No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC., et al., Plaintiffs-Appellants, REBECCA HARPER, et al., Plaintiffs-Appellants, and COMMON CAUSE, Plaintiff-Intervenor-Appellant, v. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al., Defendants-Appellees.	)	From Wake County 21 CVS 015426 21 CVS 500085

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LEGISLATIVE DEFENDANTS-APPELLEES' BRIEF

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INDEX

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

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INTRODUCTION

The central question in this appeal is whether the General Assembly retains even a scintilla of discretion in redistricting or whether the judiciary has become North Carolina's redistricting authority. To ask the question is to answer it. The North Carolina Constitution vests the General Assembly with redistricting authority; that body enacted new redistricting statutes, Session Laws 2022-2 and 2022-4, respectively (the "State Remedial Plans") in response to this Court's fashioning a new "partisan gerrymandering" limit on its authority; and the General Assembly is not alleged to have purposefully discriminated against the Democratic party in the State Remedial Plans. The State Remedial Plans satisfy the letter and spirit of this Court's ruling, as the partisan-fairness measurements endorsed by that ruling and adopted by the General Assembly prove.

Plaintiffs-Appellants suggest a constitutional system in which courts are free to draw districts based upon personal preference as defined by a simple majority of any particular set of judges (including of a single political party). This Court should not open that Pandora's box. The superior court's finding that the State Remedial Plans comply with this Court's prior orders is sound and supported by substantial and competent evidence. Its judgment concerning the State Remedial Plans should be affirmed.

STATEMENT OF THE FACTS

On 4 February 2022, this Court enjoined the use of Session Laws 2021-175 (original state House plan), 2021-173 (original state Senate plan), and 2021-4

(original Congressional plan) after an expedited appeal on the merits. (R pp 3819–20). The 4 February 2022 Order and subsequent opinion, for the first time, interpreted longstanding provisions of the North Carolina Constitution as limiting the General Assembly's reapportionment powers. Central to the Court's holding was the factual finding of the superior court that each of these maps was "the product of intentional, pro-Republican partisan redistricting."[1] *Harper v. Hall*, 2022-NCSC-17, ¶ 184; *see also id.* at ¶¶ 27, 37, 39, 63, 64, 68, 69, 193, 197, 201, 203, 211. The Court fashioned new limits on "partisan gerrymandering, through which the ruling party in the legislature manipulates the composition of the electorate to ensure that members of its party retain control." *Id.* at ¶ 141. It held this form of gerrymandering violates the Free Elections Clause, N.C. Const. art. 1, § 2, because gerrymandering "denies to certain voters…substantially equal voting power…on the basis of voters' partisan affiliation," *Harper*, 2022-NCSC-17, ¶ 140; the Equal Protection Clause, N.C. Const. art. 1, § 19, because gerrymandering "[c]lassif[ies] voters on the basis of partisan affiliation so as to dilute their votes," *Harper*, 2022-NCSC-17, ¶ 150; and the Free Speech and Free Assembly Clauses, N.C. Const. art. 1, §§ 12, 14, because, by engaging in gerrymandering, the legislature "intentionally engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny," *Harper*, 2022-NCSC-17, ¶ 157.

[1] Legislative Defendants have never agreed with this conclusion and still do not. They assume its validity here for the sake of argument only.

The 4 February 2022 Order remanded this case to the superior court to "oversee the redrawing of the plans by the General Assembly or, if necessary, by the court." (R pp 3816–36). The 4 February Order and a subsequent order mandating judgment set forth the following schedule for the remedial process:

- 18 February 2022 at 5:00 p.m.: Deadline for the General Assembly and other parties to submit proposed remedial plans to the superior court;
- 21 February 2022 at 5:00 p.m.: Deadline for the parties to submit comments on any remedial plans to the superior court;
- 23 February 2022 at 12:00 p.m.: Deadline for the superior court to "approve or adopt compliant congressional and state legislative districting plans;"
- 23 February 2022 at 5:00 p.m.: Deadline for the parties to file emergency stays pending appeal with the Supreme Court; and
- 24 February 2022: Mandate of the Court for the clerk to enter judgment in this matter.

(R pp 3820–23; 4170–75 (15 February 2022 order mandating judgment)).[2] Notwithstanding its directives requiring new plans, the Court declined to provide specific instructions on its new "partisan fairness" standard. Instead, the Court provided a list of metrics that "may be useful" to either the General Assembly or the superior court to assess the partisan fairness of any proposed remedial plans. (R pp 3821–22). In fact, in its supplemental 14 February 2022 Order, this Court specifically

[2] The Court entered two separate remedial orders. The first was entered on 4 February 2022 due to time constraints within the 2022 election schedule (hereinafter the "4 February Order"). (R pp 3816–35). The second, more-detailed order was entered on 14 February 2022 (hereinafter the "14 February Order"). *Harper v. Hall*, 2022-NCSC-17. The 14 February Order was filed four days prior to the submission deadline set forth in the 4 February Order. Collectively, the 4 February and 14 February Orders are referred to as the "Remedial Orders."

held that it did not "believe it prudent or necessary" to identify a particular standard to "conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Harper v. Hall*, 2022-NCSC-17, ¶ 163.

On remand, the superior court entered an order on 8 February 2022 stating that it would employ "a Special Master." (R pp 3837–38). It requested that the parties submit their proposed Special Masters by 5:00 p.m. the next day. (*Id.*). Pursuant to this Court's Order and expedited timeline, the superior court required the parties submit additional information concerning any proposed remedial plan on 18 February 2022. (*Id.*). This included requirements that the parties provide data sets and files relevant for the Special Master's assessment of the proposed remedial plans, written submissions explaining the map drawing participants, elections used to assess the remedial plan, the base map used, the results of the partisan metrics used, and any other considerations behind any proposed remedial plans. (R pp 3839–40).

This Court's *Harper* opinion provided that "the General Assembly shall now have the opportunity to submit new congressional and state legislative districting plans that satisfy all provisions of the North Carolina Constitution," and the Court expressed "the sincere hope" that the General Assembly would succeed in doing so. *Harper*, 2022-NCSC-17, at ¶ 223.

The General Assembly made good use of that opportunity. At the outset of the remedial process, the General Assembly determined it was necessary to assess the partisanship of plans it may consider or enact in order to comply with this Court's Orders. (*See* 9d R p 14761:9–11). Because the General Assembly used no partisan or

election data to enact the original plans, it first had to load election data into its map-drawing system. (9d R pp 11640–41 (Affidavit of Raleigh Myers), 15415–18 (Affidavit of R. Erika Churchill)). The General Assembly chose to create a database for the twelve elections originally used by the *Harper* Plaintiffs' expert, Dr. Mattingly.[3] (*Id.*; *see also* 9d R p 11752:17–:23). The twelve elections include: 2016 Presidential; 2016 Lieutenant Governor; 2020 Presidential; 2020 U.S. Senate; 2020 Governor; 2020 Lieutenant Governor; 2020 Attorney General; 2020 Auditor; 2020 Commissioner of Agriculture; 2020 Commissioner of Labor; 2020 Secretary of State; and 2020 Treasurer. (*Id.*). Both chambers chose to use this set, which they called the "Mattingly 12," because they represented recent statewide races that the superior court relied on for its 11 January 2022 findings of fact, which this Court later adopted. (R p 3595 at ¶ 239; 3819 (Supreme Court adopting the superior court's findings of fact); 9d R p 14688:1–16 (Senate Committee testimony); 9d R pp 14752:17–23, 14757:5–14). Additionally, the General Assembly chose to use the Efficiency Gap and Mean-Median metrics to analyze the partisanship of any remedial plans because those "formulas are not proprietary or unique to a single expert witness but are replicable." (9d R p 14941:7–20).

In drawing the remedial plans, both chambers complied with the Joint Criteria passed by the House and Senate Redistricting Committees on 12 August 2021, except in the event of conflict with the North Carolina Supreme Court's Remedial Orders (R

[3] Dr. Mattingly's report in the merits phase of this litigation contained two election composites. One of these composites, containing 12 elections, was used throughout the vast majority of his report. (*See e.g.* R pp 2592–2628; 2661–67).

pp 823–24 (Joint Criteria); *see* 9d R p 14672:4–:14), in which case the Criteria would yield to this Court's Orders (9d R p 14678:4–:8). Additionally, both remedial plans were constrained by the Whole County Provision of the North Carolina Constitution. *See Stephenson v. Bartlett*, 355 N.C. 354, 362–72, 383–84, 562 S.E.2d 377, 384–90, 396–98 (2002). For the 2020 Census, the *Stephenson* county-groupings mandate ten single-district groups in the state Senate and eleven single-district groups in the state House.[4] (R pp 2569–70; 9d R p 744–58).

Senate Remedial Proceedings

Senators Berger, Blue, and their respective staffs met on February 8 and 9 to explore approaches for a collaborative remedial map-drawing effort. (See 9d R 14670:10–19). Senator Blue, leader of the Democratic caucus, initially agreed to work with Republican leadership in an effort to draw a compromise remedial plan. (9d R pp 14671:24–14672:1). Senators Berger and Blue also agreed that it was necessary to use political data in map-drawing to comply with this Court's Orders and that it would not be feasible to draw in a public committee setting because of the time constraints. Senator Berger and Senator Blue then released a joint statement committing to work together. (9d R pp 14949:8–12, 14969:18–23).

During their preliminary meetings, 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

[4] Two of these single-district groups in the Senate and one of the single-district groups in the House are contained within a single county, while the remaining single district groups consist of multiple counties. (*See* R pp 2569–70).

terminal and redraw the Senate plan together. (*See* R p 4252). The Senate Democrats rejected this offer and decided to draw their own districts. Even then, Senate Republican leadership continued to offer Senate Democrats the opportunity to join Republican Committee members to draw district by district, or county-group by county-group. (*See* 9d R pp 14942:14–14943:3). Despite expressing a willingness to negotiate changes to the map, the Democratic caucus persistently refused to work with Republican leaders at a joint terminal. (*See id.*). In fact, after eight days of negotiations, Democrats insisted they would only support their own map, drawn by Democrats off-site.[5] (9d R p 14969:17–:20).

The Senate Remedial Plan, S.B. 744, was first discussed in the Senate Redistricting Committee on 16 February 2020.[6] Senator Newton testified that S.B. 744 made significant changes to the previously enacted Senate plan. (*See* 9d R p 14686:4–14). Of note, the plan changed the county groupings in the Northeastern part of the state (Senate Districts 1 and 2) to address objections raised by Plaintiff-

[5] To date, Legislative Defendants-Appellees still have no knowledge of where the Democratic proposed remedial Senate map was prepared, or who participated in the map-drawing process. Only when Republican Committee Chairs agreed to exchange draft plans did Democratic leadership provide a flash drive of their proposed map to be loaded onto the public terminal. (*See* R p 4209–:10).

[6] Even after Senate Republicans introduced S.B. 744, Senator Berger called Senator Blue and made one last attempt to reach a compromise, offering the Democratic Caucus the opportunity to draw all of the districts contained in Mecklenburg County, all of the districts in the Wake-Granville County grouping, as well other changes. Even after Senator Blue rejected that offer, the Republican Chairs of the committee emailed Senator Blue putting Senator Berger's offer back on the table. That offer was again rebuffed, with the Senate Democrats insisting that they would only support their off-site map.

Intervenor Common Cause.[7] (9d R p 1469:5–20). Senator Newton further explained that S.B. 744 was significantly more competitive than the original enacted map, with ten competitive districts within +/-5 points and eight within +/-3 in the 2020 presidential race. (9d R pp 14686:20–14687:3). Additionally, Governor Cooper would have won twenty-three districts under the previously enacted map compared to twenty-five districts under S.B. 744. (9d R p 14678:8–:11).[8]

Senator Newton also testified that S.B. 744 matched or improved upon traditional redistricting criteria as compared to the original enacted plan, including *inter alia*:

- Reducing split VTDs statewide from nineteen to three, with all three splits occurring in Wake County due to population deviations in the Wake-Granville county grouping;
- Avoiding incumbent pairings, other than those who were paired together due to the *Stephenson* county groupings criteria, or incumbents who announced retirement or were running for another office;
- Maintaining whole municipalities, except when splits were necessary to prioritize competitiveness, compactness, and keeping precincts whole or to achieve districts of substantially equal population.

[7] While Legislative Defendants-Appellants maintain that the previous choice of county groups for this region was legal, these groupings were adopted in the spirit of compromise and to create a more Democratic-leaning county grouping.

[8] Another example of the remedial Senate plan's competitiveness is in the Guilford-Rockingham county grouping. As one political observer noted, SD-26 under the remedial map, home to the President Pro Tempore, Senator Berger, shifted from a historically safe Republican seat to a "substantially competitive" district. (R pp 4358–60). The same observer went so far as to say that Senator Berger is a "political loser" under the Remedial Senate Plan compared to other members who came out with more favorable districts. (*Id.*).

(9d R pp 14689:8–14690:20; *see* R pp 823–24). Ultimately, S.B. 744 passed the Senate Redistricting Committee on 16 February 2022 and went to the Senate floor. (9d R pp 14721:20–14722:24).

On 17 February 2022, Democrats offered several amendments just moments before the full Senate was scheduled to debate and vote on S.B. 744. (9d R pp 14953:21–14988:20). Each was tabled. (*Id.*). Ultimately, S.B. 744 passed the Senate and House on 17 February 2022, and was enacted as Session Law 2022-2. Maptitude reports provided by non-partisan staff showed that the Remedial Senate Plan has an Efficiency Gap score of -3.98%, and a Mean-Median of -.63%. (9d R pp 15420, 15424).

House Remedial Process

Shortly after the 4 February Order, Speaker Moore reached out to Minority Leader Reives and began a bipartisan dialogue about how to comply with the Court's Orders. (9d R p 14752:1–:10). This bipartisan dialogue continued throughout the entire House remedial process, and was praised by Minority Leader Reives on the House Floor when he urged passage of H.B. 980 on 16 February 2022. (9d R p 14752:10–:16; 9d R p 14880:17–14881:12).

On 16 February 2022, Representative Hall proposed H.B. 980 in the House Redistricting Committee. (9d R pp 14850:13–14851:15). Representative Hall testified that while the plan was re-drawn on a statewide level, the most significant changes were made to comply with the North Carolina Supreme Court's Order in Buncombe, Pitt, Guilford, Cumberland, Mecklenburg, New Hanover, Cabarrus, Robeson, and Wake Counties. (9d R pp 14755:6–14757:4). Representative Hall further testified that

H.B. 980 was significantly more competitive than the previously enacted map. Specifically, former President Trump would have won seventy districts under the originally enacted map, compared to sixty-two districts under H.B. 980. (9d R p 14753:4–:9). Governor Cooper would have won fifty-eight House districts under the previously enacted plan, but sixty-three under H.B. 980. (9d R pp 14752:25–14753:8).

Representative Hall also testified that H.B. 980 met or improved upon certain redistricting criteria from the original enacted House plan, including *inter alia*:

- Reduced split municipalities from 81 to only 49 splits in municipalities involving population;
- Improved the compactness of the plan overall as shown by Reock and Polsby-Poper scores;
- Kept other communities of interest whole, like ECU and Hope Mills.

(9d R p 14754:8–:15; 9d R p 14756:11; *see* R pp 823–24). Several bipartisan compromises were adopted into H.B. 980 at the Committee level built on previous discussions and negotiations between House Minority Leader Reives, and House Republican Leadership. (9d R pp 14851:16–14862:16). These compromises cumulated in four amendments offered on the House floor that altered the already Democratic leaning districts in Wake, Mecklenburg, and Buncombe Counties to be more Democratic leaning, and the adoption of an additional Democratic-leaning district in Cabarrus County. (*Id.*). Both Minority Leader Reives and Representative Hall spoke in favor of the four amendments. (*See, e.g.*, 9d R pp 14851:24–14852:12; 9d R pp 14857:24–14858:13). Each amendment offered by Minority Leader Reives was overwhelmingly adopted with nearly unanimous bipartisan support. (9d R. pp

14851:16–14862:16). These amendments effectively another district that was won by Democrats in the composite score. They also shifted the plan from 62 Trump-won seats to 61 Trump-won seats, and 62 Cooper-won seats to 63. (9d R pp 14752:25–14753:9). Ultimately, H.B. 980 passed the House Redistricting Committee on 16 February 2022 and went to the House floor. (9d R pp 14797–98).

On the House floor, two additional amendments proposed by Democrats were passed with near unanimous support.[9] (9d R pp 14862:17–14868:16). Representative Harrison offered one amendment that switched Wayne County's grouping and double-bunked Republican incumbents. (9d R pp 14869:15–14872:19). Chairman Hall testified that Representative Harrison's amendment, which sought to implement Common Cause's Remedial SD 4, was not part of the bipartisan compromise and "would actually make [the] entire map illegal." (9d R p 14873:2–9). Representative Harrison's amendment was voted down in a bipartisan vote. (9d R pp 14874:12–14875:23). Minority Leader Reives emphasized that the vote on Representative Harrison's amendment was purely a legal disagreement, not a partisan one. (9d R pp 14881:23–14882:10).

On 16 February 2022, H.B. 980 passed the House with overwhelming bipartisan support by a vote of 115-5, and was enacted as Session Law 2022-4. (9d R p 14884:7–:18). Maptitude Reports provided by non-partisan staff showed that the

[9] Representative Meyer asked that two precincts in Orange County be swapped because he said it would keep Carrboro whole (although it was later revealed that it would not, in fact, do that). Representative Hawkins asked for some adjustments to Durham County to better follow educational district lines. (9d R pp 14862:17–14868:16).

Remedial House plan has an Efficiency Gap score of -.84% and a Mean-Median of -.71%. (9d R pp 154340, 15434). Both of these measures fall within the Supreme Court's acceptable range for each of these partisan metrics.

Special Masters' Work

On 16 February 2022, the superior court appointed three retired jurists as its Special Masters—the Honorables Robert Orr, Robert Edmunds, and Thomas Ross. (R pp 4176–79). The superior court authorized the Special Masters to "hire research and technical assistants and advisors reasonably necessary to facilitate their work[.]" (R p 4181). Pursuant to this directive, the Special Masters hired Dr. Bernard Grofman, Dr. Tyler Jarvis, Dr. Eric McGhee, and Dr. Samuel Wang as assistants (hereinafter the "SMAs"). (R pp 4870–71).

The Special Masters were instructed to file with the Court a report that would "provide the Special Masters' analysis of the General Assembly's Proposed Remedial Plans and the compliance of those plans with the Supreme Court's Order and full opinion." (R p 4181). Given the time constraints, the superior court noted that it would receive no objections or exceptions to the report of the Special Masters before it made its own determination. (*See* R p 4182).

On 18 February 2022, Plaintiffs and the Legislative Defendants served their written submissions and filed proposed plans, including the remedial plans passed by the General Assembly. The Legislative Defendants' submission included all three remedial plans, statistics, and data the General Assembly used in preparing the plans. (R pp 4185–4374). Legislative Defendants also included a report from Dr.

Michael Barber (R pp 4375-4423) and a report from Dr. Jeffrey B. Lewis, (R pp 4424-44). The *Harper* Plaintiffs submitted their plans for the North Carolina Senate and Congress. (R pp 4445–74). *NCLCV* Plaintiffs submitted their plans for the North Carolina Senate and House and their plan for Congress. (R pp 4475–4553). The *NCLCV* Plaintiffs' submissions also included an affidavit from Dr. Moon Duchin. (R pp 4553–74). Plaintiff-Intervenor Common Cause also submitted its remedial plans for redrawing one remedial district in the state House plan and one remedial district in the state Senate plan. (R pp 4575–94). Common Cause also included an affidavit of Christopher D. Ketchie. (R pp 4595–4607).

On 21 February 2022, the parties filed responses and objections to the other side's proposed plans. (R pp 4618–57). The same day, Legislative Defendants also filed a motion to disqualify Dr. Sam Wang and Dr. Tyler Jarvis based on their ex *parte* communications with Plaintiffs' experts. (R pp 4655-77).

On 23 February 2022, the superior court entered an order on the remedial plans, holding that the Senate and House plans met the requirements of the state Constitution. (R pp 4866–89). In contrast, the superior court held that the General Assembly's remedial congressional plan failed to satisfy the constitutional requirements established by this Court and adopted its own remedial congressional plan. (R pp 4866–89). Attached to the superior court's order were the recommendations of the Special Masters and reports the SMA's provided to the Special Masters. (R pp 4890–95).

On 25 February 2022, all of the parties appealed different aspects of the superior court's 23 February Order. Legislative Defendants appealed the superior court's order denying disqualification of Drs. Wang and Jarvis. (R pp 5143–44). As to the remedial plans, Legislative Defendants appealed the rejection of the General Assembly's remedial congressional plan and the Court's decision to order the implementation of its own remedial plan for the 2022 general election.[10] (*Id.*). The *Harper* and *NCLCV* Plaintiffs appealed the superior court's approval of the Remedial Senate Plan. (R pp 5147–48, 5152). Plaintiff Common Cause appealed the superior court's approval of the Remedial Senate and House Plans. (R pp 5156–57).

STANDARDS OF REVIEW

In bench proceedings, "the superior court's findings of fact have the force and effect of a jury verdict and are conclusive on appeal if there is competent evidence to support them, even though the evidence could be viewed as supporting a different finding." *Stephenson v. Bartlett*, 337 N.C. 301, 309, 582 S.E.2d 247, 252 (2003) (internal citation omitted); *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) ("Even if 'evidence is conflicting,' the trial judge is in the best position to 'resolve the conflict.'" (internal quotation omitted)). "Once it has been determined that the findings of fact are supported by the evidence, we must then determine whether those findings of fact support the conclusions of law." *Id.* (internal citation omitted).

[10] Subsequently, on 13 July 2022, Legislative Defendants moved to dismiss their appeal of the superior court's order related to the interim Congressional districts and the requested disqualification of Drs. Wang and Jarvis.

Conclusions of law and constitutional questions are reviewed de novo. *State v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016); *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011); s*ee also Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004) ("Conclusions of law drawn by the superior court from its findings of fact are reviewable de novo on appeal.").

The superior court's discretionary rulings are reviewed for an abuse of discretion. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) ("It is well established that where matters are left to the discretion of the superior court, appellate review is limited to a determination of whether there was a clear abuse of discretion."). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Importantly, items not raised at the lower court are waived. N.C. R. App. P. 10(a); *see Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001) ("[I]ssues and theories of a case not raised below will not be considered on appeal.").

SUMMARY OF ARGUMENT

All three sets of Plaintiffs-Appellants challenge the remedial Senate plan, Session Law 2022-2 (hereinafter the "Remedial Senate Plan") approved by the superior court. Only the Common Cause Plaintiff-Appellant challenges the superior court's ruling adopting the remedial House plan, Session Law 2022-4 (hereinafter the

"Remedial House Plan").[11] Their appeals lack merit. No set of Appellants meaningfully argues that the General Assembly "intentionally engage[d] in…discrimination" on a partisan basis in crafting the State Remedial Plans, *Harper v. Hall*, 2022-NCSC-17, ¶ 157, and no evidence would support such an argument. Plaintiffs-Appellants rely solely on fairness metrics, but even if that were a sufficient basis to establish a constitutional infirmity, this Court already held that "[i]t is entirely workable to consider the seven percent efficiency gap threshold as a presumption of constitutionality." *Id.* at ¶ 167. By any measurement, the State Remedial Plans are not only below, but well below, the thresholds this Court identified as suspect, the superior court was well within its discretion in so finding, and its decision is supported by competent evidence. It should be affirmed.

Assuming arguendo that the Court agrees that the Remedial Senate or House Plans violate the North Carolina Constitution, the parties agree that elections in 2022 must take place under the current plans approved by the superior court. (*See* 8 July 2022 Filing of State Board, 8 July 2022 Joint Filing of *NCLCV* and *Harper* Plaintiffs, 8 July 2022 Filing of Plaintiff Intervenor Common Cause). If this Court determines that either Remedial Plan continues to violate the North Carolina Constitution, the only constitutional remedy is a remand of this case to the superior court with instructions that the General Assembly be given another opportunity to draw yet another set of constitutional plans. The Constitution reserves to the General

[11] Common Cause Plaintiff-Appellant appealed from the superior court's order generally, but abandoned other arguments. (*See* R pp 5166–68).

Assembly the right to apportion state Senate and House districts. If the Court orders the implementation of permanent Senate or House plans drawn by it or the superior court, the effect of any such order would be to transfer the constitutional authority for redistricting from the General Assembly to the judicial branch. There is no precedent for any such remedy. Any ruling effectively transferring redistricting authority to the judicial branch would constitute the most extreme and outrageous violation of the separation of powers doctrine in the history of North Carolina.

Finally, the *NCLCV* Plaintiffs' request that this Court dictate that any constitutional remedial plans adopted by the superior court must remain in place until the next decennial census is a request for an advisory opinion on a future dispute that is far from ripe. The sole issue presented by *NCLCV* Plaintiffs on appeal is whether the superior court erred in approving the Remedial Senate or House Plans. (R p 5166). For this Court to announce that any given plan (especially a plan not even yet crafted or adopted as law) will override any future plan during a given time frame would be improper and unprecedented. Any such statement would constitute an advisory opinion that would not, and could not, prove binding in future litigation. *See Poore v. Poore*, 201 N.C. 791, 791, 161 S.E. 532, 533 (1931) ("It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the

pursuit of some academic matter.").[12] It is, at best, unknown whether the General Assembly will enact new plans this decade, and only after it took such a step would the *NCLCV* Plaintiffs' argument against it be ripe for judicial determination.

I. The superior court correctly held that the State Remedial Plans satisfy constitutional standards and properly deferred to the General Assembly's policy and legislative decisions

A. The superior court applied the correct legal standard.

As a matter of law, the superior court properly affirmed the State Remedial Plans and afforded the General Assembly deference in its policy and legislative decisions.

First, it is settled that North Carolina courts must presume the remedial plans passed by the General Assembly are 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). That presumption applies in full force, even though the acts remedied prior laws the Court invalidated. *See Abbott v. Perez*, 138 S. Ct. 2305, 2324–25, 201 L.E.2d 714 (2018). The superior court properly adopted the Special Masters' determination that deference should be afforded to legislative enactments. The superior court's approval of the Special Master's recommendation on legislative deference should be affirmed.

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[12] The Supreme Court of the United States held as much in *Covington* when it reversed and remanded the lower courts' improper holding that the legislature had violated the ban on mid-decade districting by altering several districts that were uncontested during the remedial phase. *North Carolina v. Covington*, 138 S. Ct. 2548, 2552 (2018) (per curiam).

Second, the superior court correctly concluded that the State Remedial Plans satisfy the North Carolina Constitution as interpreted in *Harper*. Plaintiffs make no serious argument that the State Remedial Plans are "the product of intentional, pro-Republican partisan redistricting," *Harper*, 2022-NCSC-17, at ¶ 184, and they offer no evidence supporting such a conclusion. The implied premise of Plaintiffs' briefing appears to be that intent is not a requisite element of a gerrymandering cause of action, but that makes no sense, when "partisan gerrymandering" refers to "the ruling party in the legislature manipulat[ing] the composition of the electorate to ensure that members of its party retain control." *Harper*, 2022-NCSC-17, at ¶ 141. Plaintiffs fail to explain how that could be shown without a showing of discriminatory purpose, and this Court's *Harper* decision repeatedly cites discriminatory purpose as central to the constitutional infringement it divined. Gerrymandering, it held, is discrimination "on the basis of partisan affiliation" that "also constitutes viewpoint discrimination and retaliation." *Id.* at ¶ 221. This essential concept of discriminatory purpose permeates the *Harper* ruling.[13] *See, e.g., id.* at ¶¶ 27, 37, 39, 63, 64, 68, 69, 140, 141, 150, 157, 193, 197, 201, 203, 211. That is because a plaintiff must establish "intentional, purposeful discrimination" to assert a violation of the constitutional provisions *Harper* construed. *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 662, 178 S.E.2d 382, 386 (1971); *accord Holmes v. Moore*, 270 N.C. App. 7, 16, 840 S.E.2d 244, 254

[13] Plaintiffs argued in the *Harper* appeal that their claims depended on a showing of intent and effect. *See Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *108–123 (N.C. Super. Ct. Sept. 3, 2019). (*See Harper* Pls' Br. 49, 57, 68, 70 (citing intent as critical to a manageable standard under the constitutional provisions at issue).

(2020). If the law were otherwise, the General Assembly would be required to purposefully aid political parties to avoid disfavoring them, which would amount to discrimination against other parties.

Third, even assuming a constitutional impingement could be shown solely on the basis of fairness metrics, Plaintiffs failed to make the requisite showing. This Court's *Harper* ruling recognizes that "[i]t is entirely workable to consider the seven percent efficiency gap threshold as a presumption of constitutionality," *Harper*, 2022-NCSC-17, at ¶ 167, and it is undisputed that the State Remedial Plans fall not only below but far below that figure. This Court also recognized that a court "could" adopt "a threshold standard such that any plan with a mean-median difference of 1% or less when analyzed using a representative sample of past elections is presumptively constitutional," *id.* at ¶ 166, and the State Remedial Plans both pass that test as well. The superior court surely did not err in looking to standards this Court articulated as permissible and manageable standards to govern these claims.

Plaintiffs-Appellants seem to argue that the superior court erred as a matter of law by applying these two tests. (*Harper* Pls' Br. at 28–33; Common Cause Br. at 47; *NCLCV* Pls' Br. at 17–20). But it is difficult to see how the superior court could have erred in doing what this Court hoped it would do and said it should do. And it is impossible to see error where the standards the superior court chose were two standards this Court said, respectively, would be "entirely workable" and an approach a lower court "could" take. *Harper*, 2022-NCSC-17, at ¶¶ 166-67. Even if the superior

could have taken other approaches, is does not follow that it erred in utilizing these approaches.

Fourth, the superior court's approach to evaluating the State Remedial Plans is further justified by its obligation to respect the General Assembly's lawful policy choices. After all, it was not, in the first instance, the superior court's decision to look primarily to the Efficiency Gap and Mean-Median scores; the General Assembly chose to utilize them predominantly in the legislative redistricting process. Because this Court in *Harper* recognized that it may not "remove all discretion from the redistricting process," and that its role is restricted to enforcing "constitutional limitations," *Harper*, 2022-NCSC-17, at ¶ 117, the General Assembly's choice of metrics should merit deference from the judiciary. The superior court properly exercised that deference, and it properly exercised its discretion in adjudicating this novel claim.

B. The superior court's finding that the Remedial Senate Plan is constitutional is supported by substantial and competent evidence.

Substantial and competent evidence in the record supports the superior court's finding that the remedial state Senate plan provides a substantially equal opportunity for each political party to translate seats into votes.

First, the General Assembly used a widely accepted districting program called Maptitude to draw and analyze maps. Using the Maptitude program, the General Assembly's non-partisan staff – at the direction of, but independent from, committee members and their staff – could measure Efficiency Gap and Mean-Median scores for any plan loaded into Maptitude. (9d R pp 11640–41 (Affidavit of Raleigh Myers),

15415–18 (Affidavit of R. Erika Churchill)). The General Assembly's decision to adopt the Remedial Senate Plan was rooted in the Maptitude reports generated by central staff scoring the Remedial Senate Plan under the Efficiency Gap and Mean-Median. (*Id.*). The scores demonstrated that the Remedial Senate Plan has an Efficiency Gap score of -3.98%, and a Mean-Median of -.63%. (R pp 15420, 15423). As discussed, these scores fell well within the standards this Court identified as permissible standards for the superior court to apply and the General Assembly to adopt.

Second, the General Assembly's Maptitude scores were buttressed by the analysis conducted by Legislative Defendants' expert, Dr. Michael Barber. Dr. Barber calculated results using all four of the fairness tests endorsed by this Court. (R pp 4702–30). Each of Dr. Barber's analyses indicated that the Remedial Senate Plan 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. Dr. Barber calculated an Efficiency Gap score for the Remedial Senate Plan of -3.97%. (R p 4728). Dr. Barber also calculated a Mean-Median score of -.65%.[14] (*Id.*). Dr. Barber's analysis confirmed the Maptitude scores generated by central staff. As explained above, both scores are within the Court's thresholds for presumptive constitutionality. *Harper*, 2022-NCSC-17, at ¶¶ 166–67. Additionally, Dr. Barber found a vote bias in the Remedial Senate Plan for 50% of the seats of exactly 0%. (R p 4728). This means that if Democrats win 50% of the statewide vote they would win

[14] This is about .023 different than the Maptitude calculation, likely caused by rounding.

50% of the Senate seats. (*Id.*). There can be no better example of perfect symmetry.[15] Therefore, under Dr. Barber's analyses of all four metrics identified by this Court, the Remedial Senate Plan is presumptively constitutional.

Third, the analysis by central staff and Dr. Barber was largely confirmed by the SMAs. While each SMA reached slightly different results for the Efficiency-Gap and Mean-Median, this is unsurprising given that each SMA utilized different elections, and different calculation methods or rounding points. But all of the SMAs found that the Remedial Senate Plan fell within the 7% Efficiency Gap range adopted by the Court. (R pp 5039, 5072, 5086, 5124–25). And two of the four SMAs found a Mean-Median of less than 1%. (*Id.*).

For example, one of the assistants, Dr. Bernard Grofman, used Dave's Redistricting App to measure the fairness of the State Remedial Plans. (R p 5027). While it is unclear from Dr. Grofman's report exactly how he or Dave's Redistricting calculated the Mean-Median or Efficiency Gap, Dr. Grofman reported that the Remedial Senate Plan scored an Efficiency Gap of 4.24% and a Mean-Median of .77%—both of which are within this Court's benchmarks. (R p 5039).

Dr. Samuel Wang used his own set of elections to measure the remedial plans. Overall, Dr. Wang considered 11 elections, but only 8 were used in his elections

[15] Dr. Barber also attempted to replicate Dr. Duchin's close-vote, close-seats analysis, even though the measurement has not been peer reviewed or previously used in any partisan gerrymandering case that Legislative Defendants were able to locate. (R p 4691). Dr. Barber concluded the Remedial Senate Plan produced "majoritarian outcomes in 11 of the 12 elections considered in the close-votes-close-seats analysis and the plan is responsive[.]" (R p 4728).

composite.[16] (R p 5078). Dr. Wang appeared to test for Efficiency Gap and Mean-Median by using each contest to separately judge the remedial state Senate plans instead of a composite of results for all contests, as was done by the General Assembly's Maptitude program, Dr. Barber, and at least two of the SMAs. (*See id.*). Despite these differences, Wang calculated an average Efficiency Gap for the Remedial Senate Plan of 2.2% and an average Mean-Median of .8%. (R p 5086).

Dr. Tyler Jarvis purported to calculate the fairness of the Remedial Senate Plan using Dr. Mattingly's model. However, the elections used by Dr. Jarvis are different from the set of contests used by Dr. Mattingly or the General Assembly. Unlike Dr. Mattingly, Dr. Jarvis used a composite of eleven elections: 4 elections from the 2016 cycle (Attorney General, Presidential, Lt. Governor, and Governor) and 7 elections from the 2020 election cycle (including Attorney General, Presidential, Lt. Governor, Governor, Treasurer, US Senate, and Secretary of State). (R p 5116). Absent from Dr. Jarvis's historical elections are three races won by Republicans in 2020 that were used by Dr. Mattingly: the Commissioner of Agriculture, Commissioner of Labor, and State Auditor. Instead, Dr. Jarvis substituted the 2016 Attorney General and 2016 Governor races. (R p 5116). Dr. Jarvis does not explain the discrepancies between his election set and Dr. Mattingly's. Nor does he explain why he selected his election set over the set used by the General Assembly. Despite

[16] For the composite, Dr. Wang also averaged election results "with equal weights from three components: (1) the average of President 2016 and 2020; (2) the average of Senate 2016 and 2020; and (3) the average of Governor and Attorney General 2020." (R p 5078).

the different set of contests used by Dr. Jarvis, Dr. Jarvis's Efficiency Gap score falls within the Court's parameters at -4.0%. (R p 5125). Dr. Jarvis also calculated a Mean-Median score for the Remedial Senate Plan at -1.4%, which is only slightly outside this Court's parameters. (R p 5124). This raises a question of whether Dr. Jarvis would have calculated a Mean-Median score of under 1% if he had included all of the contests won by Republican candidates in 2020 that were used by the General Assembly and Dr. Mattingly.

Dr. Eric McGhee's report is based upon a novel approach. All of the other experts calculated which candidate would win a proposed new district using prior election contests to determine which statewide candidate would have won the district in a prior election. Instead of analyzing who would have won a prior election, Dr. McGhee used a service called "Planscore" to predict who would win the district in the future. (R pp 5057–58). None of the other experts took Dr. McGhee's approach and it certainly is not mentioned in the Supreme Court's 14 February Order. The exact elections used by Planscore to predict future election results are not identified by Dr. McGhee. Nor does he explain the assumptions used by Planscore to predict future results. Nor does he explain if the Planscore algorithm has been peer reviewed or available for third parties interested in testing its reliability or ability to replicate it. In any case, Dr. McGhee calculated an Efficiency Gap of only 4.8% when all seats are open (4.5% when considering incumbents) under the Remedial Senate Plan and a Mean-Median score of 2.2% when all seats are open (3.0% considering incumbents). (R p 5072).

In summary, non-partisan central staff utilizing Maptitude, Dr. Barber, and two of the four SMAs calculated a Mean-Median score of less than 1% for the Remedial Senate Plan. The Maptitude reports, Dr. Barber, and all four SMAs agree that the Remedial Senate Plan falls within the parameters set for the Efficiency Gap. The only outliers come from the SMAs who intentionally excluded statewide elections won by Republicans when calculating Mean-Median, or, in the case of Dr. McGhee, using Planscore, an algorithm that had not been peer reviewed or previously endorsed by this Court. As such, the superior court's findings of fact on the Remedial Senate Plan are based upon competent evidence and should be affirmed.

C. The superior court's finding that the Remedial House Plan is constitutional is supported by substantial and competent evidence

NCLCV Plaintiffs-Appellants, the only set of plaintiffs to offer a full remedial House plan as an alternative to the legislative Remedial House Plan at the superior court, have abandoned their argument on the constitutionality of the Remedial House Plan on appeal. Only the Common Cause Intervenor-Appellant continues to argue that the Remedial House Plan is an unconstitutional partisan gerrymander. The appeal by Common Cause should be rejected because the factual record supports the superior court's findings that the Remedial House Plan is not a partisan gerrymander.

First, the Maptitude scores compiled by non-partisan central staff for the Remedial House Plan show an Efficiency Gap score of -.84% and a Mean-Median of -.71%. (9d R pp 15430, 15434). Both are within the range of scores this Court identified

as proper standards for the superior court to apply. (*See* R pp 4061–62, at ¶¶ 166–67).

Second, Dr. Barber found an Efficiency Gap score of -.84% and a Mean-Median score of -.70%. (R p 4714). Dr. Barber's partisan symmetry analysis of the Remedial House Plan shows a small vote bias for 50% of the seats of -.2%. (R p 4710–12). This means that if Democrats win 49.8% of the statewide vote they would win 50% of the House seats. (*Id.*). This too, is clearly symmetrical, with a slight benefit to Democrats in close elections.[17]

Dr. Barber's findings are consistent with the reports filed by the SMAs, which also support the superior court's holding. All four SMAs agree that the Remedial House Plan falls far below the 7% Efficiency Gap threshold this Court identified as a permissible partisan-gerrymandering standard. (R pp 5039 (Grofman reporting 2.7%), 5066 (McGhee reporting 3.0%); 5090 (Wang reporting 3.0%), 5135 (Jarvis reporting -2.7%)). Two of the SMAs, Dr. Grofman and Dr. Wang, found the Remedial House Plan falls within the 1% Mean-Median threshold this Court identified as a permissible partisan-gerrymandering standard. (R pp 5039 (Grofman reporting .89%), 5090 (Wang reporting .90%)). Thus, the weight of the evidence supports the superior court's determination.

Two SMAs, Dr. Jarvis and Dr. McGhee, calculated Mean-Median scores as falling only slightly outside of the presumptively constitutional range. (R pp 5066

[17] Dr. Barber also calculated that under the close-votes, close-seats analysis, the Remedial House Plan produced "majoritarian outcomes in 11 of the 12 elections[.]" (R p 4714).

(McGhee reporting -1.5%), 5134 (Jarvis reporting 1.4%)). But, as explained, Dr. Jarvis's analysis is not probative because it excluded contests won by Republican candidates. Meanwhile, Dr. McGhee's testimony was based upon Planscore, a non-peer reviewed program that attempts to predict future election results instead of reporting how districts actually performed in past elections. *See supra* pp 26–27. The superior court, of course, was not obligated to invalidate a presumptively constitutional redistricting plan on the basis of a non-probative and unreliable analysis. In short, there is competent evidence to support the superior court's holding that the Remedial House Plan is constitutional.

II. Any partisan skew in the remedial state Senate and House plans is a result of the of the natural political geography of North Carolina.

The superior court correctly determined that any partisan bias in the State Remedial Plans that may arise to legal significance is the natural and probable consequence of North Carolina's political geography. (R pp 4879, 4882). Plaintiffs-Appellants attempt to shoulder the heavy burden of showing this factual determination to be clearly erroneous. They fail to do so. The record, including reports by the SMAs, shows that the court's findings on political geography are based on competent evidence.

The unrebutted liability-stage record establishes that Democratic and Republican constituents are not evenly distributed throughout North Carolina. Democratic constituents are concentrated in dense, urban areas; Republican constituents are spread more broadly in suburban and rural areas. A plan drawn without the intent of aiding the Republican Party, then, will tend to have an

unintended pro-Republican bias. To overcome that bias would require intentional line-drawing to benefit the Democratic Party. The State Constitution does not require this.

Dr. Barber's original report provides a framework for understanding this natural political geography. Specifically, Dr. Barber's original report shows that the natural clustering of Democrats in North Carolina cities and the Northeastern part of the state leads to natural disadvantages for Democratic political fortunes—at least if districts are drawn to be compact and contiguous and to respect North Carolina's county grouping requirements and otherwise honor political-subdivision lines. (R p 2881–90). Dr. Grofman confirmed these principles and found a natural Republican lean in the State of 1-3%. (R pp 5034–37). Evidence presented to the superior court showed that Plaintiffs and Legislative Defendants' experts mostly agreed that North Carolina's natural political geography will result in plans that lean Republican. (*See, e.g.*, T p 50:2–12 (Dr. Chen admits that 59.6% of his computer simulated Congressional plans draw nine Republican districts)). Drs. Cooper and Taylor confirmed that the migration of Democrats to cities results in natural clustering of Democrats in a few urban districts in contrast to a more evenly dispersed Republican electorate across the state. (T pp 120:24-121:18; T pp 500:18-502:24; 9d R pp 9514–66). To the extent any partisan skew arises to the level of legal significance in the Remedial Senate or House Plans (it does not), there is competent evidence in the

record showing that it "necessarily results from North Carolina's political geography." (R pp 4879, 4882).[18]

III. Plaintiff-Appellant Common Cause's racial claims lack merit.

Common Cause, but not the other Plaintiffs-Appellants, argues that the State Remedial Plans violate some legal principle related to racial equality, which it struggles to define. As a preliminary matter, the argument is difficult to follow. At times, it appears Common Cause contends that one or both Remedial Plans violates Section 2 of the Voting Rights Act, but these claims are not properly before the Court as they were not raised in the court below. N.C. R. App. P. 10(a). To entertain the claim would be especially improper because, had Common Cause properly raised such an argument, Legislative Defendants would have been entitled to remove this case to federal court (and would have done so). *See* 28 U.S.C. § 1441.[19]

To the extent Common Cause argues that the alleged absence of performing minority crossover districts violates the North Carolina Constitution, it is insufficient for them to rely only on evidence that purportedly shows a violation of Section 2 of the Voting Rights Act. Section 2 is violated regardless of intent when a legislative

[18] To that point, ten to fourteen single member Senate districts and eleven to thirteen single member House districts are a function of the *Stephenson* county grouping formula. Out of these districts, most are Republican leaning. (R pp 2898–2900; 3047–50).

[19] Should the Court be inclined to consider the Section 2-related arguments, other than to reject them, the Court should defer its ruling until the Supreme Court issues a decision in *Merrill v. Milligan*, No. 21-1086, as the United States Supreme Court is poised to issue new controlling and clarifying guidance concerning a state's obligations to comply with Section 2.

plan has the effect of diluting the voting strength of the minority group. *Thornburg v. Gingles*, 478 U.S. 30, 50–51, 106 S. Ct. 2752, 92 L.Ed.2d 25 (1986). By contrast, the State Constitution's equal-protection guarantees require proof of intent to discriminate. *See Holmes*, 270 N.C. App. at 16, 840 S.E.2d at 254; *cf. Mobile v. Bolden*, 446 U.S. 55, 67–68, 100 S. Ct. 1490, 64 L.Ed.2d 47 (1980) (plurality).

Regardless, the Common Cause theory is meritless because it would, if adopted, place state law at odds with the U.S. Constitution. Districts may not be drawn for predominantly racial reasons—as purposefully drawn crossover districts would be, *Georgia v. Ashcroft*, 539 U.S. 461, 491, 123 S. Ct. 2498, 156 L.Ed.2d 428 (2003) (Kennedy, J., concurring)—unless the use of race advances a compelling government interest, such as compliance with Section 2. *See Cooper v. Harris*, 137 S. Ct. 1455, 1465, 197 L.Ed.2d 937 (2017) (stating that the Supreme Court "has long assumed" that such efforts to comply with Section 2 are a "compelling interest" that can justify such "race-based sorting"). Thus, when the Wisconsin Supreme Court adopted a plan with an additional minority-opportunity district, the Supreme Court summarily reversed its judgment as a violation of the Equal Protection Clause. *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1250–51 (2022) (holding the trial court "improperly relied on generalizations to reach the conclusion that the [*Gingles*] preconditions were satisfied" (internal citation omitted)). This Court should decline the invitation to follow in its footsteps.

Competent evidence in the record supports the superior court's finding that the State Remedial Plans do not violate any conceivably applicable theory of racial

equality (at least one consistent with the Equal Protection Clause) and shows that the districts proposed by Common Cause are not justified under Section 2 and constitute racial gerrymanders. This is because the results of recent elections and the evidence before the General Assembly regarding racial polarization rates demonstrate that Black North Carolinians can elect their candidate of choice in districts that are not majority-Black. Thus, there was no evidence presented to the General Assembly or the superior court that would justify the use of race in the drawing of legislative districts as proposed by Common Cause.

A. The General Assembly performed a racially polarized voting analysis, which showed that majority-minority districts are not required to comply with Section 2.

This Court's remand order instructed the General Assembly to "first assess whether, using current election and population data, racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African-American voters." *Harper v. Hall*, 2022-NCSC-17, ¶ 8.[20] The General Assembly complied with this directive, as the superior court correctly recognized.

For a legislature to legally draw districts for predominantly racial reasons it must have evidence of the same three threshold conditions that a plaintiff must demonstrate to prove a claim under Section 2. These include evidence that (1) a

[20] This was a curious holding given that none of the Plaintiffs, including Common Cause, alleged that the General Assembly's original plans violated Section 2. Justice Newby recognized the majority's "attempted contextualization" of the mandate to apply the federal Voting Rights Act in his dissent to the 14 February Order. *Harper v. Hall*, 2022-NCSC-17, ¶ 260 n. 5 (Newby, J., dissenting).

"'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 *Gingles*, 478 U.S. at 50–51). Proof of these *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, 113 S. Ct. 1075, 122 L.Ed.2d 338 (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, 16 S. Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality)).

The evidence before the General Assembly and the superior court demonstrated the complete absence of the *Gingles* preconditions or that the remedial plans dilute Black voting strength. First, the superior court's findings of fact support its conclusion that the "Remedial Plans provide African Americans with proportional opportunity to elect their candidates of choice." (R p 4874 (trial court's remedial order), FOF 17). This means that the State Remedial Plans satisfy the VRA because they afford the State's Black communities an equal electoral opportunity.

Substantial evidence supports that conclusion. The superior court acknowledged and reviewed the General Assembly's reliance upon Dr. Lewis's report, which "confirm[ed] the absence of legally significant racially polarized voting in North Carolina." (9d Supp. pp 14675:23–14676:23; *see* R pp 4873–75 (superior court's remedial order), FOFs 16–18). Dr. Barber's remedial report confirms Dr. Lewis's findings. (R pp 4424–44 (Dr. Lewis Remedial Report); R pp 4714–15, 4728–29 (Dr. Barber Remedial Report)). Thus, the superior court's factual finding that the General Assembly had performed a racially polarized voting analysis, as required by this Court's prior order, is supported by competent evidence. The superior court's conclusion in this case is supported by findings just a few years ago that there is no legally significant racially polarized voting in North Carolina. *Common Cause v. Lewis*, 2019 WL 4569584, * 131 (Wake Cnty. Super. Ct. 2019). Nothing in the polarization analysis or any other evidence before the General Assembly or the superior court could justify the use of race in drawing districts.

B. The General Assembly lacked good reasons to conclude drawing remedial districts without race was required to protect from Section 2 liability.

At the time of redistricting the General Assembly lacked "good reasons" to conclude that it could lawfully use race to draw districts needed to protect the State from Section 2 liability. *See Cooper*, 137 S. Ct. at 1463–64. The General Assembly also lacked "good reasons" to justify the constitutionally suspect use of race in drawing the remedial districts.

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*, 137 S. Ct. at 1468; *Covington v. North Carolina*, 316 F.R.D. 117, 128 (M.D.N.C. 2016) *aff'd*, 137 S. Ct. 2211 (2017) (Mem.). In both instances, the General Assembly relied upon two expert reports showing the presence 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 United States Supreme Court held that mere statistically significant RPV did not satisfy the requirement that a state can only justify Section 2 majority-minority districts when there is evidence of legally significant RPV.[21] *Cooper*, 137 S. Ct. at 1470, 1471 n.5; *Covington*, 316 F.R.D. at 169 (In both cases, 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, both sets of plaintiffs offered experts 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).

[21] Common Cause errs in contending that racial predominance is not a predicate to its plans. A materially identical argument was rejected in *Cooper*, 137 S. Ct. at 1469 & n.3, and there can be no serious question that Common Cause would not have configured its illustrative districts as it did, or proposed them, unless it were "motivated" by the racial purpose of achieving minority-opportunity districts, *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 132 L.Ed.2d 762 (1995). Any factual doubt on the matter would require resolution before the superior court in any event.

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* R pp 7591, 7643, 7756). 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 (M.D.N.C. 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, at * 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*, 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, at *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.[22] 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.[23] The number of African

[22] November 6, 2018 General Election Results by Contest, *NCSBE*, https://er.ncsbe.gov/?election_dt=11/06/2018&county_id=0&office=FED&contest=0.
[23] 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

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. De Grandy*, 512 U.S. 997, 1013–15, 114 S. Ct. 2647, 129 L.Ed.2d 775 (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 a majority-Black district. (9d R pp 7592–7602). And only two of the 37 districts in which African Americans were elected to the legislature were majority African American. (9d R pp 9583–9649).

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.

Representatives Demographics, 154th Session, 2019–2020 (Oct. 15, 2020), https://ncleg.gov/DocumentSites/HouseDocuments/2019-2020%20Session/2019%20Demographics.pdf.

The superior court ultimately approved the revised 2019 Senate and House plans. *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. North Carolina General Assembly 2021 Senate Demographics (Jan. 12, 2021), https://webservices.ncleg.gov/ViewDocSiteFile/6210; North Carolina House of Representatives Demographics, 155th Session, 2021-2022 (July 19, 2022), https://webservices.ncleg.gov/ViewDocSiteFile/8107.

This history of litigation, the results of the 2018 and 2020 general elections, evidence submitted in this matter, and the General Assembly's decision not to use race during the drawing of the 2021 districts or the remedial districts support the superior court's finding.

C. The evidence set forth by Common Cause is unpersuasive.

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 Section 2 lawsuit, but instead because of its submissions

purporting to show a vote dilution claim through "demonstrative" majority-Black districts.[24] Not so.

As an initial matter, Common Cause's forfeiture of a Section 2 claim dooms its argument on appeal, because state law cannot justify a use of race that presumptively contravenes the *federal* Constitution. The Supreme Court has never held that compliance with *state* law creates a compelling interest to justify race-based redistricting that otherwise violates the Fourteenth Amendment. Compliance with the federal Voting Rights Act has been assumed to qualify as a compelling interest because "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment," and "[t]he power to 'enforce' may at times also include the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490, 109 S. Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion) (citing examples, including cases upholding the Voting Rights Act from constitutional challenge). "That Congress may identify and redress the effects of society-wide discrimination does not mean that, *a fortiori*, the States and their political subdivisions are free to decide that such remedies are appropriate." *Id.* at 490; *see also id.* at 521 (Scalia, J., concurring). Because "the Fourteenth Amendment is an explicit *constraint* on state power," this

[24] Common Cause attempts to claim its evidence, including its letters to the General Assembly, provide "uncontested evidence" that the *Gingles* criteria are met in the areas around its two proposed districts. The record shows otherwise. Legislative Defendants have vehemently denied Common Cause's claims. (*See* R pp 4232–45).

Court—as an instrument of the state—does not stand co-equal with Congress in enforcing the Civil War Amendments when it construes the North Carolina Constitution. *Id.* at 490. There is, then, no basis for Common Cause to argue that the North Carolina Constitution can justify presumptively unconstitutional redistricting, when the Fourteenth Amendment was intended to *curtail* the North Carolina Constitution along with other state action compelling race-based decisions.

That aside, there is no colorable Voting Rights Act violation in this case, so even federal law (were it properly before this Court) could not justify the race-based redistricting Common Cause demands. No court would or could impose Section 2 districts based on the evidence proffered by Common Cause. *See Growe*, 507 U.S. at 40–41 ("Unless" the Section 2 prerequisites "are established, there neither has been a wrong nor can be a remedy."). For starters, Common Cause's witness Christopher Ketchie was not even offered, much less accepted, as an expert by the superior court. He lacks the credentials to conduct a true racial polarization analysis. (*See* R pp 4595–99). He also has not been subject to cross-examination on the remedial districts proposed by Common Cause.

Next, Common Cause's alternative districting configurations cannot be adopted because the Voting Rights Act does not demand it and, in all likelihood, the Equal Protection Clause forbids it. Common Cause relies upon two purported "Demonstrative Districts" – Demonstrative HD 10 and Demonstrative SD 4 – to support its argument that the remedial plans dilute the voting strength of Black

voters. Pictures of both Demonstrative HD 10 and Demonstrative SD 4 are embedded below:

Figure 1: HD10 *Gingles I* VRA Demonstrative

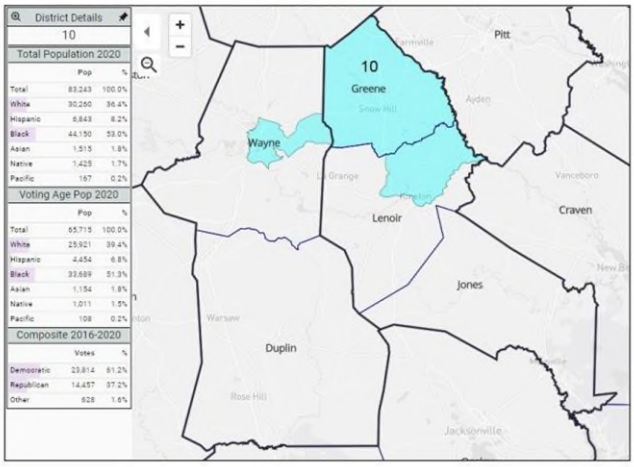
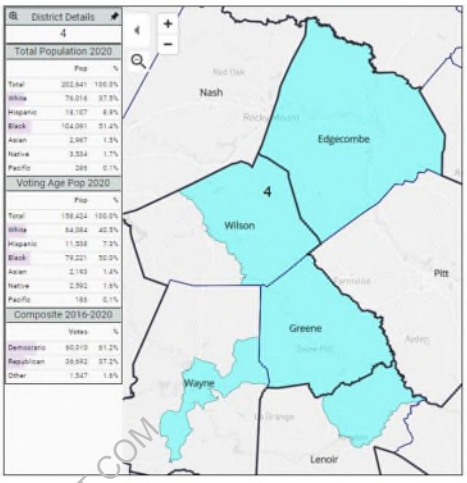


Figure 3: SD4 VRA *Gingles* I Demonstrative



(9d R pp 11626, 11629). But, past decisions strongly indicate that the Common Cause Demonstrative Districts are illegal racial gerrymanders. For example, 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. 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: 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. Given the appearances of the Common Cause Demonstrative Districts, the General Assembly would have ample reasons to believe that adopting either

district would not protect the state from Section 2 liability and instead would invite lawsuits challenging those districts as racial gerrymanders. If the districts found to be 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.

Next, Common Cause Demonstrative SD 4 is not needed to remedy a possible Section 2 violation. Demonstrative SD 4 includes all of Edgecombe and Greene Counties and portions of Wilson, Wayne, and Lenoir Counties. In comparison, under the Remedial Senate Plan, all of Edgecombe and Pitt Counties are assigned to a *Stephenson* required two-county single member SD 5. (9d R p 12269). Common Cause has offered no proof that legally significant racially polarized voting exists either in Edgecombe County or the Senate Remedial Plan's SD 5. In fact, the Senate Remedial Plan's 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. (9D R p 9610). 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 instead of the hypothetical majority-Black district. Embedded below are Common Cause's Remedial HD 10 and SD 4:

Figure 2: HD10 VRA Remedial

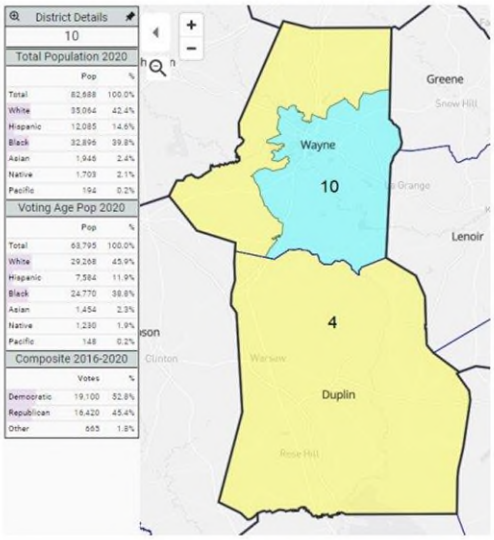
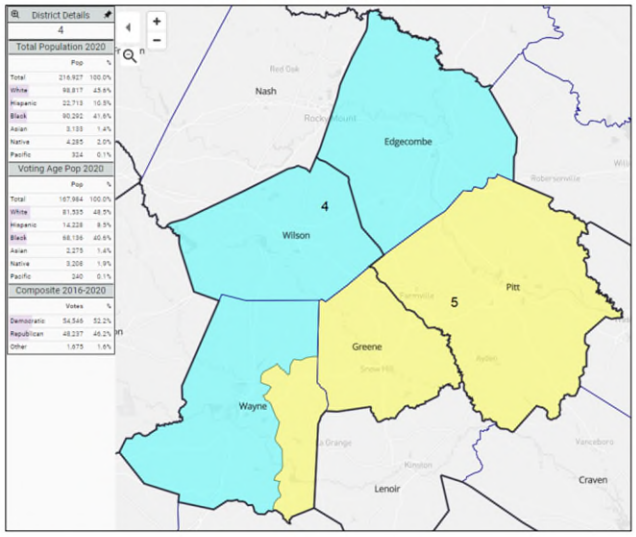


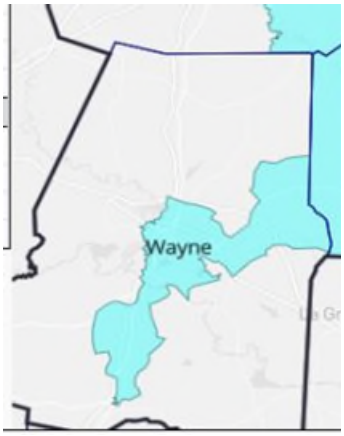
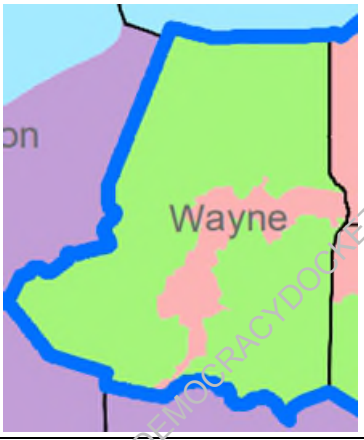
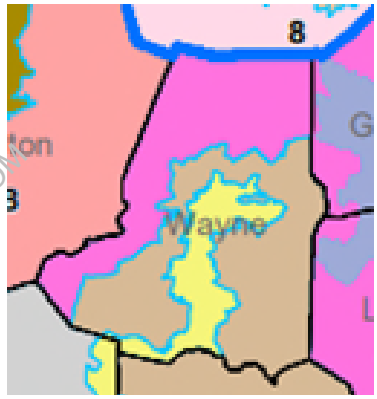
Figure 4: SD4 Remedial District



(9d R pp 1627, 11630). There is a glaring illogic associated with the Common Cause proposal. Its "remedy" would only provide a remedy for some but not all of the voters who reside in its demonstrative districts. Compare Common Cause Demonstrative HD 10 with its Remedial HD 10 and Demonstrative SD 4 with its 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 voters who were 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 v. Hunt*, 517 U.S. 899, 916 (1996).

This discrepancy is obvious from the comparison of Common Cause's demonstrative HD 10 with Common Cause's Remedial HD 10. 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, particularly in Wayne County, found in several of the illegal 2011 majority-Black districts including HD 21 and SD 4:

Common Cause Demonstrative	Senate Plan 2011-2016	House Plan 2011-2016
		

(9d R pp 11629, 7643, 7756). Common Cause then plays a sleight of hand and locates its Remedial HD 10 solely in Wayne County. Voters residing in Greene and Lenoir Counties, 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 SD 4 ignores the fact that under the Remedial 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 Districts actually justified the use of race to draw districts to protect the state from Section 2 liability, then the remedy is to require the state to adopt the majority-Black districts, and not crossover districts that encompass only portions of the demonstrative districts. *Shaw,* 517 U.S. at 916. States have the discretion to draw majority-Black districts when there is evidence of the three *Gingles* threshold conditions, but this does not give states the authority to replace majority-Black districts with crossover or influence districts. *Bartlett v. Strickland*, 556 U.S. 1, 23–24, 129 S. Ct. 1231, 173 L.Ed.2d 173 (2009).

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.

Common Cause's reconfigured SD 5 reveals what Common Cause truly seeks is not majority-Black remedial districts, but for the Court to entrench the voting strength of the Democrat ticket. Thus, the Common Cause remedial districts clearly

are intended to inappropriately use race as a proxy for politics. *Bush*, 517 U.S. at 958. This type of "maximization" theory concerning the requirements of Section 2 has been expressly rejected by the Supreme Court in both *Bartlett v. Strickland* and *League of United Latin American Citizens v. Perry*, 548 U.S. 339, 445, 126 S. Ct. 2594, 165 L.Ed.2d 609 (2006). It is also wholly inappropriate for a court to order that the state adopt these districts when the Remedial 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*, 512 U.S. at 1013-15.

D. Common Cause's argument regarding the intentional destruction of crossover districts is erroneous.

Common Cause's argument that the General Assembly and the superior court intentionally destroyed crossover district (Common Cause Br. at 32) is wrong legally and factually.

First, as we have explained, the General Assembly had not only good reasons not to adopt the Common Cause plan, but the *best* reason imaginable: to avoid the severe risk of a constitutional violation. *See Wisconsin Legislature*, 142 S. Ct. at 1250–51 (prompt Supreme Court intervention for state agents doing what Common Cause proposes). Neither a legislature nor a court may, for predominantly racial reasons, draw a crossover district or a district in which Black voters can control the outcome with less than 50% BVAP. Instead, racial predominance may only be justified upon proof that Black voters will lack equal electoral opportunity without being placed in a district that exceeds 50% BVAP. There is simply no basis in law to argue that North Carolina has an obligation to draw districts that Black-preferred candidates can win

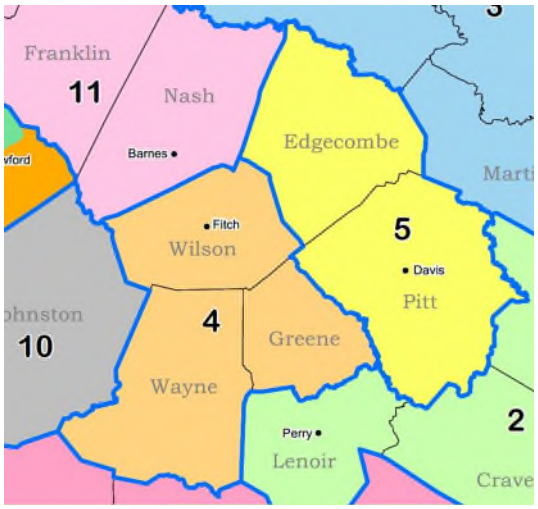
at levels of BVAP of less than 50%. It defies law and common sense for Common Cause to assert that the General Assembly discriminated for purposes of the North Carolina Constitution by avoiding a severe risk of a federal-law violation, and, in any event, that theory would have to yield to federal law.

Next, there is no factual basis to argue that the General Assembly or the superior court intended to destroy crossover districts. It is undisputed that the Remedial Senate and House Plan both provide Black voters with an opportunity to elect a proportional number of Black-preferred candidates—even though only four of the House districts are majority-Black. (9d R pp 11671–74). In other words, Black voters have an equal chance to elect a proportional number of Black preferred candidates, which in turn must be because of the high number of crossover districts in the State Remedial Plans approved by the superior court. It is irrational to argue that a legislature that enacted enough crossover districts to provide Black voters with proportionality simultaneously intended to destroy crossover districts.

Further, Common Cause cites two districts it alleges were performing minority crossover districts (SD 4 and HD 21) that the General Assembly did not carry forward from the last decade's redistricting plan. (Common Cause Br. at 33). But the undisputed facts show that the General Assembly could not have carried these districts forward because of North Carolina's neutral redistricting laws, including its equal-population rule and its county-grouping rules established in *Stephenson I* and its progeny. The General Assembly cannot be said to have intentionally destroyed districts that it could not have preserved consistent with the State Constitution.

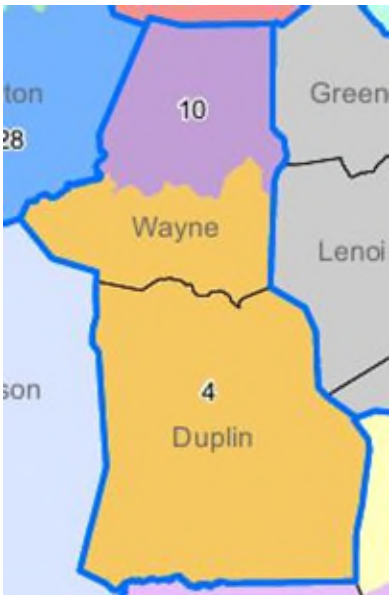
Turning first to SD 4, it is undisputed that the 2020 version of that district was based upon the 2010 census and was located in a three-county group consisting of Halifax, Edgecombe, and Wilson Counties. (9d R p 5270). A copy of the 2019 remedial Senate plan grouping, as used in the 2020 elections, is shown below:

(9d R p 5270). But under the 2020 census, SD 4 (and Wilson County in particular) had to be placed in a different county group. A copy of the Senate Remedial Plan SD 4 and 5 grouping is shown below:

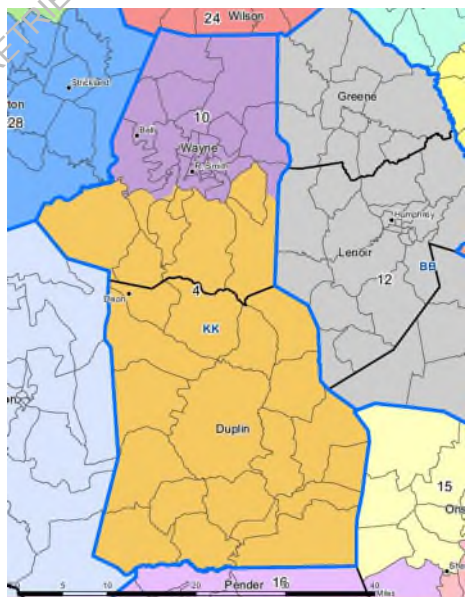


(9d R p 12269). The General Assembly selected the county group consisting of Wilson and Edgecombe—which is a mandatory county grouping under North Carolina law, as Plaintiffs' expert, Dr. Mattingly, recognized (9d R pp 744–58). Even Common Cause concedes that Wilson County and the Senate Remedial Plan version of SD 4 must be placed in a different county group than the one found in the 2020 map. It proposes that a grouping of Edgecombe, Wilson, and Wayne be used. Thus, Common Cause effectively concedes that the General Assembly did not intentionally destroy the 2020 version of SD 4; the district simply could not be carried forward consistent with the county-grouping rules.

These same is true of HD 21. The 2020 version of HD 21 was based upon the 2010 census. It was located in a seven-county group consisting of Greene, Wayne, Johnston, Sampson, and Bladen, as shown below:



(9d R p 5271). Common Cause contends that the proper comparison to the 2020 version of HD 21 is the Remedial House Plan version of HD 10. (*Id.*). Both the General Assembly and Common Cause agree that the Remedial House Plan version of HD 10 must be located in a two-county group consisting of Wayne and Duplin, as seen in the Remedial House Plan grouping below:



(9d R pp 11644; Common Cause Br. at 23). Neither Common Cause nor any other party has argued that the seven-county group that included HD 21 under the 2020 House map may be constitutionally re-created using the 2020 census.

Common Cause fails to explain how the General Assembly can be faulted for purposefully destroying districts when the State Constitution gave it no other choice. Common Cause appears to believe that, because the General Assembly did not adopt Common Cause's alternative configuration of regions of the state around SD 4 and HD 10, it intentionally destroyed crossover districts. But that makes no sense: the Common Cause alternative does not qualify as establishing performing crossover districts that could be destroyed because it never existed in law or fact—the State has never used that alternative. The General Assembly cannot be said to have purposefully destroyed what never existed.

Besides, it is a mystery whether Common Cause's alternatives satisfy the county-grouping rules statewide because Common Cause did not provide a complete alternative redistricting plan and it cannot be ascertained from partial plans whether the county-grouping rule is satisfied. Thus, Common Cause's arguments regarding SD 4 and HD 10 boil down to the same argument rejected in *Pender County v Bartlett*, 361 N.C. 491, 349 S.E.2d 364 (2007), *affirmed sub nom. Bartlett v Strickland*, 556 U.S. 1 (2009), that the county grouping formula may yield to a goal of drawing minority crossover districts. This argument, of course, was flatly rejected by both the North Carolina Supreme Court and the United States Supreme Court because it has no conceptual foundation: the county-grouping rule is a *legal* requirement, but

minority crossover districts are not *required* under the Voting Rights Act. At best, they may be drawn out of legislative discretion; at worst, they violate the Equal Protection Clause. The facts show that North Carolina had no discretion to re-create the 2020 versions of either SD 4 or HD 21 because both districts (or any comparator district) must be located in different county groups than those created under the 2010 Census.

Finally, Common Cause's arguments fail to speak to the applicable standard for ascertaining discriminatory intent. A plaintiff must establish that the legislature "enact[ed] law 'because of,' and not 'in spite of" its discriminatory effect." *Holmes*, 270 N.C. App. at 17, 840 S.E.2d at 255 (quoting *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). "'Discriminatory purpose,' . . . implies more than intent as volition or intent as awareness of consequences." *Id.* at 279. At best, even assuming some form of adverse consequence (which is unfounded for reasons stated), Common Cause establishes awareness, not purposeful achievement of negative consequences. In this regard, it is significant that Common Cause relies chiefly on the fact that members of its organization and its counsel made certain representations and provided certain information to the General Assembly. (Common Cause Br. P 24). Because the General Assembly did not adopt Common Cause's redistricting concept, the argument goes, it engaged in purposeful discrimination. It is difficult to see a limiting principle to that doctrine, and this Court should not adopt it.

IV. This Court does not have the authority to implement any of Plaintiffs-Appellants' proposed remedies.

The remedies proposed by Plaintiffs-Appellants and the Governor's and Attorney General's Amicus Brief have no foundation in either the text of the North Carolina Constitution or precedent. Each of the three sets of Plaintiffs-Appellants request the Court grant various forms of relief. Their arguments lack merit.

A. The Court lacks authority to adopt a remedial plan.

Harper Plaintiffs-Appellants request that the Supreme Court adopt their proposed remedial Senate plan as the "more-fair" plan. They do not propose a period of time for which the plan should be in place, but ask that the Court "reverse the superior court's order and remand with instructions to adopt the *Harper* Plaintiffs' remedial plan." (*Harper* Pls' Br. at 37–38). Common Cause Plaintiff-Appellant requests incorporation of their proposed SD 4 and HD 10, as well as implementation of alternative county groupings. Common Cause Plaintiffs cite to a concurring opinion by Justice Earls in *Blue v. Bhiro*, 2022-NCSC-45, in support of its claim that "[w]hile this Court could remand the issue of whether the remedial House and Senate maps comport with all constitutional requirements back to the superior court, such a step is unnecessary in light of the factual record developed during the remedial stage." *See Blue v. Bhiro*, 2022-NCSC-45, ¶ 16, 871 S.E.2d 691, 696 (Earls, J. concurring) ("It is indisputable that this Court possesses the authority to resolve this case now under these circumstances. Indeed, it is routine for this Court to address dispositive issues

not resolved by the Court of Appeals when doing so requires making purely legal determinations."). (Common Cause Br. pp 60–61).[25]

These arguments overlook that state law requires that the General Assembly first have the opportunity to remedy any defects in a plan before a court could even consider imposing a temporary remedial plan. N.C. Gen. Stat. § 120-2.4(a). The State Remedial Plans are two "plan[s]" the General Assembly enacted, and no court has yet set forth "findings of fact and conclusions of law" identifying "defects" in these plans, and, even if this Court were to do so—which would be improper without remand in any event—that would not satisfy the requirement that it afford the General Assembly "a period of time to remedy any defects." There is, then, no serious argument that affording the demanded relief would violate this statutory provision.

Neither *Harper* Plaintiffs-Appellants nor Common Cause Plaintiff-Appellant even cite this provision in their opening briefs, and they offer no argument justifying their aggressive demand that this Court adopt their plans as an appellate tribunal, without further litigation, and without an opportunity for the General Assembly to cure any deficiencies this Court identifies. Any new argument on this matter in reply would be too little, too late. *See Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 708, 682 S.E.2d 726, 740 (2009) ("By raising his condition precedent argument for the first time in his reply brief, Hardin has frustrated the adversarial process by depriving defendants of the opportunity to respond to his argument.").

[25] In fact, Common Cause Plaintiff-Appellant clearly asked that the Supreme Court order the state to implement their proposed remedial crossover districts without considering changes in county groupings that would be required.

B. *It would be improper for this Court to issue an advisory opinion on the effectiveness of any future remedial plan that would, in any event, be legally incorrect.*

NCLCV Plaintiffs-Appellants, supported by the Governor and Attorney General as Amici, tender a different remedial argument that is both procedurally and substantively incorrect. *NCLCV* Plaintiffs-Appellants concede that remand is necessary and ask that the Court do so "for the adoption of the NCLCV Senate Map or some other remedial Senate map that complies with the standard this Court set[s]." (*NCLCV* Pls' Br. at 31). Although *NCLCV* Plaintiffs-Appellants (unlike the other Plaintiffs-Appellants) do address N.C. Gen. Stat. § 120-2.4, they do not address its requirement that the General Assembly be afforded an initial opportunity to redistrict. (*See NCLCV* Pls' Br. at 30-31). Any argument that this opportunity should be denied is therefore waived, and there is no meaningful argument before this Court against affording the General Assembly the first opportunity to redistrict. Such an opportunity must be afforded if this Court reverses on the merits.

NCLCV Plaintiffs-Appellants jump ahead to the question of what duration a Senate plan will have "once this appeal is resolved and a constitutionally compliant Senate map is adopted." (*See NCLCV* Pls' Br. at 31). They concede that N.C. Gen. Stat. § 120-2.4 provides that any court-ordered plan can be effective for "the next general election only," but argue that "the General Assembly cannot limit the scope of judicial remedies for constitutional violations." This argument is premature, not properly before this Court, and wrong.

1. The Court should not reach *NCLCV* Plaintiffs' arguments.

NCLCV Plaintiffs-Appellants' arguments on remedy have not been previously made in this case and are therefore waived. The Court should deny Plaintiffs-Appellants' overreaching requests for relief and only consider the issues plainly before it. N.C. R. App. P. 10(a); *see Westminster Homes, Inc.*, 354 N.C. at 309, 554 S.E.2d at 641.

Moreover, the arguments are premature because they speak to a state of affairs that does not yet exist and may never exist. If this Court affirms the superior court's ruling regarding the legislative plans, then the case is over and there is no reason to reach any issue regarding Section 120-2.4. If this Court reverses the superior court's ruling, then any issue regarding Section 120-2.4 would only arise, theoretically, after some further proceedings and events. There is no basis for the Court to issue an advisory opinion on the outcome of such future events, which is unripe.

2. The *NCLCV* Plaintiffs' arguments are incorrect.

Even assuming questions concerning constitutionality of N.C. Gen. Stat. § 120-2.4(a1) were properly before the Court, there are no grounds for finding that it is unconstitutional.

The *NCLCV* Plaintiffs' arguments ignore that the North Carolina Constitution grants the General Assembly exclusive authority to draw state Senate and state House districts. N.C. Const. art. II, secs. 3, 5. These sections provide that once districts are "established" by the General Assembly, they shall remain unaltered until the return of the next decennial census. *Id.* In interpreting specific sections of the Constitution, this Court is obligated to follow the intent of the framers of the provision

in question. *See Stephenson v. Bartlett*, 355 N.C. 354, 370, 562 S.E.2d 377, 389 (2002) ("*Stephenson I*"). At the time Sections 3 and 5 were adopted, disputes concerning the legality of legislative districts were considered to be political questions and beyond the jurisdiction of state courts. *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E. 2d 316, 324 (1939). Thus, at the time sections 3 and 5 of Article II were adopted, it was understood that once districts were established by the General Assembly, they could not thereafter be modified by either the General Assembly or a North Carolina court.

In this respect, *NCLCV* Plaintiffs-Appellants' argument that "the General Assembly cannot limit the scope of judicial remedies" is backward. (*NCLCV* Pls' Br. at 31). More than a remedy, a court-ordered redistricting plan is the functional equivalent of a law that only the General Assembly has authority to enact. The authority *NCLCV* Plaintiffs cite holds that, where "a common law theory or defense established by this Court" conflicts with "constitutional rights," the latter "must prevail." *Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 330 N.C. 761, 786, 413 S.E.2d 276, 292 (1992) (sovereign immunity). In entering the redistricting field, by contrast, the judiciary is entering legislative territory, and "the judiciary must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong." *Id.*

In *Stephenson I*, the Supreme Court of North Carolina determined that legislative plans adopted by the General Assembly in 2001 were subject to judicial review for compliance with the provisions of Sections 3 and 5 of Article II, known as

the "Whole County Provisions" or "WCPs." Under both sections, the Constitution requires "that no county shall be divided in the formation of a senate [or house] district." N.C. Const. Art. II, secs. 3(3) and 5(3). In *Stephenson I*, the Court found that senate and house plans adopted by the General Assembly in 2001 violated the WCPs. In making this ruling, the Court did not conclude that a finding of illegality voided the General Assembly's one and only chance to "establish" districts, but instead remanded the case for a determination on whether there was sufficient time for the General Assembly to adopt a second set of plans. The Court held that should the General Assembly decline or be unable to adopt a second set of legislative plans, the superior court should adopt "temporary or interim remedial plans for the North Carolina Senate and North Carolina House of Representatives . . . for use in the 2002 election cycle." *Stephenson I*, 562 S.E.2d at 398. This Court also provided that even if elections were held in 2002 under a temporary or interim remedial plan that "the General Assembly shall be accorded the opportunity to enact new redistricting plans, consistent with the requirements" of the WCP "during its 2003 session." *Id.* at n.9

Following the decision in *Stephenson I*, the General Assembly acted expeditiously and adopted a second set of legislative plans to be used in the 2002 elections. Thereafter, the superior court found the General Assembly's second set of legislative plans to be in violation of the WCP and adopted its own temporary or interim remedial plans, which were used in the 2002 General Elections. The North Carolina Supreme Court subsequently affirmed the superior court's holding that the

General Assembly's second set of legislative plans, adopted in 2002, violated the WCPs. *Stephenson v. Bartlett*, 337 N.C. 301, 582 S.E.2d 247 (2003) ("*Stephenson II*").

It is clear that at the time this Court issued its decisions in *Stephenson I* and *II*, it determined that the constitutional authority to establish permanent legislative districts remained with the General Assembly, even following a court ruling finding one or more districts illegal. This Court also clearly held that under the North Carolina Constitution, courts could only order the implementation of "temporary" or "interim" plans to be used only when the General Assembly was unable to enact constitutional districts in time for the next election. Further, the Court held that there is no precedent for a court to establish permanent districts that must be used until the next decennial census. No one argued, and the Court certainly did not decree, that the Constitution only gave the General Assembly one or even two or three bites of the apple to establish districts.

In response to *Stephenson I* and *II*, the General Assembly then enacted a third set of legislative districts in 2003. At that same time, the General Assembly adopted provisions requiring that redistricting challenges be filed in a three-judge superior court based in Wake County, as well as the statute now challenged on constitutional grounds in this case by the Attorney General and the *NCLCV* Plaintiffs-Appellants. But in relevant part, N.C. Gen. Stat. § 120-2.4 does nothing more than codify the remedial process the *Stephenson I* court decided is required by the Constitution. More specifically, Section 120.2.4 codifies the constitutional requirement that the General Assembly must be afforded the opportunity to address any judicial findings holding

specific districts or a redistricting plan unconstitutional. *Stephenson v Bartlett*, 358 N.C. 219, 595 S.E.2d 112, 115 (2004) ("*Stephenson III*").

Following the General Assembly's enactment of Section 120-2.4, there have been four subsequent, relevant decisions by North Carolina courts concerning the constitutional authority of the General Assembly to modify legislative districts found to be illegal. In *Stephenson III*, the Supreme Court dismissed plaintiffs' constitutional challenge to a third set of legislative plans drawn by the General Assembly after its first set was declared illegal in *Stephenson I*, and its second set declared illegal in *Stephenson II*.

The Attorney General of North Carolina – now Governor, Roy Cooper – defended all three sets of legislative plans challenged in the *Stephenson* cases during a time that the Democratic Party constituted a majority of the members in the General Assembly. Instead of the position now advocated by the Attorney General, in all three *Stephenson* decisions, the Attorney General asserted that the General Assembly retained the exclusive constitutional authority to modify legislative plans to comply with court orders finding specific districts illegal. At no time did the Attorney General argue that Section 120-2.4 illegally barred the Court from issuing a remedy in constitutional cases or that the Court should deny the General Assembly an opportunity to correct constitutional defects or that the Court instead establish its own permanent plan to be used until the next decennial census.

The Attorney General then maintained these same positions in *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007), *affirmed sub nom. Bartlett v*

Strickland, 556 U.S. 1 (2009). In *Pender County*, this Court found the 2003 version of House District 18 to be in violation of the WCP. This Court then enforced the terms of Section 120-2.4, and granted the General Assembly the opportunity to adopt a fourth legislatively enacted House plan that was in fact used in the 2010 General Elections.

Next, in *Common Cause v. Lewis*, 2019 WL 4569584 (Wake Cnty. Super. Ct. 2019), a three-judge superior court found that legislative plans enacted by the General Assembly in 2017 violated the same fairness provisions of the North Carolina Constitution that are at issue in this case. The Attorney General's office – now, under Josh Stein – represented the North Carolina State Board of Elections in that case and did not object to an order by the superior court affording the General Assembly the opportunity to correct the constitutional deficiencies it found to exist under the 2017 legislative plans.

Finally, in the pending case, on 4 and 14 February 2022, this Court found that legislative plans adopted by the General Assembly in 2021 violated the fairness requirements of the North Carolina Constitution. Consistent with the precedent established in the *Stephenson* cases and *Pender County*, this Court remanded the case to the superior court to afford the General Assembly an opportunity to pass new districts. From the beginning of this case, the Attorney General's office has defended the North Carolina State Board of Elections. Neither the Attorney General's office nor any of the Plaintiffs-Appellants (nor any of the Amici) opposed or objected to this

Court's order giving the General Assembly the opportunity to modify its legislative plans to address violations.

Given the history of positions taken by the Attorney General in previous redistricting cases, it is beyond disingenuous for the Attorney General and the Governor (as the former Attorney General) to argue for the first time in decades that once the General Assembly establishes legislative plans, it loses any and all authority to modify plans to address constitutional violations identified by the courts. In fact, the Attorney General previously took the completely opposite view when Democrats controlled the majority in the General Assembly.

The unprecedented remedy now sought by the Attorney General, contrary to the position that office has taken in five different redistricting decisions over the last twenty years, finds no basis in the text of the North Carolina Constitution. No rational person could read the state Constitution without concluding that all redistricting authority lies exclusively with the General Assembly. Nowhere in the Constitution are there any provisions that can reasonably be construed as allowing the courts to declare districts illegal so that they can then draw permanent districts they prefer to districts adopted by the People's representatives. Any such ruling transferring the authority to adopt permanent districts from the General Assembly to the courts would represent the most flagrant and blatant violation of separation of powers doctrine in the history of North Carolina.

CONCLUSION

For these reasons, the Remedial Senate and Remedial House Plans should be affirmed.

Respectfully submitted, this the 27th day of July, 2022.

NELSON MULLINS RILEY & SCARBOROUGH LLP

Electronically submitted
Phillip J. Strach
N.C. State Bar No. 29456
4140 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612
Telephone: (919) 329-3800
Facsimile: (919) 329-3799
Email: phil.strach@nelsonmullins.com

I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

Thomas A. Farr (NC Bar No. 10871)
John E. Branch, III (NC Bar No. 32598)
D. Martin Warf (NC Bar No. 32982)
Nathaniel J. Pencook (NC Bar No. 52339)
Alyssa M. Riggins (NC Bar No. 52366)
NELSON MULLINS RILEY & SCARBOROUGH LLP
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
Telephone: (919) 329-3800
tom.farr@nelsonmullins.com
john.branch@nelsonmullins.com
martin.warf@nelsonmullins.com
nate.pencook@nelsonmullins.com
alyssa.riggins@nelsonmullins.com

BAKER HOSTETLER LLP

Mark E. Braden* (DC Bar No. 419915)
Katherine McKnight* (VA Bar No. 81482)

1050 Connecticut Ave NW, Suite 1100
Washington DC 20036
Telephone: (202) 861-1500
MBraden@bakerlaw.com
kmcknight@bakerlaw.com
**Admitted Pro Hac Vice*

Attorneys for Legislative Defendants-Appellees

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date the foregoing **Legislative Defendants-Appellees' Brief** was served upon the following by electronic email addressed as set forth below:

John R. Wester
Adam K. Doerr
ROBINSON, BRADSHAW & HINSON, P.A.
101 North Tryon Street
Suite 1900
Charlotte, NC 28246
(704) 377-2536
jwester@robinsonbradshaw.com
adoerr@robinsonbradshaw.com

Stephen D. Feldman
ROBINSON, BRADSHAW & HINSON, P.A
434 Fayetteville Street
Suite 1600
Raleigh, NC 27601
(919) 239-2600
sfeldman@robinsonbradshaw.com

Erik R. Zimmerman
ROBINSON, BRADSHAW & HINSON, P.A
1450 Raleigh Road
Suite 100
Chapel Hill, NC 27517
(919) 328-8800
ezimmerman@robinsonbradshaw.com

Sam Hirsch*
Jessica Ring Amunson*
Zachary C. Schauf*
Karthik P. Reddy*
Urja Mittal*
JENNER & BLOCK LLP
1099 New York Avenue NW
Suite 900
Washington, D.C. 20001
(202) 639-6000
shirsch@jenner.com

zschauf@jenner.com
**Admitted Pro Hac Vice*

Counsel for NCLCV Plaintiffs

Burton Craige
Narendra K. Ghosh
Paul E. Smith
PATTERSON HARKAVY LLP
100 Europa Dr., Suite 420
Chapel Hill, NC 27517
(919) 942-5200
bcraige@pathlaw.com
nghosh@pathlaw.com
psmith@pathlaw.com

Abha Khanna
ELIAS LAW GROUP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
Phone: (206) 656-0177
Facsimile: (206) 656-0180
AKhanna@elias.law

Lalitha D. Madduri
Jacob D. Shelly
Graham W. White
ELIAS LAW GROUP
10 G Street NE, Suite 600
Washington, DC 20002
Phone: (202) 968-4490
Facsimile: (202) 968-4498
LMadduri@elias.law
JShelly@elias.law
GWhite@elias.law

Elisabeth S. Theodore
R. Stanton Jones
Samuel F. Callahan
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Avenue NW
Washington, DC 20001-3743
(202) 954-5000

Elisabeth.Theodore@arnoldporter.com
Stanton.Jones@arnoldporter.com
Sam.Callahan@arnoldporter.com

Counsel for Harper Plaintiffs

Allison J. Riggs
Hilary Harris Klein
Mitchell Brown
Katelin Kaiser
Jeffrey Loperfido
Noor Taj
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 W. Highway 54, Suite 101
Durham, NC 27707
Telephone: 919-323-3909
Facsimile: 919-323-3942
allison@southerncoalition.org
hilaryhklein@southerncoalition.org
mitchellbrown@scsj.org
katelin@scsj.org
jeffloperfido@scsj.org
noor@scsj.org

J. Tom Boer
Olivia T. Molodanof
HOGAN LOVELLS US LLP
3 Embarcadero Center, Suite 1500
San Francisco, California 94111
Telephone: 415-374-2300
Facsimile: 415-374-2499
tom.boer@hoganlovells.com
olivia.molodanof@hoganlovells.com

Counsel for Plaintiff-Intervenor Common Cause

Terence Steed
Special Deputy Attorney General
tsteed@ncdoj.gov
Mary Carla Babb
Special Deputy Attorney General
mcbabb@ncdoj.gov

Stephanie Brennan
Special Deputy Attorney General
sbrennan@ncdoj.gov
Amar Majmundar
Senior Deputy Attorney General
amajmundar@ncdoj.gov
Post Office Box 629
Raleigh, NC 27602
Phone: (919) 716-6900
Fax: (919) 716-6763
Counsel for State Defendants

This the 27th day of July, 2022.

Electronically submitted
Phillip J. Strach
N.C. State Bar No. 29456
NELSON MULLINS RILEY &
SCARBOROUGH LLP
4140 Parklake Avenue, Suite 200
Raleigh, North Carolina 27612
Telephone: (919) 329-3800
Facsimile: (919) 329-3799
Email: phil.strach@nelsonmullins.com