No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC. et al. COMMON CAUSE, v. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.	)	From Wake County
REBECCA HARPER, et al. v. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.	)	

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REPLY OF PLAINTIFF-APPELLANT COMMON CAUSE

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REPLY OF PLAINTIFF-APPELLANT COMMON CAUSE

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INTRODUCTION

The omissions in Legislative Defendants-Appellees' Brief (the "Response") speak volumes and show definitively that the trial court's Remedial Order[1] contains legal error requiring reversal by this Court. Common Cause explained how the trial court failed to properly evaluate whether the remedial state legislative plans comport with *all* state constitutional requirements, as it was required to do. (*See* Brief of Plaintiff-Appellant Common Cause ("Brief") at 11 (Section II)). Common Cause also described the trial court's error in failing to properly consider whether the remedial maps intentionally destroy functioning crossover districts in violation of North Carolina's Equal Protection Clause. These legal errors merit complete reversal.

Legislative Defendants do not even attempt to address Common Cause's arguments, seeking to sweep the clear errors in the Remedial Order under the rug. Instead, their Response misinterprets and misrepresents Common Cause's position and then attempts to strike down those straw-man arguments. For example, Legislative Defendants imply that the Equal Protections Clause would require enacting crossover districts *identical* to the 2020 benchmark districts, a position never asserted by Common Cause and that has no bearing on the grounds Common Cause has established for striking down the remedial state legislative maps. Legislative Defendants also never confront the fact that they and other legislators were well aware, based upon reports including that of their own expert, that the

[1] Common Cause incorporates by reference the abbreviations in its 27 June 2022 Appellant's Brief.

remedial state legislative maps would systematically reduce BVAP levels in areas with functioning crossover districts in eastern North Carolina; and they chose deliberately to enact plans that would destroy them despite choosing to modify other districts. The historical context of these decisions supports that they intentionally targeted minority voters in this area to achieve their overall objectives in remedial redistricting. The trial court ignored this evidence entirely, warranting reversal of the Remedial Order on these grounds as well.

In light of the above, the Court can choose not to parse through the convoluted legal arguments presented by Legislative Defendants in addressing Common Cause's vote dilution claims; instead, this Court can and should reverse the Remedial Order and strike down the state legislative maps on Equal Protection grounds alone. Common Cause anticipated Legislative Defendants' arguments and proved them legally unsound (*see* Brief 29–31), particularly Legislative Defendants' disingenuous argument that taking the legally required steps to protect voters of color from vote dilution would somehow violate federal law. Their Response simply ignores the fact that the intentional destruction of crossover districts has been specifically condemned by the Supreme Court in *Strickland*. An order requiring the remedial districts proposed by Common Cause would be fully consistent with applicable law, and Legislative Defendants have failed to show otherwise. But, whether or not it reaches the merits of Common Cause's vote dilution arguments, the Court should make clear, for this and future redistricting cycles, the General Assembly's failure once again to satisfy its obligations under *Stephenson* and hold that Legislative Defendants'

purported justifications for doing so all rest on erroneous interpretations of applicable law.

Finally, in response to the conclusive evidence that their remedial state legislative maps fail to provide substantially equal voting power and only perpetuate the partisan gerrymandering that this Court's February decision outlawed, Legislative Defendants dig their heels into the erroneous and myopic analysis of just two metrics they purported to follow during the remedial process. Their only justification is to characterize these metrics as the only non-"proprietary" measurements (Response 6)—a requirement nowhere addressed in this Court's 4 February Order and 14 February Opinion—and baselessly assert that their choice deserves complete deference. As the submissions of the Plaintiffs-Appellants and Special Masters' assistants illustrate, a full view of the many applicable, Court-approved metrics instead confirms that the remedial state legislative maps fail to give voters of all political parties substantially equal opportunity to translate votes into seats across the plans, and furthermore deny them the equal opportunity to aggregate with likeminded voters to elect a governing majority. It is crucial this Court confirm that the constitutional requirements set forth in its Order and Opinion were mandatory—not advisory and not pick-and-choose-as-you-please—by reversing the Remedial Order.

ARGUMENT

I. The Remedial State Legislative Plans Fail to Comport with *All* State Constitutional Requirements, the Trial Court Erred in Failing to Evaluate This, and Legislative Defendants Have Neglected to Argue Otherwise.

Legislative Defendants fail to address, much less successfully rebut, the trial court's error in failing to evaluate whether the remedial state legislative plans comport with *all* state constitutional requirements. (*See* Brief 11–14).

This Court directed the General Assembly to "submit new congressional and state legislative districting plans that satisfy *all provisions* of the North Carolina Constitution" and allowed all parties and intervenors to submit proposed remedial plans and comments on any maps submitted with the trial court. (R p 3823 (Order ¶ 9) (emphasis added); *see also id.* at 4090 (Opinion ¶ 223)). In its Objections, Common Cause explicitly alleged an independent basis under the state's Equal Protection Clause for why the trial court should reject the remedial state House and Senate maps, due to Legislative Defendants' intentional destruction of performing crossover districts.[2]

The trial court completely ignored this claim: Its Remedial Order does not evaluate Legislative Defendants' destruction of performing crossover districts, nor does it find that the remedial districts comport with North Carolina's Equal

[2] (*See* R p 4832–33 (CC Objections to Defendants' Remedial Maps) (noting the remedial Senate map "destroys what was otherwise shown to be a functioning crossover districting, providing yet another independent state law basis under the North Carolina Equal Protections Clause") and 4837 (citing the "need for the remedial [House] district proposed by Common Cause to comport with the North Carolina Equal Protections Clause")).

Protection Clause. Nothing in the Remedial Order even suggests that the trial court was aware that this claim remained pending and required judicial review. This error alone requires reversal. *See, e.g.*, *Small v. Small*, 107 N.C. App. 474, 477–78, 420 S.E.2d 678, 681 (1992) (citing N.C. Gen. Stat. § 1A-1, Rule 52, and vacating trial court judgment after finding "the findings of fact and conclusions of law set forth . . . do not finally resolve the issues raised in this cause"). Legislative Defendants chose not to rebut this point, and thus any defense to it is now abandoned. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."); *Dickson v. Rucho*, 368 N.C. 673, 673 789 S.E.2d 436, 437 (2016) ("Plaintiff-appellants waived review of this argument by failing to raise it in their brief[.]") (citing N.C. R. App. P. 28 (a)).

Where Legislative Defendants do substantively engage with Common Cause's arguments, they repeatedly fall short.

A. The Remedial State Legislative Maps Violate North Carolina's Equal Protection Clause, and the Trial Court's Failure to Consider Any of the Supporting Evidence Warrants Reversal.

Common Cause has set forth how all competent evidence supports that Legislative Defendants and other legislators intentionally enacted remedial plans that destroy functioning crossover districts in violation of North Carolina's Equal Protection Clause. (Brief 32–45). By reducing the BVAP levels for districts drawn where crossover districts were previously performing (House District 10 and Senate District 4), legislators assured the destruction of these districts. The intentionality of this act is clear: this Court's Order and Opinion required the redrawing of state legislative maps, legislators knew *from their own experts* and the extensive litigation

that these areas were performing crossovers that had been destroyed in the 2021 enacted maps, and Legislative Defendants proceeded to selectively change other areas of the state legislative maps but deliberately did not do so for these districts (despite the fact that drawing these districts would also improve constitutional compliance on partisan metrics as well), thereby targeting voters of color in these areas specifically. These actions fit within the historical backdrop of persistent and continuous targeting of Black voting power in North Carolina, in both past legislative sessions and this redistricting cycle, by (among other things) the repeated failure of legislators to follow the requirements under *Stephenson* and take steps to ensure the prevention of vote dilution for voters of color. (*See generally*, Brief 32–45).

In the Remedial Order, the trial court failed to consider any of these arguments. But even a generous reading that the trial court *implied* that it rejected these arguments would be both a clear legal error and unsupported by competent evidence.

Legislative Defendants' Response fundamentally misrepresents Common Cause's intentional discrimination claims, constructing straw-man arguments in their place to distract the Court from the trial court's legal errors. For instance, Legislative Defendants wrongly characterize Common Cause's argument as insisting on *identical* versions of Senate District 4 and benchmark House District 21 to maintain functioning crossover districts. (Response 50). It is obvious, however, that identical versions are not realistic given the release of new census data and one-person, one-vote requirements, nor is the need for identical districts what Common

Cause's contends. Rather, Common Cause identified how Legislative Defendants intentionally drafted maps destroying functioning crossover districts despite the demonstrated ability to preserve crossover districts in the same areas (and thus for the impacted voters) as before, as proven by Common Cause's proposed remedial districts. Simply put, given the option to preserve or destroy previously functioning crossover districts, Legislative Defendants chose the latter, in violation of North Carolina's Equal Protection Clause. Tellingly, Legislative Defendants never dispute the lower BVAP levels for their remedial districts, or the fact that they have no chance of performing for voters of color, as established by their own expert and explained by Common Cause. (*See* Brief 32–33).

Legislative Defendants' other arguments are similarly unavailing. Their contention that their intentional destruction of the functioning crossover district in Senate District 4 is somehow justified by other provisions of North Carolina's Constitution, and specifically the county clusters formed under the Whole-County Provision, misses the mark. First and foremost, they point to no evidence whatsoever that the General Assembly even *attempted* to preserve the crossover district. In fact, all competent evidence supports that Legislative Defendants took active steps to *prevent* any such consideration throughout the process by blocking reliance upon racial data at every step of the way. Since the Legislature's intent is at issue, this glaring omission in their Response (and the record) forecloses this argument.

Furthermore, Legislative Defendants' own stated approach to reconciling the state constitution's various redistricting requirements reveals how disingenuous

their post-hoc reasoning is. By their own words, the redistricting criteria must be looked at "holistically" in an effort to "try to harmonize it together." (R p 1934 (Rep. Hall Tr. 189:5-12)). Here, the proposed Common Cause remedial Senate District 4 shows that preserving a crossover district in this area requires the most minimal alteration of county clusters possible: combining two clusters together to form just one county split (Wayne) overall. (*See* Brief 23). Doing so harmonizes several state Constitutional requirements, including protection against intentional discrimination and remedying partisan gerrymandering as required by the Supremacy Clauses, the Equal Protection Clause, the Free Speech and Freedom of Assembly Clauses, and the Free Elections Clause.

This point is further supported by the principal case on which Legislative Defendants rely in eschewing responsibility for their intentional destruction of crossover districts: *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007), *aff'd Bartlett v. Strickland*, 556 U.S. 1 (2009). According to Legislative Defendants, the Court in *Pender* instructed that the county grouping formula may never yield to a goal of drawing minority crossover districts, thus precluding any drawing of these districts to prevent a violation of the state Equal Protection Clause. (Response 52). This is incorrect. The Court in *Pender* never considered any intentional racial discrimination allegations and resulting violations of the state Equal Protection Clause (much less the Freedom of Speech and Assembly Clauses, or the Free Elections Clause), and thus *Pender* does not pave the easy off-ramp that Legislative Defendants seek.

To the contrary, this Court's holding in *Pender* as to how the General Assembly should harmonize various redistricting requirements indicates that the state constitution actually *requires* the minimal county split necessary here; it instructs that the Whole-County Provision "'cannot be applied in isolation or in a manner that fails to comport with other requirements of the State Constitution.'" 361 N.C. at 493, 349 S.E.2d at 366 (quoting *Stephenson v. Bartlett*, 355 N.C. 354, 376, 562 S.E.2d 377, 392 (2002)).[3] Accordingly, this Court in *Pender* has already rejected Legislative Defendants' purported justification for violating the Equal Protection Clause in the remedial state Senate map by relying on the Whole-County Provision. To the extent the trial court's order could be considered as having adopted these legal arguments in approving the state legislative maps, they constitute legal error that requires reversal.

Similarly, to the extent the trial court's findings of fact could somehow be interpreted as implicitly finding no intentional discrimination, such a finding would be unsupported by competent evidence, and Legislative Defendants have failed to show otherwise. Critically, their Response does nothing to rebut the overwhelming evidence of intentional conduct presented by Common Cause during the trial and remedial proceedings. And while they contend that Common Cause has at most shown "awareness, not purposeful achievement of negative consequences" (Response

[3] *Pender* is likewise inapposite with respect to the vote dilution issues in this case, as it was impossible in that matter to draw a district in which Black voters constituted a numerical majority (and thus satisfy the first *Gingles* prong), whereas here, Common Cause submitted to the General Assembly and trial court proof that *Gingles I* is satisfied in the areas of Senate District 4 and House District 10.

60), Legislative Defendants elsewhere concede that the decision to draw minority crossover districts is one "of legislative discretion" (Response 53), a tacit admission that their decisions involving the remedial maps (and choice *not* to preserve crossover districts) were in fact purposeful.

That Legislative Defendants intentionally applied their legislative discretion to diminish minority voting power in the remedial maps is further shown by the overwhelming evidence they have failed to rebut. This includes (in chronological order): (i) the long history of seemingly race-neutral policies weaponized by the General Assembly to limit Black political participation (Brief 34–38), (ii) the original 2021 redistricting criteria adopted by Legislative Defendants that prohibited the use of racial data to protect minority voters (*id.* at 38–41); (iii) Legislative Defendants' persistent refusal to conduct a Racially Polarized Voting ("RPV") analysis during the 2021 redistricting process (*id.*), (iv) Legislative Defendants' reliance during the remedial redistricting of their expert's own report, showing diminished BVAP levels in the areas of concern identified by Common Cause, (v) Legislative Defendants' failure once again to follow this Court's February 2022 directive to conduct an RPV analysis and assess legally significant racially polarized voting, (*id.* at 41), and (vi) Legislative Defendants' decision to selectively modify *other* districts in the remedial process, but refusal to do so for House District 10 and Senate District 4 despite receiving definitive information from their own expert and from Common Cause that these districts required remediation (*id.* at 42).

Overall, there is no tenable argument that Legislative Defendants acted unintentionally when they destroyed functioning crossover districts in the remedial state legislative maps. Even if the Remedial Order could be interpreted as properly addressing this challenge to the remedial maps (which it, credibly, cannot), any findings would be unsupported by competent evidence and require reversal and an order on remand to implement the remedial House District 10 and Senate District 4 proposed by Common Cause.

B. The Trial Court Did Not Properly Assess Legislative Defendants' Obligations under *Stephenson*, so This as well as Legislative Defendants' Persistent Misinterpretation of these Obligations Require Further Guidance From this Court.

As shown above, there are independent and sufficient constitutional grounds under the state Equal Protection Clause for requiring Common Cause's remedial districts. Still, Legislative Defendants' Response betrays a persistently erroneous view of the Legislature's obligations to protect against vote dilution, as stated under *Stephenson v. Bartlett* and confirmed again by this Court in its Opinion. These legal errors and misinterpretations require correction by this Court.[4]

[4] The Court should cast aside Legislative Defendants' last-ditch effort to prevent this Court from weighing in on the grounds that it was "not raised in the court below." (Response 31). To agree would require an unusual lapse in memory: Common Cause's first claim in December 2021 in this matter was a request for Declaratory relief confirming the General Assembly's obligations to conduct an RPV study as required by *Stephenson*. (R p 1328–30 (CC Complaint ¶¶ 151–60)). After prevailing on this claim, (R p 4087–88 (Opinion ¶ 216)), Common Cause asserted that the General Assembly again failed in its *Stephenson* obligations and offered remedial districts required pursuant to state constitutional law. (*See* R p 4575–4607 (CC Proposed Remedial Districts) and R p 4825–57 (CC Objections to Defendants' Remedial Maps)).

First, the trial court erroneously held that mere proportionality would provide a safe harbor for parties that fail to perform an RPV analysis. (*See* R pp 4873–75 (Remedial Order ¶ 17)). This legal fallacy was repeatedly referenced by Legislative Defendants (*see, e.g.*, Response 34–35, 38, 39, 47) with no rebuttal to the case law and explanations provided by Common Cause showing it to be wrong. (*See* Brief 28 (citing *Johnson v. De Grandy*, 512 U.S. 997, 1026 (1994) (O'Connor, J., concurring) and *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 437 (2006)). Legislative Defendants' only support for their proportionality argument is a passing citation to *Johnson*. (Response 38). But the *first sentence* of *Johnson* squarely rejects Legislative Defendants' contention (and the trial court's finding) that proportionality alone is enough to defend against a challenge on the grounds of vote dilution: "[S]uch proportionality is *not dispositive* in a challenge to single-member districting[.]" 512 U.S. at 1000 (emphasis added).

Johnson, as well as the more recent holding in *LULAC,* confirm that legislators cannot simply "trade off" the rights of individuals in one challenged area with changes in another region. *Id.* at 1019 (rejecting the premise "that in any given voting jurisdiction (or portion of that jurisdiction under consideration), the rights of some minority voters under [Section] 2 may be traded off against the rights of other members of the same minority class"); *LULAC*, 548 U.S. at 437 ("[A] State may not trade off the rights of some members of a racial group against the rights of other

members of that group . . . .") (internal quotation marks and citation omitted).[5] And much like federal case law, there is no basis in this Court's precedent that the state constitutional requirement to conduct an RPV study when engaging in state legislative redistricting is somehow excused based on a finding of proportionality alone.

The second line of arguments that this Court should explicitly reject is Legislative Defendants' reliance on outdated data and analysis to assert there is no racially polarized voting in North Carolina presently. This Court directed the General Assembly to "first assess whether, using *current election and population data*, racially polarized voting is legally sufficient" such as to require districts to avoid vote dilution. (R p 3823 (Order ¶ 8) (emphasis added)). Nonetheless, Legislative Defendants spend *four pages* touring through their own unlawful redistricting from past cycles. (Response 35–39). The only thing this section proves is that Legislative Defendants have a long pattern of misinterpreting relevant legal standards and failing in their obligations, all to serve their own objectives, and at the expense of voters of color.[6] It

[5] For the same reasons, Legislative Defendants' assertions about remedial Senate District 5 (Response 43) are legally inapposite given that this district excludes the Wilson and Wayne county voters impacted. (*Compare* R p 4588 (Figure 4, Common Cause Senate *Gingles I* demonstrative district) *with id.* at 12414 (Senate District 5 in the Remedial Map, S.L. 2022-2)).

[6] For similar reasons, Legislative Defendants' assertion that "what Common Cause truly seeks is . . . to entrench the voting strength of the Democratic ticket," (Response 46), is obvious projection. Legislative Defendants' motive in redistricting state legislative maps has consistently been to entrench their own power, a fact proven at trial and summarily affirmed by this Court in this matter; and the evidence once again demonstrates that it was achieved by targeting voters of color.

is crucial for the Court to provide clarification now to ensure that the General Assembly's obligations under *Stephenson* are understood and followed.

Third, this Court should explicitly reject Legislative Defendants' assertions that protecting against vote dilution would run afoul of federal law, and specifically that the federal Equal Protection Clause would "forbid" protecting voters of color. (*See, e.g.*, Response 41). Common Cause anticipated these arguments and has shown them to be erroneous (*see* Brief 29–31), especially in light of the holding in *Strickland* that "[Section] 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts." 556 U.S. at 23 (citing *Georgia v. Ashcroft*, 539 U.S. 461, 480–83 (2003)). Legislative Defendants fail to even acknowledge this outright rejection of their defense, instead attempting to rely upon the recent emergency stay decision in *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 142 S. Ct. 1245, 1250–51 (2022). Such support is misplaced.

In *Wisconsin*, the U.S. Supreme Court held that the Wisconsin Supreme Court committed legal error in accepting the Governor's proposed remedial state legislative maps after finding (1) the Governor "provided almost no other evidence or analysis supporting his claim that the VRA required the seven majority-black districts that he drew" other than "there [was] now a sufficiently large and compact population of black residents to fill it," and (2) the lower court had held only that district "may" be required. *Wis. Elections Comm'n*, 142 S. Ct. at 1249–50. The Supreme Court also rejected the strict-proportionality analysis that the trial court committed here. *Id.*

(reversing the lower court because it "focused exclusively on proportionality" while ignoring the other Senate factors). Rather than supporting Legislative Defendants' decisions this redistricting cycle, the *Wisconsin* decision reinforces the importance that map-drawers conduct a comprehensive RPV analysis before redistricting, a step Legislative Defendants adamantly (and repeatedly) have refused to do.

Common Cause provided an extensive and undisputed list of reasons the analysis of Dr. Lewis, on which Legislative Defendants relied during remedial redistricting, is not a valid RPV analysis, and thus Legislative Defendants failed to determine whether there is legally significant racially polarized voting as ordered by this Court and required under applicable law. (*See* Brief 26). The trial court recognized the limitations of Dr. Lewis' report in its Judgment, holding that Dr. Lewis analyzed only what could be considered "effective Black districts" as defined by *NCLCV* Plaintiffs' expert Moon Duchin. (*Id.* (citing R p 3703 (Judgment ¶ 594)).[7] Legislative Defendants rebutted *none* of this in their Response. Instead, they provide a quote from the record asserting that Dr. Lewis "confirm[e]d the absence of legally significant racially polarized voting in North Carolina." (Response 35 (quoting R pp

[7] Dr. Lewis's concept of "effective Black districts" not only lacks a basis in law, but directly contravenes it. He qualifies as "effective Black districts" those with *any* number of Black voters, even where minimal. (*See, e.g.,* R p 4439 at line "H980 Third Edition-021" (showing BVAP of 8.69% with an 82 "Imputed Black-Preferred Win Rate")). But his analysis lacks any assessment of whether these voters' support would control the outcome rather than being negligible or merely "influential." This error further disqualifies his report from assessing issues of vote dilution. *Cf. Montes v. City of Yakima*, No. 12-cv-3108-TOR, 2015 U.S. Dist. LEXIS 194284, at *25 (E.D. Wa. Feb. 17, 2015) (holding that a plan in which Latino voters could only control the outcome of one district and merely "influence" another did not remedy a Section 2 violation).

14675–76 (16 Feb. Sen. Cmte. Hr'g Tr. 8:23-9:3)). They must have hoped this Court would not actually look at the record cite, because this quote is not from Dr. Lewis himself. It is not even from the trial court's Judgment. Instead, this is a quote from *Legislative Defendant* Senator Daniel from the 16 February 2022 Senate Redistricting Committee meeting. In other words, Legislative Defendants' whole basis for relying upon Dr. Lewis' insufficient analysis is "because we say so." This line of argument would hardly earn them a passing grade in high school debate, much less support competent evidence in this matter.[8]

Legislative Defendants' attempts to cast doubt upon the competent evidence in the record, including the data submitted by Common Cause, is similarly unconvincing. They assert a "complete absence of the *Gingles* preconditions" in their Response (at 34) without showing a single error with the RPV analysis submitted by Common Cause or presenting any valid analysis of their own. They baselessly contend the Common Cause remedial districts would constitute racial gerrymanders, relying on *Cooper v. Harris*. But while *Cooper* references a "body of evidence—showing an announced racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites," 137 S. Ct. 1455, 1469 (2017), here the competent evidence shows no such target or subordination

[8] The other authorities relied upon (but not quoted) by Legislative Defendants also do not support that Dr. Lewis properly determined whether racially polarized voting is legal significant, as established by Common Cause. (*See* Brief 12 (addressing the Remedial Order's legal error and factual findings), 16 (addressing the flaws in the Lewis reports), 33 (addressing the Barber Report, which does not even mention Dr. Lewis's analysis or racially polarized voting).

occurred. (*See* R pp 4597–98 (First Ketchie Affidavit ¶ 11) ("I also considered minimizing county splits and traversals, minimizing splits of community related boundaries such as municipalities and precincts, and maximizing compactness because I did not intend or want race to predominate in the drawing of these remedial district lines.")).[9]

Finally, Legislative Defendants suggest that the U.S. Supreme Court's consideration of the Section 2 case *Merrill v. Milligan* should be reason enough for the Court to ignore issues of vote dilution in order to await instead "new controlling and clarifying guidance concerning a state's obligations to comply with Section 2." Response 31 n.19 (citing *Merrill v. Milligan*, No. 21-1086 (S. Ct. Jan. 28, 2022)). But any potential clarifications provided in *Merrill* will not sanction the gross misrepresentations of applicable law by Legislative Defendants, which contravene core established precedent (as well as logic) and, in any event, involve issues of state law as well. The urgent need for clarity on North Carolina state constitutional requirements in redistricting and the directives of this Court in *Stephenson* and its February Opinion remain. Legislative Defendants have failed to satisfy their requirements under current law, and the Court should so hold.

[9] Legislative Defendants also continue to confuse Common Cause's *demonstrative* districts with the proposed remedial districts, and thus their comparisons of the *demonstratives* to purported racial gerrymanders (*see* Response 42) are completely irrelevant to the lawfulness of the proposed remedial districts. They also assert, inaccurately, that the proposed Common Cause remedial Senate district 4 contains Pitt County (Response 45–46), which it plainly does not.

II. The Remedial State Legislative Maps Are Unconstitutional Partisan Gerrymanders.

Common Cause has established how the trial court erred in assessing whether the state legislative maps were unconstitutional partisan gerrymanders—first by misapplying the legal standard provided by this Court, and then, by nature of that error, restricting its consideration of evidence in the record. (Brief 45–47). Legislative Defendants, in response, attempt to provide cover for these errors with overstated claims of legislative deference, flawed interpretations of the legal standard explained in this Court's Opinion, and a self-serving and selective recitation of facts in the record supportive of their remedial maps. For the reasons provided below, these arguments should be rejected and the remedial state legislative maps deemed insufficient and, indeed, unconstitutional.

A. Neither Legislative Deference Nor Considerations of Intent Can Salvage the Trial Court's Flawed Analysis of the State Legislative Plans.

General principles of judicial deference are a starting point for any trial court performing remedial review after maps are held to violate the state constitution. From there, "[r]ather than passively deferring to the legislature," a trial court has the "responsibility [] to determine" whether remedial maps "encumber the constitutional rights of the people of our state," specifically whether those maps "encumber the constitutional rights of the people to vote on equal terms and to substantially equal voting power." (R pp 3959–60 (Opinion ¶ 7)). Thus, Legislative Defendants' invocation of legislative deference both as to the passage of the remedial maps (Response 19) and in policy decisions preceding their passage (*id.* at 22) is a red herring. That

concept is already built into the legal standard set forth by this Court, and it cannot inoculate a legislative act from constitutional challenges nor authorize the trial court to abrogate its duty to assess the constitutionality of a challenged act, as Legislative Defendants here suggest.

Legislative Defendants also seek to support the trial court's holding with a stalking horse argument about whether under this Court's Opinion, "intent" is a requisite element of a partisan gerrymandering cause of action. (Response 17, 20). This argument misses the mark for several reasons. First, the standard for partisan gerrymanders does not speak of "intent" in the way Legislative Defendants seem to address the concept in their briefing, that is, in terms of the requirement for direct evidence of intent, distinct from effect. In fact, this Court, in reviewing the trial court's findings of facts, endorsed the trial court's decision to "determine[] the enacted plans were intentionally constructed to yield a consistent partisan advantage for Republicans" despite a "lack of direct evidence of intent." (R pp 3973–74 (Opinion ¶ 28)). And this Court, when reviewing the trial court, applied that standard similarly. (*See e.g.*, *id*. at 4077 (Opinion ¶ 194) ("The General Assembly has substantially diminished the voting power of voters affiliated with one party on the basis of partisanship—indeed, in this case, the General Assembly has done so intentionally.")).

Nevertheless, Legislative Defendants seem to divine from this Court's Opinion a need to show "intentional, purposeful discrimination" in a peculiar (and incorrect) way, going so far as to suggest that the absence of an intent requirement would

require the General Assembly to purposefully aid political parties to avoid disfavoring them.[10] But this Court was clear about the pleading and proof standards for someone attempting to show that a districting plan infringes upon a voter's fundamental right to vote, none of which requires a specified showing of intent:

> To trigger strict scrutiny, a party alleging that a redistricting plan violates this fundamental right must demonstrate that the plan makes it systematically more difficult for a voter to aggregate his or her vote with other likeminded voters, thus diminishing or diluting the power of that person's vote on the basis of his or her views. Such a demonstration can be made using a variety of direct and circumstantial evidence . . . .

(*Id.* at 4071–72 (Opinion ¶ 180); *see also id.* at 4053–54 (Opinion ¶ 157) ("When the General Assembly systematically diminishes or dilutes the power of votes on the basis of party affiliation, it *intentionally* engages in a form of viewpoint discrimination and retaliation that triggers strict scrutiny.") (emphasis added)).[11]

In short, so long as there is evidence—direct or circumstantial—supporting a showing of diminished or diluted voting power, the proof requirements for

[10] This is cynical view of redistricting not shared by Common Cause, nor, most importantly, this Court. (R p 4059 (Opinion ¶ 164) ("There is such a thing as a plan that creates a level playing field for all voters."); *see also id.* at 3957–58 (Opinion ¶ 3) ("[T]he technology that makes such extreme gerrymanders possible likewise makes it possible to reliably evaluate the partisan asymmetry of such plans . . . .")).

[11] Legislative Defendants' reliance on *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 662, 178 S.E.2d 382, 386 (1971) and *Holmes v. Moore*, 270 N.C. App. 7, 16, 840 S.E.2d 244, 254–55 (2020) for this point is unavailing. As an initial matter, both cases only implicate the Equal Protection Clause and not the Free Elections, Free Speech and Freedom of Assembly Clauses also at play here. Moreover, neither case creates a requirement for direct evidence of intent, and the *Holmes* decision, in fact, acknowledges a multitude of factors and circumstantial evidence that can support an inference of discriminatory intent when trying to prove discriminatory purpose. 270 N.C. App. at 18–19, 840 S.E.2d at 255–56.

establishing a partisan gerrymandering claim can be satisfied, even in the absence of direct evidence of intent. This makes perfect sense as "'officials seldom, if ever, announce on the record that they are pursuing a particular course of action because of their desire to discriminate' against a particular group." *League of Women Voters of Mich. v. Johnson*, No. 17-14148, 2018 U.S. Dist. LEXIS 86398, at *11–12 (E.D. Mich. May 23, 2018) (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 341 (E.D. Va. 2015)). This also means that, contrary to Legislative Defendants' contention otherwise (Response 21), a constitutional impingement *can* be shown solely based on fairness metrics so long as those metrics demonstrate a diminution or dilution of power of a person's vote on the basis of his or her views.

Finally, Legislative Defendants' arguments about intent are lacking because nothing in the Remedial Order suggests that the trial court ever even considered that issue. Rather, as noted by Common Cause (Brief 47), and conceded by Legislative Defendants (Response 21), the trial court incorrectly relied upon only two of the many relevant measures of partisan skew, finding that each state legislative plan was "satisfactorily within the statistical ranges set forth in the Supreme Court's full opinion" (R pp 4879, 4881 (Order ¶¶ 42, 55)), and then ended its consideration without performing the multi-factored, fact-intensive analysis required to determine whether a map truly denies voters equal voting power. This was legal error and grounds for reversal. Plainly aware of this error and their own inability to justify the trial court's findings, Legislative Defendants are attempting to move the goal posts on Plaintiffs-

Appellants' burden of proof by adding an element to the claim not required by this Court's decision. This effort should be rejected.

B. The Trial Court's Factual Findings That the Remedial Senate and House Plans Are Constitutional Are Erroneous.

1. The Trial Court Misinterpreted and Misapplied This Court's Instructions for Scrutinizing Potential Partisan Gerrymanders.

The trial court erred when assessing the constitutionality of the remedial state legislative maps by misapplying this Court's standard for assessing claims of partisan gerrymandering. Specifically, the trial court grounded its decision in two statistical ranges, finding adherence to those ranges to be dispositive of the question at hand. But this Court did not adopt such a simplistic framework for assessing constitutional infirmities in a district map. Instead, it declared a standard that requires redistricting plans to provide voters of each party with substantially the same opportunity to elect a majority or supermajority of representatives in the General Assembly. And, consistent with other redistricting jurisprudence, it expressly declined at this stage to delineate a bright light rule that would automatically render a plan constitutional. (*See generally* R pp 4057–63 (Opinion ¶¶ 163–69)).

Legislative Defendants' Response clings to a tortured reading of this Court's Opinion, claiming that the trial court simply did what "this Court hoped it would do and said it should do" and that while the trial court "could have taken other approaches, i[t] does not follow that it erred in utilizing these approaches." (Response 21–22). But this position is irreconcilable with this Court's guidance on assessing the

constitutionality of districting plans under the North Carolina Constitution. (*See* Brief 45–47).

The fact that the General Assembly made a policy decision to look primarily to efficiency gap and mean-median scores as measures of partisan fairness does not alter that conclusion, as the Legislative Defendants contend. (Response 22 (noting the "General Assembly chose to utilize them predominantly in the legislative redistricting process")). Even though the General Assembly has primary responsibility for redistricting under the North Carolina constitution and, consequently, some obvious discretion in the way it goes about that task, that discretion, as Legislative Defendants acknowledge, has "constitutional limitations." (Response 22 (citing R p 4025 (Opinion ¶ 117)). The General Assembly cannot make redistricting policy decisions that are incompatible with the North Carolina Constitution and North Carolina Supreme Court precedent. Nowhere in the Opinion did this Court endorse the efficiency gap and mean-median analyses as conclusive tests for assessing the constitutionality of redistricting maps. Accordingly, the General Assembly's purported "lawful policy choice[]" (Response 22) here is no different than its prior unlawful policy choice of redistricting the state in a purportedly "race-neutral" manner in contravention of this Court's guidance in *Stephenson*. In sum, a policy decision that flouts clear constitutional guidelines, as this one does, is a policy decision entitled to no deference whatsoever.

2. Because the Trial Court Misapplied the Legal Standard, It Erroneously Disregarded Compelling, Competent Evidence Showing the Remedial State Legislative Maps Are Partisan Gerrymanders.

Common Cause has identified an array of evidence from the trial court and remedial record that, when considered under the correct legal framework from this Court's Opinion, prove that the remedial house and senate maps fail to meet constitutional standards. (Brief 48–55). That evidence includes analyses by the Special Masters' assistants, submissions by Common Cause's experts, and an accounting of what the Report of the Special Masters failed to consider. (*Id.*)

Legislative Defendants' Response contends that the existence of "substantial and competent evidence" supports the trial court's findings of constitutionality. (Response 22–29). This recounting of evidence by Legislative Defendants, however, suffers from one major flaw: It ignores the actual findings of fact declared by the trial court in its Remedial Order, which make clear that the trial court's consideration of the remedial maps was substantially more limited than what Legislative Defendants now present to this Court as a post hoc rationalization of the trial court's decision.

For example, Legislative Defendants' Response discusses an analysis conducted by Dr. Michael Barber, which they contend calculated results using all four of the fairness tests endorsed by the Court. (*Id.* at 23, 28). It also details statistical findings from the General Assembly's non-partisan staff addressing efficiency gap and mean-median scores. (*Id.* at 22, 27). Though the trial court acknowledged the involvement of legislative staff and Dr. Barber in the remedial process (*see* R p 4872 (Remedial Order ¶¶ 11–12)), the trial court plainly stated that its consideration of

partisanship was limited to the analysis performed by the Special Masters and their advisors, and specifically to whether the plans scored "within the statistical ranges set forth in the Supreme Court's full opinion. *See Harper v. Hall*, 2022-NCSC-17, ¶166 (mean-median difference of 1 % or less) and ¶167 (efficiency gap less than 7%)." (R pp 4879, 4882 (Remedial Order ¶¶ 42, 55); *see also id.* at 4875 (Remedial Order ¶ 27) (noting the "adopt[ion] in full the findings of the Special Masters and set[ting] out additional specific findings on the Remedial Plans' compliance with the Supreme Court Remedial Order below")).

In bench proceedings, "the trial 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*, 357 N.C. 301, 309, 582 S.E.2d 247, 252 (2003) (citation omitted). But here, the limited evidence cited by Legislative Defendants was not considered by the trial court, and thus it alone cannot serve as a post-hoc basis for the trial court's holding. Instead, as shown by Common Cause, a comprehensive view of all competent evidence supports only one conclusion: that the remedial state legislative maps are unconstitutional partisan gerrymanders. (Brief 48–55).

3. Even Assuming Arguendo That the Trial Court Was Correct to Rely on Only Two Fairness Metrics In Its Analysis, the Trial Court Erred in Its Attribution to North Carolina's Political Geography, Which Is an Independent Basis for Reversal.

Legislative Defendants again point to what they contend is "competent evidence" supporting the trial court's fact findings on the natural political geography of North Carolina and its resulting partisan skew. (Response 29–31). But Legislative

Defendants' argument is again unavailing because of the disconnect between the Court's guidance on this issue and the trial court's interpretation and application of that guidance, which reflects legal error requiring reversal.

This Court held that one of the "reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander" is looking at "whether a meaningful partisan skew *necessarily* results from North Carolina's unique political geography." (R pp 4057–59 (Opinion ¶ 163) (emphasis added)). The trial court, after finding the remedial legislative maps presumptively constitutional, asked a different question: whether the remaining partisan skew in the remedial plans could be "*explained* by the political geography of North Carolina." (R p 4879, 4882 (Remedial Order ¶¶ 43, 56) (emphasis added)). This difference in approach is not simply semantics, it is critical to the analysis of partisan gerrymandering. The first inquiry, mandated by this Court, asks whether a certain level of partisan skew is unavoidable, thus justifying its presence in what is otherwise a neutral districting plan. This functions as a cap for excused partisan bias in a North Carolina statewide redistricting plan.[12] The other approach (here, the trial court's approach) skips that question entirely and instead focuses on whether the political geography of the state may be contributing to the degree of partisan skew exhibited in a redistricting plan.

[12] Thus, Legislative Defendants' concern about having to overcome "an unintended pro-Republican bias" by "intentional line-drawing to benefit the Democratic Party" (Response 29–30) is misinformed and overstated. This Court's Opinion explicitly excuses that type of naturally occurring partisan bias, assuming the evidence shows that it is in fact naturally occurring.

The competing evidence offered in the briefing highlights the legal significance of these different approaches. Legislative Defendants attempt to downplay the trial court's error by pointing to evidence in the trial and remedial record they contend establishes a natural partisan skew in the state's political geography. (Response 29–30). From this, and without any attempt to quantify the degree of partisan skew that is unavoidable when redistricting statewide in North Carolina, Legislative Defendants conclude that the partisan skew exhibited by their remedial plans must be permissible. Even conceding arguendo a slight natural Republican bias caused by the political geography of North Carolina, this argument fails because Legislative Defendants, like the trial court, failed to consider whether the partisan bias present in the Remedial maps exceeded what would naturally be expected in a neutral plan. Common Cause's evidence answers that question: Common Cause's experts and the Special Master's assistants both found the degree of partisan skew in the remedial plans to be outliers compared with what would be expected in maps that adhered to neutral redistricting criteria. (Brief 56–57). Clearly if the partisan skew in the remedial maps was necessitated by political geography, that would not be the case. Because the trial court misapplied the legal standard in reaching its findings, those findings should be rejected.

CONCLUSION

For the reasons stated above and in Common Cause's opening brief, the trial court's approval of the remedial state Senate and House maps should be reversed.[13]

As a tacit acknowledgment that they are in the wrong, Legislative Defendants seek to have another bite at the apple and contend that, upon reversing the Remedial Order, this Court permit them for a third time to attempt to enact constitutional state legislative plans. But such a request runs directly contrary to the statutory prescription for remedial proceedings, which provide that where the General Assembly fails to "act to remedy any identified defects to its plan", the court impose an "interim districting plan for use in the next general election." N.C. Gen. Stat. § 120-2.4.

Here, the General Assembly has failed to remedy identified defects in the state legislative plans originally enacted in 2021, after already being afforded the chance to do so, and thus an interim plan for the next general election in 2024 is the prescribed and appropriate next step. This approach respects the balance of powers and provide a "workable framework for judicial review." *Stephenson v. Bartlett*, 358 N.C. 219, 230, 595 S.E.2d 112, 120 (2004).

Respectfully submitted, this the 10th day of August, 2022.

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[13] Any points not specifically addressed herein have been addressed in Common Cause's opening brief and are not waived.

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