SOUTHERN COALITION for SOCIAL JUSTICE

1415 W. Hwy 54, Suite 101
Durham, NC 27707
919-323-3380
southerncoalition.org

February 15, 2022

VIA EMAIL

To: Sen. Phil Berger, President Pro Tempore, North Carolina Senate
Rep. Tim Moore, Speaker, North Carolina House of Representatives
Sen. Daniel, Sen. Hise, and Sen. Newton, Co-Chairs, Senate Standing Committee on Redistricting and Elections
Rep. Hall, Chair, House Standing Committee on Redistricting
(All via Counsel)

CC: Sen. Dan Blue, Senate Democratic Leader
Rep. Robert T. Reives, II, House Democratic Leader
Members, Senate Standing Committee on Redistricting and Elections
Members, House Standing Committee on Redistricting
State Defendants (*via Counsel*)
Harper Plaintiffs (*via Counsel*); NCLCV Plaintiffs (*via Counsel*)

RE: VRA-Required Remedial Districts in State Legislative Maps

Dear Sirs,

We write on behalf of Common Cause in reference to the 4 February 2022 Order (the "NCSC Order") and the 14 February 2022 Opinion (the "NCSC Opinion") of the North Carolina Supreme Court in *Harper v. Hall*, No. 413PA21 and the 8 February 2022 Order of the three-judge panel in the consolidated matter *NCLCV v. Hall*, Nos. 21 CVS 015426, 21 CVS 500085 (the "Trial Court Order"), which set forth the requirements for any remedial redistricting of state Legislative districts undertaken by the General Assembly.

As a preliminary matter, we would like to reiterate your obligations to retain relevant documentation of the redistricting process pursuant to N.C.G.S. § 120-133(a), which provides that

> *[A]ll* drafting and information requests to legislative employees and documents prepared by legislative employees for legislators concerning redistricting the North Carolina General Assembly or the Congressional Districts are no longer confidential and become public records upon the act establishing the relevant districting plan becoming law.

(emphasis added).[1] The trial court reaffirmed your obligations to preserve all documentation, including any concept maps or other materials provided to or prepared by legislative staff. *See* Order, *NCLCV v. Hall*, (Dec. 27, 2021) at 4 (requiring disclosure of "the identification of all persons who took part in the drawing of the Enacted Plans in any way as well as all documents or data relied upon by those involved in the map drawing process").[2]

In addition to preserving documentation, both the trial court and the North Carolina Supreme Court have also reinforced the General Assembly's obligation to perform the necessary racially polarized voting (RPV) analysis to draw districts required by the Voting Rights Act prior to all others, as set forth in *Stephenson v. Bartlett*, 355 N.C. 354, 383 (2002).

Specifically, Paragraph 8 of the NCSC Order provides, in relevant part, that:

> The General Assembly must first assess whether, using current election and population data, racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African-American voters.

The Supreme Court reiterated this on pages 134 through 137 of the NCSC Opinion, holding that "under *Stephenson*, the General Assembly was required to conduct a racially polarized voting analysis prior to drawing district lines" to comply with the North Carolina state Constitution and to "avoid the dilution of minority voting strength."

Paragraph 2(a) of the Trial Court Order provides, in relevant part, that the General Assembly include in its written submission accompanying any Proposed Remedial Plans:

> The results of the required initial assessment of whether a racially polarized voting analysis requires the drawing of a district in an area of the state to comply with Section 2 of the Voting Rights Act.

Pursuant to these directives, we write to inform you of two state legislative districts that fulfill the three threshold criteria set forth under *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986). We also provide remedial districts for these areas that prevent unlawful vote dilution for voters of color to ensure compliance with the Voting Rights Act.[3]

---

[1] Furthermore, N.C.G.S. § 120-133(a) states that "[p]resent and former legislative employees may be required to disclose information otherwise protected by N.C.G.S. 120-132 concerning redistricting the North Carolina General Assembly or the Congressional Districts upon the act establishing the relevant district plan becoming law." A legislative employee is broadly defined to include "employees and officers of the General Assembly, consultants and counsel to members and committees of either house of the General Assembly or of legislative commissions who are paid by State funds, students at an accredited law school while in an externship program at the General Assembly…and employees of the School of Government at the University of North Carolina at Chapel Hill[.]" N.C.G.S. § 120-129(2).

[2] *Available at* https://www.nccourts.gov/assets/inline-files/21.12.27%20-%20Order%20on%20Harper%20Plaintiffs%20First%20Motion%20to%20Compel.pdf?th15NEzvP6Qgu_e1OyedjDz7UCZ6g22C

[3] The expert testimony presented at trial in *NCLCV v. Hall*, namely that by Common Cause expert Dr. Leloudis and the appendix of Dr. Mattingly, confirm that North Carolina's political process would not be equally open to minority

Importantly, VRA remedial districts must be based upon a "practical evaluation of the 'past and present reality'" of political processes in this area of the state, as well as a "functional" view of the political process, to determine whether the political processes are equally open to Black voters. *Gingles*, 478 U.S. at 45 (quoting S. Rep. No. 97-417, p. 30 & n.120 (1982)). Contrary to what the General Assembly has previously assumed, "VRA districts" should not be created to simply meet a rigid and uniform 50%+1 BVAP population requirement. Instead, based on the facts of this case, remedial districts should be developed to achieve the BVAP level required to ensure Black voters have an equal opportunity to elect representatives of their choice within the particular area.

To be clear, we understand the ruling in *Bartlett v. Strickland* that crossover districts cannot be used to satisfy the *Gingles* preconditions to establish Section 2 liability. But the distinction between the demographic possibilities here and in the Pender County case is distinguishing. In *Pender County v. Bartlett*, 361 N.C. 491, 506–07 (2007), the North Carolina Supreme Court determined that neither a remedial majority-minority district in the larger Pender County region nor a crossover House district could be drawn in Pender County without crossing a county line. Based on the area demographics, there was no way to draw a district in which Black voters constituted a numerical majority. *Id.* It was therefore impossible to satisfy the first *Gingles* prong, and the Whole County Provision controlled the shape of the district that encompassed Pender County. *Id.* at 507. In contrast, as shown below, it is possible to draw the remedial districts discussed in this letter in areas of North Carolina that meet all three *Gingles* criteria today, which necessitates the creation of districts that allow minority voters to elect their candidates of choice.

This application of the VRA is consistent with both the plain text of Section 2 – which nowhere requires majority-minority districts to achieve equal "opportunity" to elect candidates of choice – and applicable precedent, which supports this jurisdictionally-sensitive approach rather than a uniform 50%+1 BVAP population requirement. *See, e.g.*, *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009) ("[Section] 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts."); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 429 (2006) (observing that even a majority of voting-age population in a district does not automatically make it an opportunity district, and that the analysis depends on whether the group "could have had an opportunity district" given how district lines are drawn).

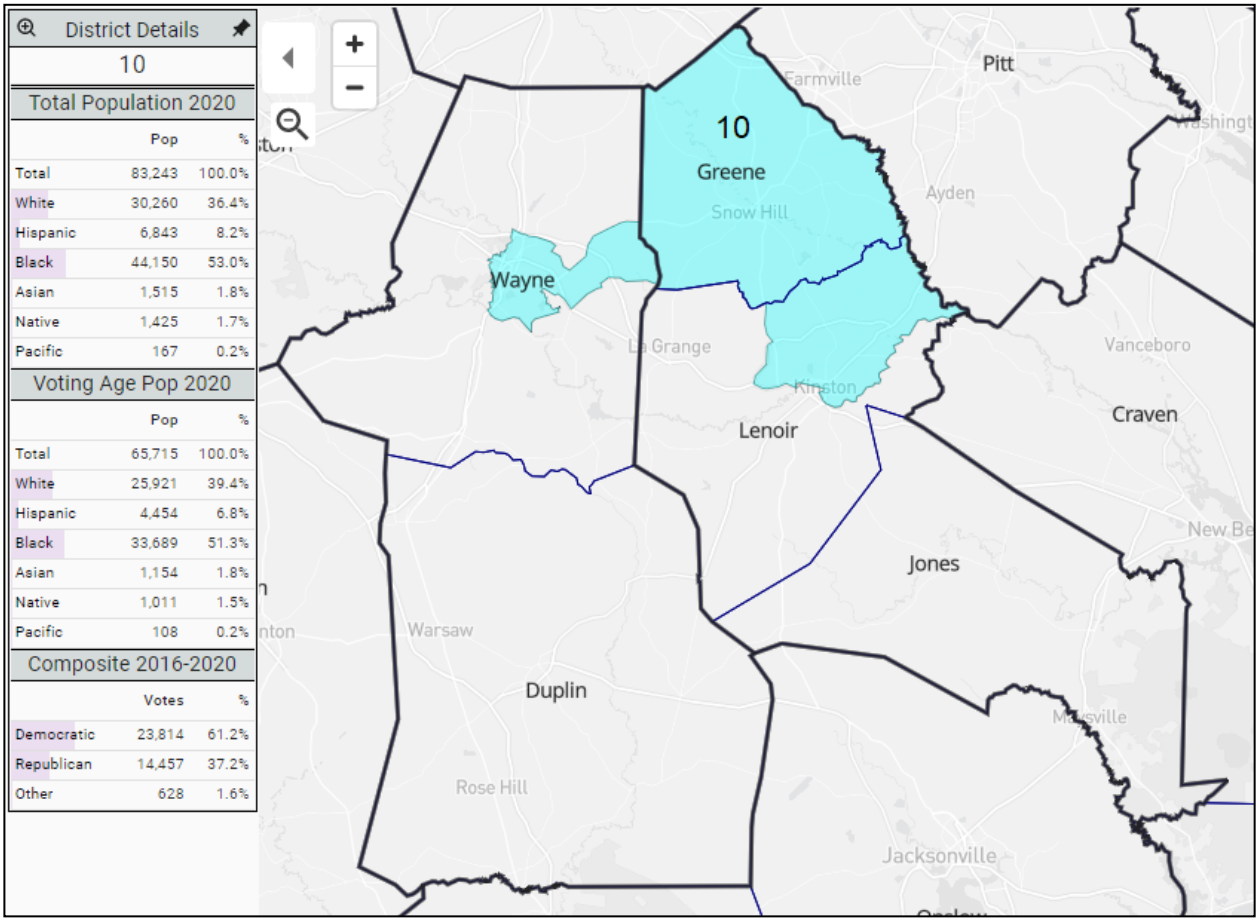
With this in mind, we outline below where the *Gingles* criteria are met and offer appropriate remedial districts that we believe will harmonize the need to protect Black voters with state constitutional requirements and will prevent violations of Section 2 in North Carolina's remedial state legislative maps.

House District 10

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

voters in these areas based upon the "totality of the circumstances." *See Thornburg v. Gingles*, 478 U.S. 30, 79 (1986).

Figure 1: HD10 *Gingles I* VRA Demonstrative

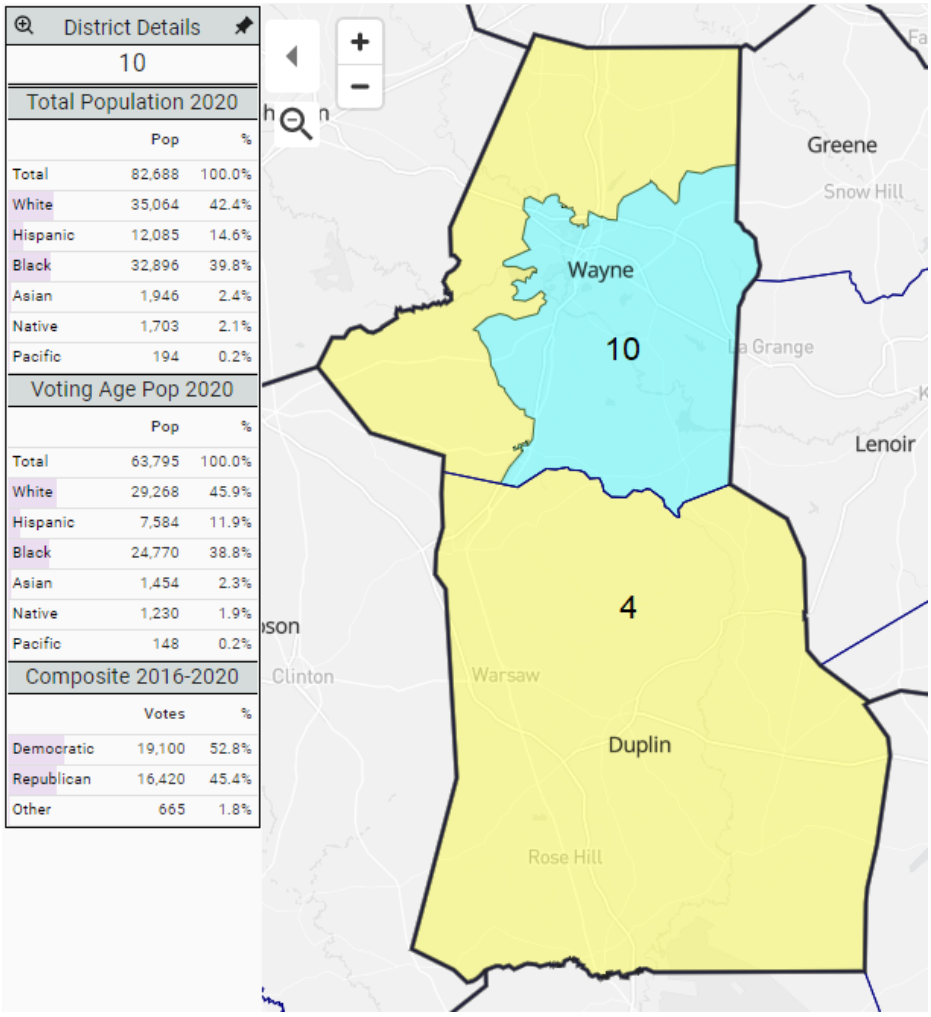


The RPV analysis attached as **Exhibit 1** to this letter indicates that Black voters are politically cohesive in the Wayne County precincts utilized by the General Assembly when enacting S.L. 2021-175. The data in **Exhibit 1** also demonstrate that there is racially polarized voting in this area, such that the white majority vote sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate, i.e., that racially polarized voting is significant in this area.[4] In contrast to the legislature's inadequate (and outdated) RPV analysis from the 2011 redistricting cycle, this RPV analysis properly addresses the third prong of *Gingles* – whether the RPV is legally significant. Accordingly, the second and third *Gingles* preconditions are also satisfied.

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

[4] This analysis is also consistent with the conclusions of Dr. Lewis offered by Legislative Defendants in *NCLCV v. Hall* for this area. *See* Lewis Deposition 70:3-71:2.

Figure 2: HD10 VRA Remedial



This remedial district contains 38.8% BVAP, which is sufficient for Black voters to have an equal opportunity to elect candidates of choice, as shown by the RPV data provided in **Exhibit 2**.[5] This remedial district has the advantage of not requiring any change to the county clustering, obviating any argument that the Whole County provision is in conflict with the need to provide a racially equitable remedy to the harm wrought on Black voters by the 2011 enacted plan.

Beyond this, we also believe there are independent state constitutional grounds for requiring these districts. In the NCSC Opinion, the North Carolina Supreme Court makes clear that partisan fairness and compliance with the state constitutional prohibition on partisan gerrymandering can be measured on a statewide basis, and that the 2021 Enacted maps were deemed unconstitutional on that basis. NCSC Opinion at p. 105. The Court also made clear, in footnote 14, that single districts can constitute partisan gerrymanders. Furthermore, in each of the districts described below, the racially polarized voting studies show that Black voters overwhelmingly prefer

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

Democratic candidates. Thus, the creation of these two additional Democratic districts is likely necessary to ensure that the metrics pointed out by the courts reflect statewide partisan fairness. Should the trial court or North Carolina Supreme Court agree with us that there is an independent state constitutional basis for the redrawing of these districts (separate from or in addition to the vote dilution issue), then we believe that the North Carolina Supreme Court ruling will be unappealable.[6]

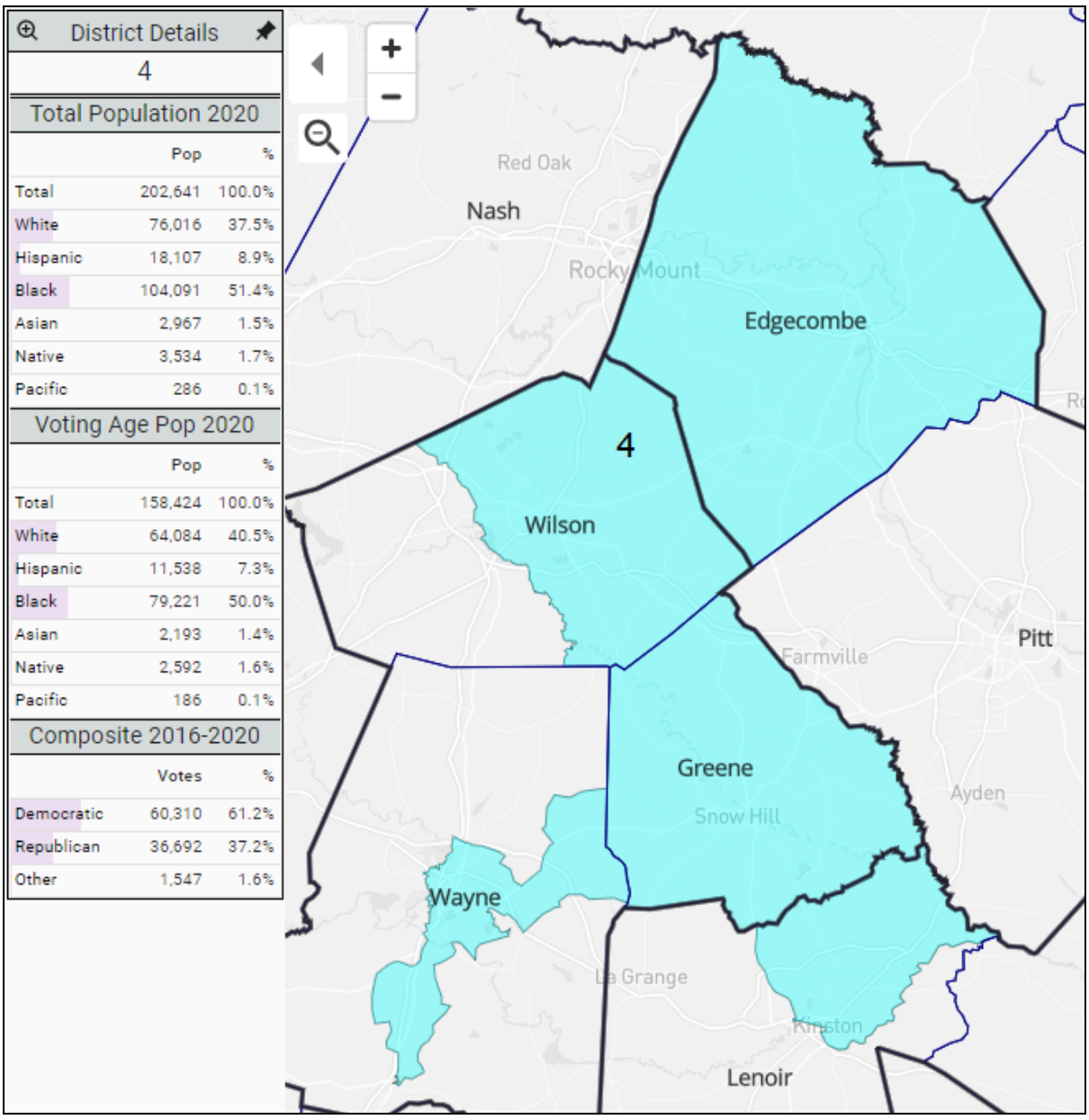
Senate District 4

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

[Rest of page intentionally left blank

[6] We do not concede that the decision to implement these districts would be appealable if grounded only in the Court's *Stephenson* precedent, but regardless, we anticipate it will be moot since independent grounds exist for this remedy.

Figure 3: SD4 VRA *Gingles* I Demonstrative



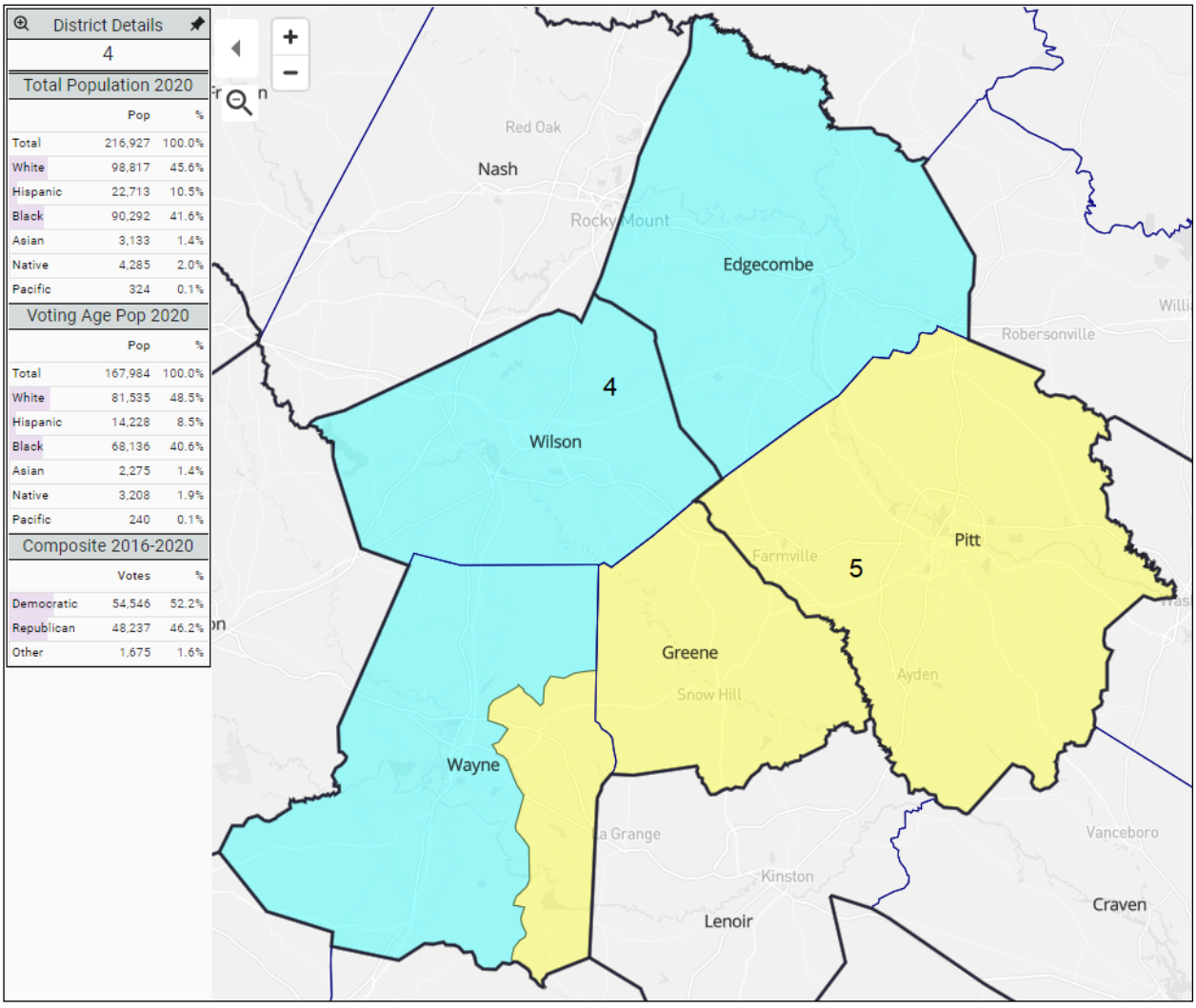
Furthermore, the RPV analysis attached as **Exhibit 3** to this letter indicates that Black voters are politically cohesive in Greene, Wayne, and Wilson counties, which are the three counties in this area set forth in the Senate Cluster options utilized by the General Assembly when enacting S.L. 2021-173.

The data in **Exhibit 3** also demonstrate there is racially polarized voting in this area, such that the white majority vote sufficiently as a bloc to enable it to usually defeat the minority's preferred

candidate, i.e., that racially polarized voting is significant in this area.[7] In contrast to the Legislature's inadequate (and outdated) RPV analysis from the 2011 redistricting cycle, this RPV analysis properly addresses the third prong of *Gingles* – whether the RPV is legally significant. Accordingly, the second and third *Gingles* preconditions are also satisfied.

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

Figure 4: SD4 VRA Remedial



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

This remedial district contains 40.6% BVAP, which is sufficient for Black voters to have an equal opportunity to elect candidates of choice, as shown by the RPV data provided for this district in **Exhibit 4** to this letter.[8]

While this remedial district does require the grouping of a single-district, two county cluster and a single-district, three county cluster to create a two-district, five county grouping, the effect on the overall map is limited to these two clusters. Similarly to HD 10, the drawing of this state Senate district is likely to ensure that the map, measured statewide, provides partisan fairness. The RPV analysis we have provided demonstrate that Black voters in this area prefer Democratic candidates. This provides an independent basis understand constitutional law, notwithstanding VRA compliance, for implementing this remedy. Moreover, the slight modification of the *Stephenson* county clustering produced by the settled algorithm is necessary to ensure that a map is drawn consistent with the North Carolina Supreme Court's ruling under the equal protection clause, free elections clause, freedom of speech clause, and freedom of assembly clause. That is, the only question that may exist is one of reconciling or harmonizing state constitutional provisions with each other – a question only for the North Carolina Supreme Court to resolve.

To further your use of this information, we have included as **Exhibits 5 and 6** the block files in native format for the remedial districts contained herein.

* * * * *

In light of the three-judge panel's determination that Senate District 1 in S.L. 2021-173 was drawn as a result of partisan gerrymandering, Judgment ¶ 300 (Jan. 11, 2022), and the North Carolina Supreme Court's determination that this violates the North Carolina Constitution, *see generally* NCSC Order, Common Cause understands that any constitutional remedial map will have to utilize the alternative Senate cluster "Z1" for northeast North Carolina (one that protects the ability of Black voters to continue electing their candidate of choice) and thus has not included analysis relevant to this Senate cluster herein. However, Common Cause's choice not to address this, or any other state or Congressional legislative districts that similarly require remediation pursuant to the Supreme Court's ruling on partisan gerrymandering, should not be construed in any way as an admission that no VRA-related issues exist in these remaining areas.

It is Common Cause's sincere hope that you will take heed and follow the extensive guidance provided by state and federal courts on the requirements of the North Carolina Constitution and federal law to craft remedial maps that prevent any needless violations of applicable law, including the Voting Rights Act. North Carolina voters should not be consigned once again to a decade of avoidable and costly litigation that undermines faith in our democratic processes and detracts from the legislature's ability to undertake the people's business. Instead, the voters of this state deserve finality and certainty in the voting districts used to elect representatives for the following decade. Likewise, specious threats of appeal to the United States Supreme Court should not deter this body

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

from taking a different course than it took in 2011 – one that respects and protects the ability of Black voters to elect their preferred candidates, and to not discriminate against them because, in these two areas, they prefer Democratic candidates.

If you have any questions, please do not hesitate to contact us. In light of the February 18, 2022 deadline for remedial districting, we would be happy to make ourselves available at your convenience for a conference or to provide more detail about the information provided herein.

Sincerely,

Allison J. Riggs
Hilary Harris Klein
Mitchell Brown
Katelin Kaiser

Counsel for Common Cause