavored party. *See* Act of Feb. 17, 2022, S.L. 2022-3; Act of Feb. 17, 2022, S.L. 2022-2.

This Court should not adopt the remedial Senate and congressional plans enacted by the General Assembly. To try to show that the enacted remedial plans satisfy the metrics identified by the Supreme Court, the Legislative Defendants performed an analysis of those plans. But their analysis fails to show that the enacted remedial plans provide North Carolina's voters with substantially equal voting power.

The Supreme Court, for instance, directed courts to consider "partisan symmetry" to assess whether plans allow voters to exercise substantially equal voting power. 2022-NCSC-17, ¶ 163. The Legislative Defendants assert that their expert, Dr. Michael Barber, performed an

analysis that shows that their remedial plans will afford symmetrical voting power to voters. *See* Leg. Def. Mem. at 28-29. In his report, Dr. Barber recognizes that measuring symmetry requires assessing whether a districting plan provides voters with symmetrical voting power "across a range" of different electoral circumstances. *See* Barber Report at 17. In his report, however, he fails to analyze quantitatively how the remedial plans enacted by the General Assembly perform across a range of outcomes. He instead only examines how the remedial maps perform in one electoral outcome: an especially close election. *Id.* at 17-19, 37-38. Dr. Barber thus did not analyze the remedial maps' performance in elections that favor one party over the other. In other words, Dr. Barber failed to examine whether the enacted remedial plans grant one party's voters asymmetrical power to elect a legislative supermajority.

It appears that Dr. Barber did not perform this analysis because such an analysis reveals that the enacted remedial plans deny voters substantially equal voting power. With respect to the enacted remedial Senate plan, for example, Dr. Barber acknowledges that in an election where the current majority party in the General Assembly receives a slight majority of votes, the plan would likely allow the party to win 28 seats, or 56% of the seats. *Id.* at 31. Dr. Barber notably makes no finding, however, that if the current minority party received a similar slight majority of votes, that it too would receive 56% of Senate seats.

He does not make that finding because it appears he cannot do so: The *NCLCV* plaintiffs report that, when the current minority party wins a slight majority of votes, the enacted remedial plans *do not* grant them 56% of the seats in the Senate. Rather, that party is normally limited to winning no more than 50% of Senate seats, even when it wins elections statewide by margins as large as 6%. *See* NCLCV Comments at 12-13; Second Duchin Affidavit at 5. Thus, Dr. Barber has failed to confirm, as the Supreme Court expressly directed, that the enacted remedial plans

grant voters "substantially the same opportunity to elect[ ] a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised [the same] percent of the statewide vote share in that same election." 2022-NCSC-17, ¶ 169.

The Supreme Court also indicated that a "close votes, close seats" analysis should guide assessments of whether districting plans provide voters with equal voting power. 2022-NCSC-17, ¶ 163. The Legislative Defendants assert that Dr. Barber performed a "close votes, close seats" analysis, which supposedly confirms that a party that wins a majority of votes will also win a majority of seats. *See* Leg. Def. Mem. at 6 n.6, 28 n.14. But once again, Dr. Barber's analysis inadvertently reveals the antimajoritarian nature of the enacted remedial plans, which are deeply skewed to favor the current majority party in the General Assembly. For both the Senate and congressional plans, Dr. Barber's analysis reveals that the plans *always* allow the favored party to translate a majority of votes into a majority of seats (never with any ties), while the disfavored party can translate a majority of votes into a majority of seats in only *half* of the four elections that Dr. Barber considered. *See* Barber Report at 16, 36.

Dr. Barber's analysis, moreover, is confirmed by the more comprehensive analysis prepared by the *NCLCV* plaintiffs, whose expert assessed how the plans performed using data from a larger number of past elections. In the twelve elections that Dr. Duchin considered where the disfavored party won a majority of the statewide votes for the Senate with less than 53% of the vote, that party obtained a majority of seats in the Senate only twice. *See* Second Duchin Affidavit at 5. In contrast, in the twenty-five elections that she considered where the favored party won by a similar margin, it *always* received a majority of the seats. *See id.* The enacted remedial plans therefore reliably allow only the favored party to translate a majority of their votes into a majority of seats.

Notwithstanding those defects in the remedial plans and the analysis that supports them, the Legislative Defendants try to defend their plans by asserting that they purportedly perform well under two metrics endorsed by the Supreme Court: the efficiency-gap and median-mean difference measures. *See* Leg. Mem. at 6, 23-24, 27.

It appears, however, that Dr. Barber may have materially erred in the manner that he calculated these figures. While he claims that the congressional plan has an efficiency gap of 5.29% and a median-mean score of 0.61%, the *NCLCV* plaintiffs report that the congressional plan fares much worse on those metrics. Specifically, the NCLCV plaintiffs report a much higher efficiency gap of 9.3% and median-mean score of 1.5%. *See* Barber Report at 11, 12; NCLCV Comments at 9. Dr. Barber's calculations for the Senate plans, moreover, appear to be equally flawed. He claims that the Senate plan has an efficiency gap of 3.97% and a median-mean score of 0.65%, but the NCLCV plaintiffs report those scores as respectively 4.5% and 2.0%. *See* Barber Report at 34; NCLCV Comments at 14. Notably, these corrected figures confirm that the enacted remedial plans have median-mean scores higher than 1%, which the Supreme Court observed in its decision was "the average mean-median difference in North Carolina's congressional redistricting plans" between 1972 and 2016. 2022-NCSC-17, ¶ 166.[2]

In any event, to the extent that the Legislative Defendants ask this Court to approve their remedial plans based on those two metrics alone, they invite legal error. Our Supreme Court did not hold that plans are valid if they satisfy only selective "precise mathematical thresholds." 2022-NCSC-17, ¶ 163. It stressed instead that plans should be assessed holistically, using a

[2] The enacted remedial plans' poor performance on these metrics is the result of specific decisions that the majority party made when it created these plans. It decided, for example, to recreate a new version of the Wilmington notch, described above, which the *Common Cause* court held was a gerrymander that wasted votes for the disfavored party in New Hanover County. *See Common Cause*, 2019 WL 4569584, at *53.

variety of different metrics, to ensure "a significant likelihood" that plans "will give the voters of all political parties substantially equal opportunity to translate votes into seats." *Id*. And here, as shown above, the enacted remedial plans do not ensure that voters have symmetrical voting power or can reliably translate a majority of votes into a majority of seats.[3]

Accordingly, the submissions before the Court show that the remedial congressional and Senate plans enacted by the General Assembly deny voters substantially equal voting power and must satisfy strict scrutiny. The Legislative Defendants therefore must show that their remedial plans are narrowly tailored to advance a compelling interest. *Id.* ¶ 181. They cannot do so, because plaintiffs' remedial plans comply with neutral districting criteria but impose a much smaller burden on voters' rights than the enacted remedial plans.

In their submission, the Legislative Defendants claim that certain of their districting decisions with respect to their remedial Senate plan were made to achieve a neutral districting criterion: creating compact districts. *See* Leg. Mem. at 20-22. The Legislative Defendants, however, have inadvertently revealed that their districting decisions were not really driven by a desire to create compact districts. They have done so because they have applied that criterion "selectively" when creating compact districts would serve their interests. 2022-NCSC-17, ¶ 45. For instance, the remedial congressional plan that the minority party in the General Assembly proposed created districts that were far more compact than the remedial plan enacted by the

[3] The Legislative Defendants also defend their decision not to enact a remedial Senate plan that grants voters equal voting power because doing so would purportedly create districts that would be "outliers." Leg. Def. Mem. at 23. In asking this Court to accept that argument, the Legislative Defendants again invite legal error. Like the *NCLCV* plaintiffs show, the constitutionality of a districting plan under our constitution depends on whether the plan allows voters to translate votes into seats, not on whether the plan falls near the middle of a distribution of randomly created plans. *See* NCLCV Mem. at 15-16.

majority party.[4] The majority party nonetheless rejected that plan. Thus, just as with the plans that the Supreme Court has already invalidated, the enacted remedial plans "subordinate[ ] . . . neutral priorities . . . in favor of partisan advantage." *Id.* ¶ 205.

Regardless, the Legislative Defendants *still* could not show that their remedial maps are narrowly tailored. As noted above, if multiple plans satisfy neutral criteria but diverge in how well they allow voters to translate votes into seats, then the plan that performs less well cannot survive strict scrutiny. Here, plaintiffs' remedial plans not only better allow voters to translate votes into seats, those plans *also* comply with neutral districting criteria. *See, e.g.*, Harper Mem. at 3, 8; NCLCV Mem. at 4-5. Indeed, this Court has already made a finding, which the Supreme Court affirmed, that the *Harper* plaintiffs' remedial Senate plan, which is based on one of the plans from Dr. Mattingly's ensembles, satisfies neutral districting criteria. *See* 2022-NCSC-17, ¶ 182; Final Judgment at 52.

Thus, the Legislative Defendants have not shown that their remedial congressional and Senate plans provide voters with substantially equal voting power. Nor can they show that those plans are narrowly tailored to achieve a compelling interest. This Court therefore should not approve the enacted remedial Senate and congressional plans.

III. This Court Should Clarify That Section 120-2.4(a1) Does Not Limit the Duration of Any New Remedial Plans.

Finally, if this Court adopts new remedial plans, it should clarify that the duration of those remedial plans is not limited by section 120-2.4(a1) of the General Statutes. That provision purports to limit the authority of courts to remedy constitutional violations: It states

[4] *Compare* Harper Mem., Ex. C, *with* Act of Feb. 17, 2022, S.L. 2022-3, Compactness Report, https://www.ncleg.gov/Files/GIS/Plans_Main/Congress_2022/SL%202022-3%20Congress%20-%20Compactness%20Report.pdf.

that if "the General Assembly does not act to remedy any identified defects [in an invalidated plan], the court may impose an interim districting plan *for use in the next general election only*." N.C. Gen. Stat. § 120-2.4(a1) (emphasis added).

The General Assembly, however, lacks authority to place limits on how courts may remedy constitutional violations. The Supreme Court has long recognized that policies "recognized by the General Assembly" cannot limit the scope of courts' authority to fashion remedies to constitutional violations. *Corum v. Univ. of North Carolina*, 330 N.C. 761, 785-86, 413 S.E.2d 276, 291 (1992). For that reason, the power of this Court to remedy constitutional violations is not "susceptible of impairment by legislation" like section 120-2.4(a1). *Midgett v. N.C. State Highway Comm'n*, 260 N.C. 241, 250, 132 S.E.2d 599, 608 (1963), *rev'd on other grounds, Lea Co. v. N.C. Bd. of Transp.*, 308 N.C. 603, 304 S.E.2d 164 (1983).[5]

This principle derives from the judicial article of our state constitution, which expressly provides that the "General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government." N.C. Const. art. IV, § 1. Citing this clause, our State's courts have held repeatedly that those judicial powers that are essential to "the orderly and efficient exercise of the administration of justice," such as the power to remedy constitutional violations, "may not be abridged by the legislature." *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987); *see also E. Brooks Wilkins Family Med., P.A. v. WakeMed*, 244 N.C. App. 567, 573, 784

[5] *See also Craig ex rel. Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 340-41, 678 S.E.2d 351, 356 (2009) (reaffirming that legislative policy cannot "operate[ ] to bar the redress of the violation of . . . constitutional rights"); *Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 617, 89 S.E.2d 290, 295 (1955) (also stressing that judicial power to remedy violations of constitutional rights is not "susceptible of impairment by legislation").

S.E.2d 178, 182 (2016) (holding that statutes that purport to restrict the inherent authority of courts "violate our state constitution").

Allowing the General Assembly to limit the power of courts to remedy constitutional violations in these circumstances would be especially inappropriate. That is so because giving effect to section 120-2.4(a1) would itself violate our state constitution. Sections 3 and 5 of article II provide that "[w]hen established," the districts from which members of the General Assembly are elected "shall remain unaltered until the return of another decennial census of population taken by order of Congress." N.C. Const. art. II, §§ 3(4), 5(4). Here, once the constitutional violations in the enacted districts are remedied, the redistricting process will be over and districts will be established for the coming decade. This Court would therefore violate our constitution if it limited the duration of any remedy that it adopts in these cases and thereby allow the General Assembly to engage in unconstitutional mid-decade redistricting.

Indeed, the Supreme Court has already held that the remedies adopted in redistricting cases like this one cannot violate other provisions of our constitution. In *Stephenson v. Barlett*, for example, the Court rejected the request by the plaintiffs in that case to impose a remedial plan that would have elected legislators from a combination of single-member and multiple-member districts, because that remedy would have violated our constitution's guarantee of equal protection. *See* 355 N.C. 354, 376, 562 S.E.2d 377, 392 (2002); *cf. In re Burton*, 257 N.C. 534, 543-44, 126 S.E.2d 581, 588 (1962) (holding that courts cannot exercise their inherent power in ways that violate constitutional rights). Here, too, adopting a remedy that expired after a single election and allowed for mid-decade redistricting would equally offend our constitution.

Providing a remedy that expired after one election would virtually also assure that the coming decade mirrors the last. Last decade, the legal challenges to the legislative districts

drawn in 2011 were not fully resolved until 2019, more than eight years after the General Assembly first enacted plans following the 2010 decennial census. *See Common Cause*, 2019 WL 4569584. Given that the General Assembly has now enacted unconstitutional plans during this cycle not only once, but twice, there is reason to believe that if this Court's remedy expired after this fall's election, North Carolina would spend yet another decade litigating and re-litigating the validity of new districts that were drawn and repeatedly redrawn mid-decade. That outcome is precisely what the constitutional ban on mid-decade districting is intended to prevent. *See* N.C. Const. art. II, §§ 3(4), 5(4). This Court should therefore clarify that any remedial plans that it establishes will not, pursuant to section 120-2.4(a1), automatically lapse after this fall's general election.

CONCLUSION

Governor Cooper and Attorney General Stein respectfully submit that this Court should not approve the remedial Senate and congressional plans enacted by the General Assembly and should clarify that the duration of any remedial plans that this Court adopts are not limited by section 120-2.4(a1) of the General Statutes.

Respectfully submitted,

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