

SUPREME COURT OF NORTH CAROLINA

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.)

PLAINTIFF COMMON CAUSE’S PETITION FOR
DISCRETIONARY REVIEW AND EMERGENCY APPLICATION
FOR A STAY PENDING APPEAL

INDEX

PETITION FOR DISCRETIONARY REVIEW	1 -
STATEMENT OF FACTS AND PROCEDURAL HISTORY	2 -
REASONS WHY CERTIFICATION SHOULD ISSUE	19 -
I. This Appeal Is a Matter of Significant Public Interest. -	19 -
II. The Cause Involves Legal Principles of Major Significance to the Jurisprudence of the State.	20 -
III. Absent Certification, Delay Will Cause Substantial and Irreparable Harm to Voters.	21 -
ISSUES TO BE BRIEFED	22 -
EMERGENCY APPLICATION FOR STAY PENDING APPEAL.....	23 -
CONCLUSION	24 -
CERTIFICATE OF SERVICE	Error! Bookmark not defined.

TABLE OF CASES AND AUTHORITIES

Cases

<i>Bartlett v. Strickland</i> , 556 U.S. 1 (2009).....	9, 10, 11, 15
<i>Harper v. Hall</i> , No. 413P21 (Dec. 8, 2021).....	3, 19, 21
<i>Harper v. Hall</i> , No. 21 CVS 500085 (N.C. Super. Ct. Jan. 22, 2022)	4, 10, 12
<i>Harper v. Hall</i> , Case No. 413PA21 (N.C. Feb. 14, 2022).....	5, 7
<i>Holmes</i> , 270 N.C. App. at 35 S.E.2d 266.....	22
<i>NCLCV and Common Cause v. Hall</i> , No. 21 VS 015426.....	2, 3, 4
<i>Stephenson v. Bartlett</i> , 355 N.C. 354 (2002)	<i>passim</i>

Constitution, Statutes, and Regulations

Declaratory Judgment Act.....	3
Voting Rights Act	18
N.C.G.S. § 1-267.1	2
N.C.G.S. § 7A-31(b)	1
N.C.G.S. § 7A-31(b)(1).....	19
N.C.G.S. § 7A-31(b)(2).....	20
N.C.G.S. § 7A-31(b)(3).....	21

Rules

Fed. R. App. P. 2.....	23
Fed. R. App. P. 8(a)	23
Fed. R. App. P. 23.....	23
Fed. R. App. P. 23(b)	23
Fed. R. App. P. 37(a)	23
N.C. R. App. P. 15	1
N.C. R. App. P. 23	1

Other Authorities

S.L. 2021-173 (Nov. 4, 2021).....	2
S.L. 2021-174 (Nov. 4, 2021).....	2
S.L. 2021-175 (Nov. 4, 2021).....	2
Bill Summary: House Bill 980 / S.L. 2022-4	6, 7
Bill Summary: Senate Bill 744 / S.L. 2022-2	6
Bill Summary: Senate Bill 745 / S.L. 2022-3	6

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PLAINTIFF COMMON CAUSE'S
PETITION FOR DISCRETIONARY REVIEW AND
EMERGENCY APPLICATION FOR A STAY PENDING APPEAL

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to the North Carolina Supreme Court's 4 February 2022 Order and Rule 23 of the North Carolina Rules of Appellate Procedure, Petitioner Common Cause respectfully petitions this Court to grant discretionary review of the trial court's 23 February 2022 order approving remedial state legislative district plans and for a writ of supersedeas to stay the execution of this same order pending review of the North Carolina Supreme Court.

In the 23 February 2022 Order (the "Remedial Order"), a three-judge panel of the Superior Court approved remedial state House and state Senate maps passed by the General Assembly after this Court rightfully held that the prior redistricting plans violated the North Carolina Constitution's Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Freedom of Assembly Clauses. The maps that the trial court approved fail to remedy the constitutional violations that this Court found in the November 2021 redistricting maps, and discretionary review and a stay is required to avert irreparable harm to North Carolina's voters.

PETITION FOR DISCRETIONARY REVIEW

Petitioner Common Cause respectfully petitions this Court to exercise its authority to grant discretionary review of the Remedial Order prior to determination by the Court of Appeals pursuant to its inherent powers under N.C.G.S. § 7A-31(b) and North Carolina Rule of Appellate Procedure 15. This matter involves subject matter of significant public interest and involving legal principles of major significance to the jurisprudence of North Carolina. A delay in final adjudication resulting from a failure to certify this matter will cause substantial harm by denying

North Carolina’s voters state Constitutional rights to elect their state Legislative representatives under district plans that provide substantially equal voting power, as guaranteed by the Free Elections Clause, Equal Protections Clause, and Freedom of Assembly and Association Clauses, and that do not unlawfully dilute the voting power of North Carolina’s Black voters.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

2021 Redistricting and Pre-Trial Phase

Following the 2020 Decennial Census, the North Carolina General Assembly enacted new redistricting plans for the North Carolina House of Representatives,¹ North Carolina Senate,² and United State House of Representatives³ on 4 November 2021. *NCLCV* Plaintiffs and *Harper* Plaintiffs, respectively, filed separate suits on 16 and 18 November 2021 challenging the constitutionality of the Enacted Maps and seeking a preliminary injunction. In accordance with N.C.G.S. § 1-267.1, the Chief Justice appointed a three-judge panel to hear *NCLCV* and *Harper* matters on 19 and 22 November 2022, respectively.

The trial court consolidated these respective cases on 3 December 2021. On the same day, the trial court heard and denied *NCLCV* Plaintiffs’ and *Harper* Plaintiffs’ Motions for Preliminary Injunction. *NCLCV* Plaintiffs and *Harper* Plaintiffs thereafter filed a notice of appeal with the North Carolina Court of Appeals. On 6 December 2021, a panel of the Court of Appeals initially granted in part a temporary

1 S.L. 2021-175 (Nov. 4, 2021) (hereinafter “Enacted House Map”).

2 S.L. 2021-173 (Nov. 4, 2021) (hereinafter “Enacted Senate Map”).

3 S.L. 2021-174 (Nov. 4, 2021) (hereinafter “Enacted Congressional Map”). Collectively, the 2021 plans are referred to as the “Enacted Maps.”

stay enjoining Defendants from opening the candidate-filing period for the 2022 elections. On the same day, the Court of Appeals issued a decision *en banc* denying Plaintiffs' requested temporary stay.

On 8 December 2021, the Supreme Court of North Carolina granted Plaintiffs' preliminary injunction and temporarily stayed the candidate filing period "until such time as a final judgment on the merits of plaintiffs' claims, including any appeals, is entered and remedy, if any is required, has been ordered." Order Granting Preliminary Injunction, *Harper v. Hall*, No. 413P21 (Dec. 8, 2021). The Order further directed the trial court to hold proceedings on the merits of *NCLCV* Plaintiffs' and *Harper* Plaintiffs' claims and provide a written ruling on or before 11 January 2022. In light of the Supreme Court's directive, the trial court entered a scheduling order on 13 December 2021, supplemented on 28 and 30 December, expediting discovery and scheduling trial to commence on 3 January 2022.

The *Harper* Plaintiffs amended their Complaint on 12 December 2021. On 13 December 2021, Common Cause moved to intervene in these consolidated cases as a plaintiff. The trial court granted the motion to intervene on 15 December 2021, and Plaintiff-Intervenor ("Plaintiff") Common Cause filed its Complaint the next day, challenging the constitutionality of the Enacted Maps and seeking, among other relief, a declaratory ruling under the Declaratory Judgment Act.

Trial Court Judgment

Pursuant to the trial court's Case Scheduling Order, an expedited two-and-half-week period reserved for discovery closed on 31 December 2021. Parties

thereafter submitted, in lieu of pre-trial briefs, an initial stipulation of facts and initial proposed findings of fact and conclusions of law. A three-and-one-half day bench trial was held on 3 through 6 January 2022 before the three-judge panel, who received evidence through record designations, trial exhibits, and trial witnesses. On 11 January 2022, the trial court issued a ruling finding the 2021 Enacted Maps were the product of “intentional, pro-Republican partisan redistricting,” Judgment ¶ 569, *NCLCV and Common Cause v. Hall*, No. 21 VS 015426 and *Harper v. Hall*, No. 21 CVS 500085 (N.C. Super. Ct. Jan. 22, 2022) (“Judgment”), achieved through systematic “packing” and “cracking” of Democratic voters throughout the state. *Id.* at ¶¶ 195, 198, 201. The effect was to create maps that “resiliently safeguard electoral advantage for Republican candidates,” *id.* at ¶ 192, and “safeguard[] Republican majorities in any plausible election outcome, including those where Democrats win more votes by clear margins.” *Id.* at ¶ 192 (Congressional); *see also id.* at ¶¶ 196 (Senate), 199 (House). Nonetheless, the trial court held that claims of extreme partisan gerrymandering present purely political questions that are nonjusticiable under the North Carolina Constitution. *Id.* at ¶ 144. The trial court also denied Plaintiff Common Cause’s claim of intentional discrimination under the Equal Protections Clause and claim for Declaratory Judgment. *Id.* at ¶¶ 172, 186.

Appeal of Judgment

On 14 January 2021, this Court issued an Order setting forth an expedited briefing schedule and heard oral argument on 2 February 2022. On 4 February 2022, this Court issued an Order striking down the 2021 Enacted Maps as unconstitutional

partisan gerrymanders, in violation of the Free Elections Clause, the Equal Protection Clause, the Free Speech Clause, and the Freedom of Assembly Clause of the North Carolina Constitution. Order ¶ 3, Case No. 413PA21 (N.C. Feb. 4, 2022) (the “Order”). This Court held that the “General Assembly violates the North Carolina Constitution when it deprives a voter of his or her right to substantially equal voting power on the basis of partisan affiliation[.]” and that “such a plan is subject to strict scrutiny[.]” *Id.* ¶ 5. This Court also held that,

[t]he ‘Whole County Provision’ must be applied in a manner consonant with the requirements of the Voting Rights Act and federal ‘one-person, one-vote’ principles. *Stephenson*, 355 N.C. at 382. 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.

Order ¶ 8.

In its 14 February 2022 Opinion, this Court elaborated on these holdings. The Opinion conclusively established that “when a districting plan systematically makes it harder for individuals because of their party affiliation to elect a governing majority than individuals in a favored party of equal size[.]” that districting plan “deprives on the basis of partisan affiliation a voter of his or her right to equal voting power.” Opinion ¶ 160, *Harper v. Hall*, Case No. 413PA21 (N.C. Feb. 14, 2022) (the “Opinion”). The Court reiterated that “such a plan is subject to strict scrutiny and is unconstitutional unless the General Assembly can demonstrate that the plan is ‘narrowly tailored to advance a compelling governmental interest.’ *Stephenson*, 355 N.C. at 377.” *Id.* ¶ 161. The Opinion also held that “[a]chieving partisan advantage incommensurate with a political party’s level of statewide voter support is neither a

compelling nor legitimate governmental interest,” *id.*, and that “the partisan gerrymandering violation is based on the redistricting plan as a whole, not a finding with regard to any individual district.” *Id.* ¶ 162. The Opinion also affirmed that,

the General Assembly’s responsibility to conduct a racially polarized voting analysis arises from our state constitution and decisions of this Court, including primarily *Stephenson*, and not from the VRA itself, or for that matter from any federal law.

Opinion ¶ 214. The Court declined to determine whether Petitioner Common Cause could prevail on its intentional racial discrimination claim. Opinion ¶ 223 n.17.

In its 4 February 2022 Order, the Court laid out a remedial process affording all parties and intervenors the opportunity to submit proposed remedial districting plans by 18 February 2022 as well as comments on any maps by 21 February 2022. Order ¶ 9. The Order directed the trial court to “approve or adopt compliant congressional and state legislative districting plans no later than noon on 23 February 2022[,]” with “[a]ny emergency application for a stay pending appeal . . . filed no later than 23 February 2022 at 5:00 p.m.” *Id.*

Remedial Phase

The Legislative Defendants proposed remedial state House,⁴ state Senate,⁵ and Congressional⁶ maps in the House and Senate Redistricting Committees on 16

⁴ See Bill Summary: House Bill 980 / S.L. 2022-4 (“An Act to Realign North Carolina House of Representatives Districts Pursuant to Order of the North Carolina Supreme Court in *Harper v. Hall*”), <https://ncleg.gov/BillLookup/2021/H980>.

⁵ See Bill Summary: Senate Bill 744 / S.L. 2022-2 (“An Act to Realign North Carolina Senate Districts Pursuant to Order of the North Carolina Supreme Court in *Harper v. Hall*”), <https://ncleg.gov/BillLookup/2021/S744>.

⁶ See Bill Summary: Senate Bill 745 / S.L. 2022-3 (“An Act to Realign North Carolina Senate Districts Pursuant to Order of the North Carolina Supreme Court in *Harper v. Hall*”), <https://ncleg.gov/BillLookup/2021/S745>.

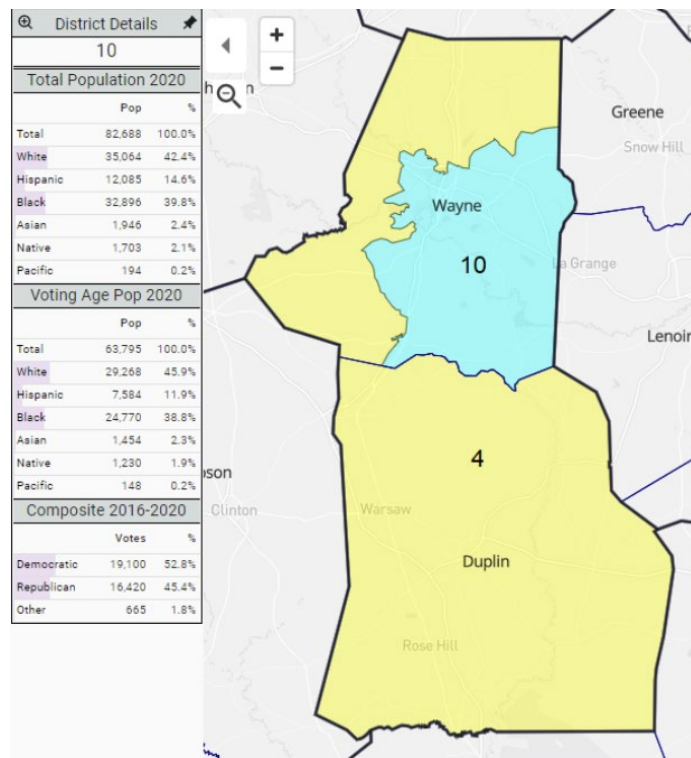
February 2022. On 17 February 2022, the LD House Map, S.L. 2022-4, was enacted in a 115-5 vote in the House and 41-3 vote in the Senate following the adoption of six amendments during the legislative process. *See supra* n.4. The LD Senate Map, S.L. 2022-4, and L.D. Congressional Map, S.L. 2022-3, were also enacted on 17 February 2022 along party-line votes and proposed amendments either tabled or failing. *See supra* n.5&6. The Legislative Defendants did not conduct a racially polarized voting study following the North Carolina Supreme Court’s 4 February 2022 Order or 14 February 2022 Opinion, and did not specify any districts in their proposal were drawn to prevent unlawful vote dilution for Black voters, nor were any such districts adopted during the legislative process.

The parties submitted remedial plans to the trial court on 18 February 2022, including the submission of the LD Remedial Maps by Legislative Defendants. Petitioner Common Cause submitted “two remedial district proposals – House District 10 and Senate District 4 – that are required to prevent unlawful vote dilution” in these areas. App. 9 (Plaintiff Common Cause Submission (“CC Submission”) at 2). Petitioner Common Cause also submitted supporting documentation required by the trial court, including “RPV studies showing legally significant racially polarized voting” in the areas of the proposed remedial districts. App. 9-10, 35, 39 (CC Submission at 2–3, Ketchie Exs. 1, 3).⁷

⁷ These proposed districts and supporting information were provided to the Legislative Defendants on 14 February 2022 through their counsel, with a copy to the members of the House and Senate Redistricting Committees.

Common Cause Proposed Remedial House District 10

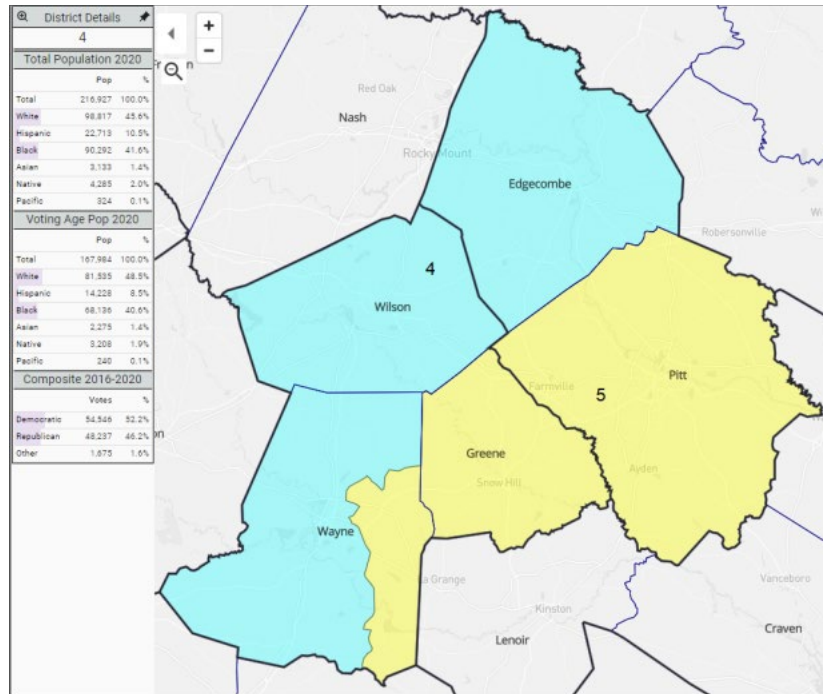
Petitioner Common Cause provided data showing there exists a sufficiently large and geographically compact population of Black voting-age-population in Greene, Lenoir, and Wayne Counties to constitute a majority in a single-member House district (satisfying *Gingles* I). App. 15 (CC Submission at 8, Fig. 1). Petitioner Common Cause also provided data showing there also exists legally significant racially polarized voting in this area, such that Black voters vote cohesively (*Gingles* II) and that white voters typically vote as a bloc sufficient to defeat Black voters' candidates of choice (*Gingles* III). App. 15-16, 35 (Submission at 8–9, Ketchie Ex. 1). To prevent unlawful vote dilution, Petitioner Common Cause proposed the following remedial House district in this area:



App. 17 (CC Submission at 10, Fig. 2). The remedial district was not modeled after any previously drawn districts, but was drawn to “minimize the number of county clusters, as set forth in the Duke Academic Paper, impacted by each remedial district.” App. 31 (Ketchie Aff. ¶ 11). The drawing of the remedial district also considered “minimizing county splits and traversals, minimizing splits of community related boundaries such as municipalities and precincts, and maximizing compactness[.]” *Id.* The remedial district is narrowly tailored to remedy the racial vote dilution made out by the three *Gingles* preconditions, which, as explained by Pettitioner Common Cause, does not require a strict 50%+1 BVAP threshold as Legislative Defendants asserted. *See* App. 12 (CC Submission at 5).

Common Cause Proposed Remedial Senate District 4

Petitioner Common Cause submitted data showing there exists a sufficiently large and geographically compact population of Black voting-age-population in the counties east of Raleigh to constitute a majority in a single-member Senate district (satisfying *Gingles* I). App. 18-19 (CC Submission at 11–12, Fig. 3). Petitioner Common Cause also submitted data showing there exists legally significant racially polarized voting in this area, such that Black voters vote cohesively (*Gingles* II) and that white voters typically vote as a bloc sufficient to defeat Black voters’ candidates of choice (*Gingles* III). App. 19-20, 39 (CC Submission at 12–13, Ketchie Ex. 3). To prevent unlawful vote dilution, Common Cause proposed the following remedial Senate district in this area:



App. 21 (CC Submission at 14, Fig. 4).). The remedial district was not modeled after any previously drawn districts, but was drawn to “minimize the number of county clusters, as set forth in the Duke Academic Paper, impacted by each remedial district.” App. 31 (Ketchie Aff. ¶ 11). The drawing of the remedial district also considered “minimizing county splits and traversals, minimizing splits of community related boundaries such as municipalities and precincts, and maximizing compactness[.]” *Id.* Like the House district, the remedial Senate district is narrowly tailored to remedy the racial vote dilution made out by the three *Gingles* preconditions. *See* App. 12 (CC Submission at 5).

In its submission, Common Cause also demonstrated that “the remedial districts proposed herein are required under federal statutory **and independently**, under state Constitutional law.” App. 10 (CC Submission at 3 (emphasis in original)). “Contrary to what the General Assembly has previously stated, ‘VRA districts’ should

not be created to simply meet a rigid and uniform 50%+1 BVAP population requirement.” App. 11-12 (CC Submission at 4–5). Rather, vote dilution analysis is district-specific, under both federal and state law. App. 11 (CC Submission at 4). Accordingly, “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.” App. 12 (CC Submission at 5). Common Cause notified Legislative Defendants that legally significant RPV was present in each of the identified areas, and urged them to comply with both North Carolina and federal law by drawing remedial districts that would correct the racial vote dilution present in the Enacted Maps. App. 12-13 (CC Submission at 5–6). Rather than heed these warnings, Legislative Defendants “relied upon two misreadings of applicable law in determining that no remedial districts are required to comply with North Carolina law or to avoid vote dilution[,]” namely the erroneous contentions that racially polarized voting can be measured on a statewide level and that remedial crossover districts are illegal under *Bartlett v. Strickland*, 556 U.S. 1 (2009). App. 12-13 (CC Submission at 5–6).

As shown in Common Cause’s 18 February 2022 Submission,

the proposed remedial districts appropriately 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, and should therefore be adopted by the Court to ensure remedial maps comply with state Constitutional requirements in redistricting. Moreover, because districts are ones in which Black voters prefer Democratic candidates, these districts are independently required . . . to remedy the extreme partisan gerrymandering in the 2021 Enacted Maps, as the creation of these districts will further remedy the

disparities statewide of the ability of Democratic voters to coalesce to elect their candidates of choice.

App. 14 (CC Submission at 7).

The parties filed objections to the proposed remedial plans on 21 February 2022. Petitioner Common Cause objected to the LD Remedial Maps on the grounds that the maps “are plainly unconstitutional when evaluated using appropriate data,” that Legislative Defendants “failed once again to undertake the proper analysis required by *Stephenson* or consider all the appropriate factors to ensure equal voting power for voters,” that Legislative Defendants “blatantly disregarded clear direction” on disclosure of all individuals involved in the map-drawing process, and that Legislative Defendants mischaracterized the legislative process leading to the adoption of the remedial plans. App. 59 (CC Objections at 2). Petitioner Common Cause supported these objections with an expert report of Dr. Jonathan Mattingly and Gregory Herschlag, jointly designated with the *Harper* Plaintiffs, as well as an addendum expert report by the same experts, and the affidavit of GIS specialist Christopher Ketchie. *See* App. 76, 85, 90 (Exhibits 1, 2, and 3 to CC Objections).

In their Senate Plan, Legislative Defendants ignored the instruction of this Court to compare a variety of metrics, instead relying predominantly on two metrics, mean-median difference and efficiency gap, both calculated using incomplete and skewed data. App. 61-62 (CC Objections at 4–5). By this inaccurate calculations, Legislative Defendants found that a mean-median difference was -0.65% and an efficiency gap of -3.97% in the Senate plan. App. 61 (CC Objections at 4). Legislative Defendants calculated these scores using a limited set of 12 elections by purportedly

relying on a choice by Plaintiffs’ expert Dr. Mattingly – but while Dr. Mattingly used 12 elections “to demonstrate *cluster-level* bias,” he used a “broader set of 16 elections for his statewide analysis.” App. 62 (CC Objections at 5). Legislative Defendants’ calculations of these metrics also “confusingly appears to have collated votes across elections before performing [their] calculations, instead of the appropriate analysis of performing calculations on individual elections and then averaging them.” *Id.*

In compliance with this Court’s order to look at the full set of relevant metrics for the Senate plan, Common Cause submitted the following metrics for consideration, which paint a fuller picture of the bias evident in the LD Senate Map and show why those presented by the Legislative Defendants were plainly inaccurate:

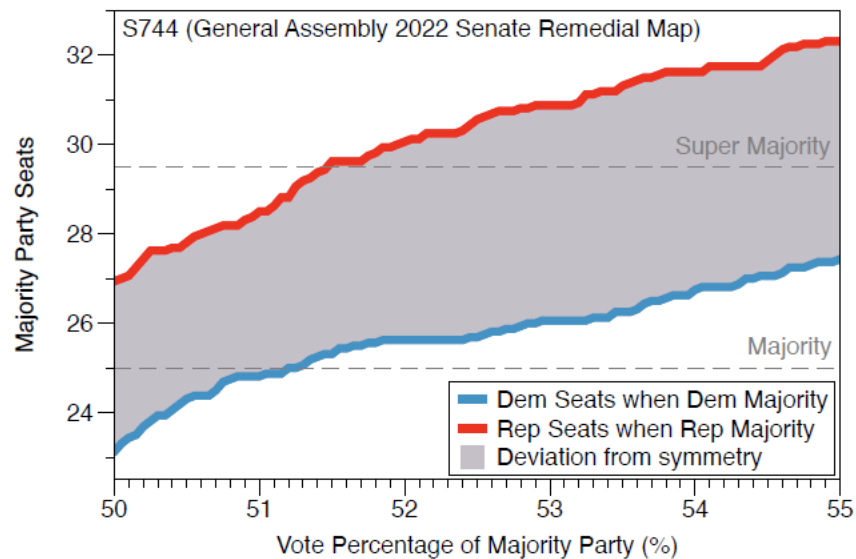
Metric	Mattingly (Ex. 1)⁸	Additional Comparators⁹
Mean-Median	1.304%	2.2% R Source: PlanScore
Efficiency Gap	4.072%	4.8% R Source: PlanScore
Partisan Symmetry (Partisan Bias)	4.0125 seat bias	4.8% R Source: PlanScore
Plausible Number of Representatives Elected Comparison	29-30 R seats with 52% R vote share v. 25-26 D seats with 52% D vote share	22D-28R / 21D-29R Source: DRA Composite / PlanScore

⁸ Dr. Mattingly and Dr. Herschlag calculated their metrics using the results of sixteen recent statewide elections: *See* Ex. 1, Mattingly Expert Report p. 1. These Senate metric scores are reflected from Pages 6-7 of their report.

⁹ The source data and methodology for calculating these additional comparators is disclosed in the Second Ketchie Affidavit, and is all based upon publicly available information. *See* Ex. 3, Second Ketchie Aff. at ¶ 11.

Relative Chances of Electing Majority (26) or Supermajority (30)	R supermajority (or close) with 48 – 49% R votes D majority with 51-52% votes	R Majority: 4/6 Scenarios D Majority: 0/6 Scenarios R Supermajority: 1/6 Scenarios D Supermajority: 0/6 Scenarios Source: Second Ketchie Affidavit
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App. 62-63 (CC Objections at 5–6). Common Cause also showed the asymmetry in the LD Senate Map by demonstrating the multi-seat gap in performance for each party based on voting percentage:



App. 63 (CC Objections at 6).

Petitioner Common Cause advocated for the adoption of its proposed remedial Senate District 4, as submitted in its 18 February 2022 submission, explaining why Legislative Defendants' arguments against such district relied upon misinterpretations of applicable law and confused the obvious distinction between the *Gingles* criteria and data – which Legislative Defendants failed to address at all – and the remedial districts proposed by Petitioner Common Cause.

In sum, Petitioner Common Cause’s objections explained how Legislative Defendants had inaccurately determined that the remedial districts were not necessary and ignored precedent that sanctions the drawing of remedial districts at BVAP levels appropriate to prevent vote dilution. *See Bartlett v. Strickland*, 556 U.S. 1 (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.”). Petitioner Common Cause also showed that Dr. Lewis’s RPV study, upon which Legislative Defendants relied, was both insufficient in its technical methods and inapposite, as it did not concern the *Gingles* analysis. App. 65 (Objections at 8). The remedial district proposed was not drawn with race predominating, and is narrowly tailored to serve several independent, compelling governmental interests – namely, to “prevent vote dilution for Black voters in violation of state Constitutional prohibitions and the Voting Rights Act,” and “to bring the Senate map into Constitutional compliance with the prohibition on partisan gerrymandering.” App. 65 (CC Objections at 9).

Common Cause also suggested modifications in the cluster groupings “that Legislative Defendants themselves acknowledged had Republican support and should be modified during the legislative process,” as well as “those that were otherwise considered during the legislative process[,]” nearly all of which were “found to be partisan outliers” by the trial court. App. 67 (CC Objections at 10). These included Wake/Granville, Mecklenburg/Iredell, New Hanover, Cumberland, Guilford, Forsyth, and Buncombe Counties. *Id.*

In their House Plan, Legislative Defendants repeated these errors, relying on the same two metrics, mean-median difference and efficiency gap, both calculated using similarly incomplete and skewed data. App. 68 (CC Objections at 11). By this inaccurate calculations, Legislative Defendants found that a mean-median difference was -0.7% and an efficiency gap of -0.84% in the House plan. App. 68 (CC Objections at 11). Legislative Defendants again calculated these scores using only 12 elections, which Dr. Mattingly used “to demonstrate *cluster-level* bias, while using a broader set of 16 elections for his statewide analysis.” App. 62 (Objections at 5). Legislative Defendants’ calculations of these metrics also “confusingly appears to have collated votes across elections before performing [their] calculations, instead of the appropriate analysis of performing calculations on individual elections and then averaging them.” *Id.*

In compliance with this Court’s order to look at the full set of relevant metrics for the House plan, Common Cause submitted the following metrics for consideration, which paint a fuller picture of the bias evident in the LD House Map:

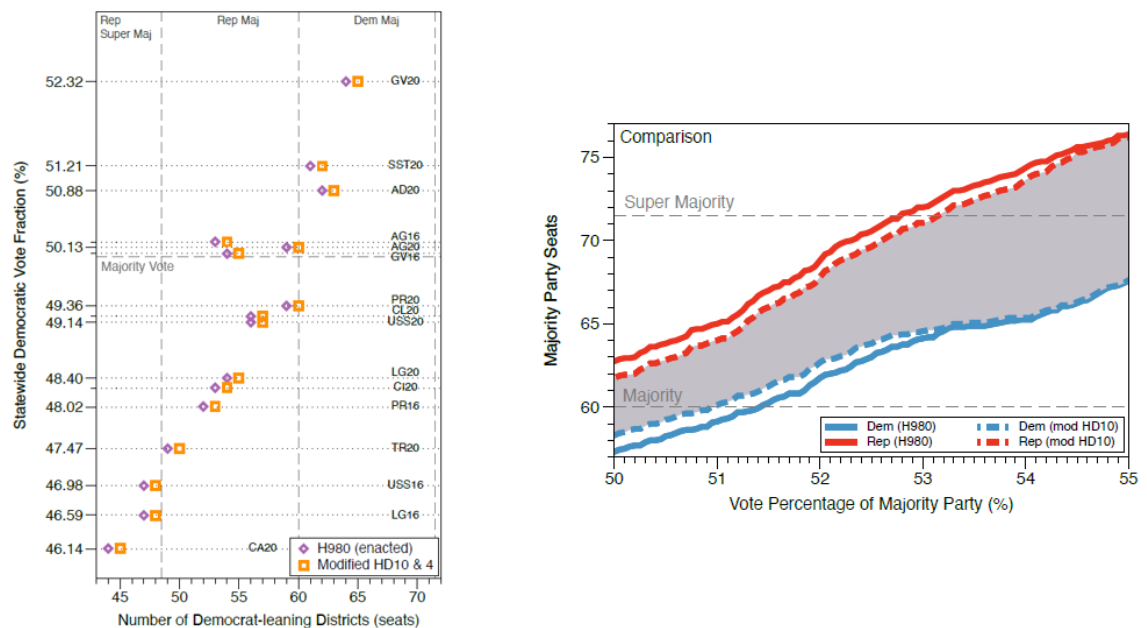
Metric	Mattingly Rep. (Ex. 1)¹⁰	Additional Comparators¹¹
Mean-Median	1.45%	1.4% R Source: PlanScore
Efficiency Gap	3.23%	3.0% R Source: PlanScore
Partisan Symmetry (Partisan Bias)	1.575 seat average deviation	2.9% R Source: PlanScore

¹⁰ Dr. Mattingly and Dr. Herschlag calculated their metrics using the results of sixteen recent statewide elections: *See* Ex. 1, Mattingly Expert Report at p. 1. These metrics and their analysis of the LD Congressional Map can be found at pages 3-5 of their report.

¹¹ The source data and methodology for calculating these additional comparators is disclosed in the Second Ketchie Affidavit, and is all based upon publicly available information. *See* Ex. 3, Second Ketchie Aff. at ¶ 18.

Plausible Number of Representatives Elected Comparison	6.59375 seats average deviation	57D-63R / 58D-62R Source: DRA Composite / PlanScore
Relative Chances of Electing Majority (61) or Supermajority (72)	See Figure below	R Majority: 4/6 Scenarios D Majority: 1/6 Scenarios R Supermajority: 1/6 Scenarios D Supermajority: 0/6 Scenarios

App. 68 (CC Objections at 11). Common Cause also showed the asymmetry in the LD Senate Map by demonstrating the multi-seat gap in performance for each party based on voting percentage:



App. 69 (CC Objections at 12). Common Cause then advocated for the adoption of its proposed remedial House District 10, as submitted in its 18 February 2022 submission. Common Cause restated its rebuttal to Legislative Defendants' contention that its proposed remedial districts were unlawful. App. 69-70 (CC

Objections at 12–13). The remedial district proposed was not drawn with race predominating, and is narrowly tailored to serve several independent, compelling governmental interests – namely, to “prevent vote dilution for Black voters in violation of state Constitutional prohibitions and the Voting Rights Act,” and to “significantly reduce[] the partisan bias of the LD House Map.” App. 66, 69 (CC Objections at 9, 12). Common Cause also raised concerns that House District 10, a functioning crossover district, had been intentionally destroyed, as evidenced by the intentional diminutions in BVAP, which in turn would raise serious questions under the North Carolina Equal Protection Clause. App. 70 (CC Objections at 13).

On 23 February 2022, the trial court issued an Order on Remedial Plans and supporting materials, including a report of its Special Masters, that accepted the LD House Map and the LD Senate Map but rejected the LD Congressional Map and replaced it with an “interim” map drawn by the Special Masters. *See* App. 118 (Remedial Order ¶ 67). In evaluating the Legislative Defendants’ proposed remedial plans, the trial court focused upon just two of the several metrics outlined as relevant by the Supreme Court in its Order and its Opinion: the mean-median difference and the efficiency gap. *See, e.g.*, App. 110 (Remedial Order ¶ 34). Based upon these metrics, the trial court determined that the LD Congressional Map “is not satisfactorily within the statistical ranges set forth in the Supreme Court’s full opinion,” App. 110 (Order ¶ 34). The trial court determined that the LD Senate Map and LD House Map were both “satisfactorily within the statistical ranges set forth in the Supreme Court’s full opinion.” App. 113, 116 (Order ¶¶ 42, 55). Petitioner

Common Cause timely filed a Notice of Appeal on 23 February 2022. *See* App. 132 (Common Cause Notice of Appeal).

REASONS WHY CERTIFICATION SHOULD ISSUE

This matter requires immediate review by the North Carolina Supreme Court for the same reasons this Court granted discretionary review for the preliminary injunctive phase: because of “the great public interest in the subject matter of these cases, the importance of the issues to the constitutional jurisprudence of this State, and the need for urgency in reaching a final resolution on the merits at the earliest possible opportunity.” Order Granting Preliminary Injunction at 1, *Harper v. Hall*, No. 413P21 (Dec. 8, 2021). As set forth above and established by the 18 and 21 February 2022 submissions by Petitioner Common Cause, the General Assembly failed in its duty to remedy the Constitutional violations of the 2021 Enacted Maps and further failed to properly ascertain and draw the districts required to prevent unlawful vote dilution for Black voters in two state Legislative districts. Immediate review, and correction, of the LD House Map and LD Senate Map rubber-stamped by the trial court, in a misapplication of the instructions set forth in the Opinion issued by this Court, is thus required to ensure the principles of substantially equally voting power guaranteed by our state’s Constitution, and confirmed by this Court in its 8 February 2022 Order and 14 February 2022 Opinion.

I. This Appeal Is a Matter of Significant Public Interest.

The Court may grant discretionary review in cases where, as here, “[t]he subject matter of the appeal has significant public interest.” N.C.G.S. § 7A-31(b)(1). This matter implicates the “fundamental right to vote” ensured by our Constitution

for each of North Carolina's voters, including the "right to enjoy 'substantially equal voting power and substantially equal legislative representation.'" NCSC Order p. 5 (quoting *Stephenson*, 355 N.C. at 382). The North Carolina Supreme Court has already found that the North Carolina General Assembly violated millions of North Carolina voters' fundamental rights in enacting unconstitutional gerrymanders. The issue before the Court now is whether they will be permitted to continue these violations with respect to the state legislative maps in the remedial phase.

As set forth above, the LD House Map and LD Senate Map do not afford voters substantially equal voting power and, instead, dilute and diminish the voting power of voters on the basis of partisan affiliation. They also require remedial districts in House District 10 and Senate District 4, as proposed by Petitioner Common Cause, to prevent unlawful vote dilution, and these districts are further independently required by the Opinion in this matter to resolve the disparities statement of the ability of Democratic voters to coalesce to elect their candidates of choice.

The necessity of correcting Legislative Defendants' continued attempts to deny equal voting power to North Carolina's voters is an issue that has broad public repercussions for millions of North Carolina voters who will cast their ballots in the upcoming primary and general elections as well as in future redistricting cycles. Accordingly, discretionary review is warranted on these grounds.

II. The Cause Involves Legal Principles of Major Significance to the Jurisprudence of the State.

The Court may also grant discretionary review in cases where, as here, the matter "involves legal principles of major significance to the jurisprudence of the

State.” N.C.G.S. § 7A-31(b)(2). As this Court held two decades ago, the judiciary has the powers to “require valid reapportionment or to formulate a valid redistricting plan” because “courts empowered to invalidate an apportionment statute which transgresses constitutional mandates cannot be left without the means to order appropriate relief.” *Stephenson v. Bartlett*, 355 N.C. 354, 375–76 (2002) (internal quotations and citations omitted). These powers would be meaningless if the Legislature can circumvent state Constitutional requirements by executing unlawful gerrymanders and vote dilution in the remedial phase without consequence. Accordingly, immediate review is necessary to ensure that the exercise of the General Assembly’s power to redistrict is subject to restrictions imposed by the state Constitution both in principle *and* in practice.

III. Absent Certification, Delay Will Cause Substantial and Irreparable Harm to Voters.

The Court may also grant review where, as here, “[d]elay in final adjudication is likely to result from failure to certify and thereby cause substantial harm.” N.C.G.S. § 7A-31(b)(3). This Court has directed the North Carolina State Board of Elections to hold primaries for all offices on Tuesday, May 17, 2022, and temporarily stayed the candidate-filing period for the 2022 elections for all offices “until such time as a final judgment on the merits of plaintiffs’ claims, including any appeals, is entered and a remedy, if any is required, has been ordered.” Order Granting Preliminary Injunction pp. 3-4, *Harper v. Hall*, No. 413P21 (Dec. 8, 2021). The Court also authorized the trial court to “issue any orders necessary to accomplish the resulting changes in the election schedule, including implementing shortened filing

periods and other administrative adjustments.” *Id.* at ¶ 1. In its Judgment, the Trial Court ordered that candidate filing resume at 8:00 A.M. on 24 February 2022 and continue through and end at 12:00 noon on Friday, March 4, 2022. Judgment at p. 258 ¶ IV.

These time considerations leave no plausible window for proceedings before the Court of Appeals before the unconstitutional LD Remedial Maps are used in the 2022 primary elections. Accordingly, immediate review of this appeal is necessary to prevent harm to voters which is irreversible once the election occurs. *See Holmes*, 270 N.C. App. at 35, 840 S.E.2d at 266 (“The need for immediate relief is especially important . . . given the fact that once the election occurs, there can be no do-over and no redress.”) (internal citations omitted).

ISSUES TO BE BRIEFED

In the event the Court allows this petition for discretionary review, Petitioners intends to present the following issues in its brief for review:

1. Whether the remedial state Senate, and state House maps enacted by the General Assembly on 17 February 2022, submitted by the Legislative Defendants in this matter on 18 February 2022, and approved by the trial court in its Remedial Order on 23 February 2022 violate state Constitutional requirements by diminishing or diluting votes on the basis of partisan affiliation and cause impermissible vote dilution for Black voters, and whether this harm to Black voters should be corrected on the independent state grounds established when the North Carolina Equal Protection Clause, Free Elections Clause, Freedom of Speech and Assembly

Clauses, and Whole County Provision (as interpreted in the *Stephenson* line of cases) are violated.

EMERGENCY APPLICATION FOR STAY PENDING APPEAL

Petitioner further requests a writ of supersedeas granting an emergency stay of the Remedial Order pending appeal in this matter, and a suspension of the Appellate Rules pursuant to Rules 2, 8(a), 23, and 37(a) of the Appellate Rules of Procedure to facilitate the expeditious review of this appeal.

Rule 8(a) provides that application of a temporary stay and writ of supersedeas may be made to the appellate court in the first instance “when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial court for a stay order.” Rule 23(b) further provides that application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order, or other determination mandated by the Court of Appeals “when a notice of appeal of right or a petition for discretionary review has been or will be timely filed” and that “[n]o prior motion for a stay order need be made to the Court of Appeals.” Under Rule 23(b), the applicant for a stay must state facts showing that it was impracticable to seek a stay in the court of first instance, and set forth a statement of any facts necessary to an understanding of the basis upon which the writ is sought, as well as the reasons why the writ should issue in justice to the applicant.

As set forth above, the extreme time-constraints relating to the May 2022 primaries and candidate filing deadline rendered it impractical to seek a stay before the lower courts. The writ is further required for the same reasons provided above

warranting discretionary review by this Court, namely that irreparable harm will ensue for voters of this state, and particularly Black voters, if the LD House Map and LD Senate Map are enforced in the upcoming elections.

CONCLUSION

Petitioner Common Cause respectfully requests for this Court to exercise discretionary review and grant and emergency application staying the enforcement of the remedial state legislative district maps.

Respectfully submitted, this the 23rd day of February, 2022.

SOUTHERN COALITION FOR SOCIAL
JUSTICE

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Appendix

Contents of Appendix

Order on Submission of Remedial Plans for Court Review, filed 8 February 2022....	1
Plaintiff Common Cause’s Proposed Remedial Districts, submitted 18 February 2022 in Wake County Superior Court Case No. 21 cvs 500085.....	8
Affidavit of Christopher Dalton Ketchie with Exhibits submitted 18 February 2022 in Support of Plaintiff Common Cause’s Proposed Remedial Districts.....	28
Exhibit 1 RPV Analysis for 2021 Enacted House District 10	34
Exhibit 2 RPV Analysis for remedial House District 10	36
Exhibit 3 RPV Analysis for 2021 Enacted Senate District 4	38
Exhibit 4 RPV Analysis for remedial Senate District 4	40
Exhibit 5 Remedial House District 10 block assignment file (Slip Sheet Only).....	42
Exhibit 6 Remedial Senate District 4 block assignment file (Slip Sheet Only).....	43
Exhibit 7 Remedial House District 10 ESRI shapefile (Slip Sheet Only)	44
Exhibit 8 Remedial Senate District 4 ESRI shapefile (Slip Sheet Only)	45
Exhibit 9 Remedial House District 10 P.L. 94-171 dataset (Slip Sheet Only).....	46
Exhibit 10 Remedial Senate District 4 P.L. 94-171 dataset (Slip Sheet Only).....	47
Exhibit 11 Remedial House District 10 “stat pack”.....	48
Exhibit 12 Remedial Senate District 4 “stat pack”.....	53
Plaintiff Common Cause Objections to Legislative Defendants’ Remedial Maps with Exhibits, submitted 21 February 2022	58
Exhibit 1 Remedial Report: Congressional and NC Senate Plans by Greg Herschlag and Jonathan C. Mattingly, dated 21 February 2022.....	76
Exhibit 2 Remedial Addendum on the House Districts by Greg Herschlag and Jonathan C. Mattingly, dated 21 February 2022.....	85
Exhibit 3 Second Affidavit of Christopher Dalton Ketchie, dated 21 February 2022	90
Order on Remedial Plans, filed 23 February 2022.....	100
Plaintiff Common Cause’s Notice of Appeal, filed 23 February 2022.....	132

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 015426

NORTH CAROLINA LEAGUE, OF
CONSERVATION VOTERS, INC., *et al.*,
Plaintiffs,

COMMON CAUSE,
Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL, in
his official capacity as Chair of the House
Standing Committee on Redistricting, *et*
al.,
Defendants.

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STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 500085

REBECCA HARPER, *et al.*,
Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in
his official capacity as Chair of the House
Standing Committee on Redistricting, *et*
al.,
Defendants.

ORDER ON SUBMISSION OF REMEDIAL PLANS FOR COURT REVIEW

THIS MATTER is presently in the remedy phase of the litigation following the Order entered by the Supreme Court of North Carolina on February 4, 2022.

On January 11, 2022, this Court entered a Final Judgment wherein this Court upheld the constitutionality of the 2021 Enacted State Legislative and Congressional redistricting plans (hereinafter "Enacted Plans") and ordered that the candidate filing period for the 2022

primary and municipal elections be set to resume at 8:00 A.M. on February 24, 2022, and continue through 12:00 noon on March 4, 2022.

Thereafter, Harper Plaintiffs, North Carolina League of Conservation Voters Plaintiffs, and Plaintiff-Intervenor Common Cause (hereinafter collectively referred to as “Plaintiffs”) appealed this Court’s Judgment directly to the Supreme Court of North Carolina. On February 4, 2022, the Supreme Court of North Carolina entered an Order, with opinion to follow, adopting in full this Court’s findings of fact in the January 11, 2022, Judgment; however, the Supreme Court concluded that the Enacted Plans are unconstitutional under N.C. Const., art. I, §§ 10, 12, 14, and 19 and remanded the action to this Court for remedial proceedings.

The Supreme Court’s Order requires the submission to this Court of remedial state legislative and congressional redistricting plans that “satisfy all provisions of the North Carolina Constitution” (hereinafter referred to as “Proposed Remedial Plans”); both the General Assembly, and any parties to this action who choose to submit Proposed Remedial Plans for this Court’s consideration, must submit such Proposed Remedial Plans on or before February 18, 2022, at 5:00 p.m. SCONC Order ¶ 9. Following an expedited review and comment period in which parties may file and submit to this Court comments on any submitted plans by February 21, 2022, this Court must approve or adopt constitutionally-compliant remedial plans by noon on February 23, 2022.

In order to comport with the timelines established by the Supreme Court of North Carolina, and ensure that the conditions of the Supreme Court’s Order are met, this Court, in its discretion and in furtherance of its review of any Proposed Remedial Plans enacted by the General Assembly or submitted to this Court for selection, hereby ORDERS the following:

1. Notwithstanding the General Assembly having the opportunity to draw Remedial Plans in the first instance and due to the expedited timeline for the Court’s review

of any Proposed Remedial Plans, the Court, by subsequent Order, will promptly appoint a Special Master.

- a. The purpose of the appointed Special Master will be to 1) assist the Court in reviewing any Proposed Remedial Plans enacted and submitted by the General Assembly or otherwise submitted to the Court by a party to these consolidated cases; and 2) assist the Court in fulfilling the Supreme Court's directive to this Court to develop remedial maps based upon the findings in this Court's Judgment should the General Assembly fail to enact Proposed Remedial Plans compliant with the Supreme Court's Order within the time allowed.
- b. No later than 5:00 P.M. on February 9, 2022, the parties may submit to the Court names and qualifications of suggested Special Masters.
- c. The Court will thereafter appoint a Special Master by subsequent order of this Court. Such order will provide further instruction on, among other things, the data sets and files for the Proposed Remedial Plans to be submitted to the Court that will be necessary for the Special Master to assist the Court.
- d. All materials submitted to the Court pertaining to any Proposed Remedial Maps will be required to be served upon the Special Master contemporaneously when submitting the materials to the Court.

2. On February 18, 2022, in addition to submitting Proposed Remedial Plans to the Court as ordered by the Supreme Court, the General Assembly, and any party to this action submitting a Proposed Remedial Plan that it wishes for this Court to consider for selection, shall contemporaneously include in writing with its submission of Proposed Remedial Plans the information the Supreme Court has set forth in its Order pertaining to redistricting plans in general and the ordered Proposed Remedial Plans specifically. This written submission shall provide an explanation of the data and other considerations the mapmaker relied upon to create the submitted Proposed Remedial Plan and to determine that the Proposed Remedial Plans are constitutional (*i.e.*, compliant with the Supreme Court's Order), including but not limited to the following information:

- a. 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. SCONC Order ¶ 8.

- b. Whether the mapmaker adhered to traditional neutral districting criteria—specifically including the “drawing of single-member districts which are as nearly equal in population as practicable, which consist of contiguous territory, which are geographically compact, and which maintain whole counties”—and an explanation as to how the mapmaker did so without “subordinat[ing] them to partisan criteria. SCONC Order ¶¶ 6, 8. Such information may include the manner in which, within a redrawn state legislative county grouping, any traversal of county lines is authorized by *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*; the efforts, if any, undertaken to draw districts in the Proposed Remedial Plans that improve the compactness of the districts as well as the values used as to the criteria of compactness; the efforts undertaken, if any, to draw state legislative districts in the Proposed Remedial Plans that split fewer precincts, or voting districts (VTDs); the manner in which municipal boundaries were considered when drawing the districts in the Proposed Remedial Plans.
- c. Whether the mapmaker considered incumbency protection and, if so, an explanation as to how “it is applied even handedly, is not perpetuating a prior unconstitutional redistricting plan, and is consistent with the equal voting power requirements of the state constitution.” SCONC Order ¶ 7. Such information may include the identity of the incumbent(s) for whom the plan was altered to avoid pairing incumbents in the same district, why a specific incumbent was protected, and what efforts were taken to not pair incumbents unduly in the same district.
- d. Whether there is a meaningful partisan skew that necessarily results from North Carolina’s unique political geography. SCONC Order ¶ 6.
- e. What methods were employed in evaluating the partisan fairness of the plan—e.g., “mean-median difference analysis, efficiency gap analysis, close-votes, close seats analysis, and partisan symmetry analysis”—as partisan fairness is defined in Paragraph 5 of the Order. SCONC Order ¶ 6.
- f. Whether the statistical metrics indicate a “significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan.” SCONC Order ¶ 6.

3. The General Assembly through Legislative Defendants, and any party to this action submitting a Proposed Remedial Plan for the Court’s possible selection, shall also contemporaneously provide the following information with the submitted Proposed Remedial Plan and the required written submission detailed above:

- a. A description of and explanation for the choice of a base map to begin the redrawing process for the Proposed Remedial Plans, as well as any

amendments or changes considered, whether adopted or not, and made thereto, and any alternative maps considered by the mapmakers. For the General Assembly, this shall also include any alternative maps considered by the Senate Committee on Redistricting and Elections, House Committee on Redistricting, or the General Assembly as a whole.

- b. In addition to the partisan analysis required by the Supreme Court's Order or this Order, the extent to which partisan considerations and election results data were a factor in the drawing of the Proposed Remedial Plans.
- c. The identity of all participants involved in the process of drawing the Proposed Remedial Plans submitted to the Court.

4. All materials required to be submitted to this Court by the Supreme Court's Order or this Order shall be submitted as provided in paragraph 3 of the December 13, 2021, Case Scheduling Order.

- 5. This Order is subject to supplementation through further Orders of the Court.

SO ORDERED, this the 8 day of February, 2022.


A. Graham Shirley, Superior Court Judge

/s/ Nathaniel J. Poovey

Nathaniel J. Poovey, Superior Court Judge

/s/ Dawn M. Layton

Dawn M. Layton, Superior Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via e-mail transmission addressed as follows:

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 8th day of February 2022.

/s/ Kellie Z. Myers
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STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

NORTH CAROLINA LEAGUE OF
CONSERVATION VOTERS, INC., *et al.*,

Plaintiffs

and

COMMON CAUSE,
Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL, in his
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Defendants.

Case No. 21 CVS 015426

REBECCA HARPER, *et al.*,
Plaintiffs

v.

REPRESENTATIVE DESTIN HALL, in his
official capacity as Chair of the House Standing
Committee on Redistricting, *et al.*
Defendants.

Case No. 21 CVS 500085

PLAINTIFF COMMON CAUSE'S PROPOSED REMEDIAL DISTRICTS

Pursuant to the North Carolina Supreme Court's February 4, 2022 Order and this Court's February 8, 2022 Order on the Submission of Remedial Plans, Common Cause provides herein proposed remedial districts for one state House of Representatives and one state Senate district. Plaintiff Common Cause is not submitting any full maps.

The two districts proposed by Common Cause are necessary to ensure compliance with state Constitutional law by drawing districts required by the Voting Rights Act (VRA) prior to all others. *See Stephenson v. Bartlett*, 355 N.C. 354, 383 (2002) (“[T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts.”). The North Carolina Supreme Court reiterated the importance of assessing whether districts are required by the VRA, and specified that this is a requirement as a matter of state law.

In its February 4, 2022 Order, the North Carolina Supreme Court stated:

The ‘Whole County Provision’ must be applied in a manner consonant with the requirements of the Voting Rights Act and federal ‘one-person, one-vote’ principles. *Stephenson*, 355 N.C. at 382. 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.

Order at 8, Case No. 413PA21 (N.C. Feb. 4, 2022). In its February 14, 2022 Opinion, the North Carolina Supreme Court stated:

Notably, the General Assembly’s **responsibility to conduct a racially polarized voting analysis arises from our state constitution and decisions of this Court, including primarily *Stephenson***, and not from the VRA itself, or for that matter from any federal law.

Opinion at ¶ 214, Case No. 413PA21 (N.C. Feb. 14, 2022) (emphasis added). Accordingly, Plaintiff Common Cause respectfully submits for the Court two remedial district proposals – House District 10 and Senate District 4 – that are required to prevent unlawful vote dilution, as indicated by the Racially Polarized Voting (RPV) studies for these areas. Appended to this submission are supporting documentation, including an **Affidavit of demographer Christopher Ketchie (“Ketchie Aff.”)**, the RPV studies showing legally significant racially polarized voting in the areas around House District 10 (**Ketchie Exhibit 1**) and Senate District 4 (**Ketchie Exhibit 3**) in the 2021 Enacted Maps that were struck down, RPV studies showing that the proposed

remedial districts are narrowly tailored to prevent unlawful vote dilution in these areas (**Ketchie Exhibits 2 and 4**), and the block assignment files for the proposed remedial districts (**Ketchie Exhibits 5 and 6**).

I. Voting Rights Act Obligations in North Carolina State Redistricting

Federal and state precedent instruct how to identify and how to prevent vote dilution in state legislative redistricting, and support that the remedial districts proposed herein are required under federal statutory **and, independently**, under state Constitutional law.

Vote dilution inconsistent with Section 2 of the Voting Rights Act occurs if,

based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected group] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

52 U.S.C. § 10301(b). *See also Stephenson v. Bartlett*, 355 N.C. 354, 363 (2002) (citing the VRA and *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986)).

In *Gingles*, the Supreme Court established that a minority group alleging a Section 2 vote dilution claim must prove three threshold preconditions: (1) “that [the minority group] is sufficiently large and geographically compact to constitute a majority in a single-member district”; (2) “that it is politically cohesive”; and third, “that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.” 478 U.S. at 50–51; *see also Growe v. Emison*, 507 U.S. 25, 40–41 (1993) (affirming the applicability of the *Gingles* preconditions in the context of Section 2 challenges to single-member districts). When the three threshold *Gingles* requirements are met, courts then assess whether a violation has occurred based on the “totality of the circumstances.” *Gingles*, 478 U.S. at 79; *see also Bartlett v. Strickland*, 556 U.S. 1, 11–12 (2009).

The analysis of whether the three *Gingles* criteria are met is district-specific. *See Covington v. North Carolina*, 316 F.R.D. 117, 173 (M.D.N.C. 2016) (finding the General Assembly had failed to substantiate drawing purported VRA remedial districts because “none of the evidence Defendants have cited--without additional proof and district-specific analysis--can constitute a strong basis in evidence demonstrating that any of the challenged districts were reasonably necessary as drawn to avoid a Section 2 violation” where “evidence regarding *Gingles*’ third factor in any particular district is sparse to non-existent.”), *summarily aff’d*, 137 S. Ct. 2211 (2017); *id.* at 174 (“[W]hen drawing the challenged districts, Defendants made no district-specific assessment regarding the third *Gingles* factor (as properly understood).”). As shown below in **Figures 1 and 3**, the areas of House District 10 and Senate District 4 have Black voting age populations (BVAPs) that are sufficiently large and geographically compact to constitute a majority in a single-member district. Furthermore, the RPV analyses appended to this motion in **Ketchie Exhibits 1 and 3** are district-specific and demonstrate that racially polarized voting in the areas of House District 10 and Senate District 4 is legally significant.¹

Similarly, remedial districts designed to avoid vote dilution 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 dictated, “VRA districts” should

¹ The demographic possibilities here and in the *Pender County* case are distinguishing. In *Pender County v. Bartlett*, 361 N.C. 491, 506–07 (2007), *aff’d Bartlett v. Strickland*, 556 U.S. 1 (2009), 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.

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.

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 *for remedy* (as opposed to establishing liability). *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).²

Plaintiff Common Cause, through counsel, alerted the Legislative Defendants via correspondence on February 15, 2022 of the need to create the two remedial districts proposed herein. During the legislative process for enacting remedial plans, the Legislative Defendants indicated they had relied upon two misreadings of applicable law in determining that no remedial districts are required to comply with North Carolina law or to avoid vote dilution. First, they appeared to rely upon a state-wide conclusion that there is no legally significant racially polarized

² *See also Covington*, 316 F.R.D. at 166 (“Narrow tailoring also requires that each district be drawn in a manner that actually remedies the potential VRA violation.”). Importantly, these cases have provided further clarity on the requirements of Section 2 remedial districts after the 2002 *Stephenson* decision which, in dicta (as the issue of what specific remedial VRA districts would be required was not directly before the court) implied that Section 2 compels the creation of majority-minority districts alone. *See Stephenson*, 355 N.C. at 403.

voting in North Carolina as a whole. As discussed above, this is not the correct analysis, which requires a district-specific examination of racially polarized voting, which was provided to Legislative Defendants in the February 14, 2022 letter and appended to this submission for House District 10 and Senate District 4. Second, Legislative Defendants incorrectly contend that drawing a remedial crossover district would be illegal under *Bartlett v. Strickland*, 556 U.S. 1 (2009). This is a plain misreading of *Bartlett v. Strickland*, which held instead that cross-over populations could not be used to satisfy the *Gingles I* criteria, *see Strickland*, 556 U.S. at 18 (“[T]he majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?”), but specifically endorsed their use as remedy districts. *See id.* at 23 (“[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.”). Here, as shown below, there exists geographically compact BVAP in the areas of House District 10 and Senate District 4 to satisfy *Gingles I* and Plaintiff Common Cause has proposed narrowly tailored remedies.

As set forth below and in the attached Exhibits, the *Gingles* criteria are met in the areas of House District 10 and Senate District 4. Furthermore, evidence submitted at trial in this matter, and credited by this Court, show that by a totality of the circumstances a failure to include VRA remedial districts will result in unequal access to the electoral process for Black voters in these areas. *See* S. Rep. No. 97-417, 97th Cong., 2d Sess (1982), pp. 28-29 (listing the “Senate Factors” for a court to consider in weighing the totality of the circumstances). Specifically, Plaintiff Common Cause’s expert Dr. Jim Leloudis testified as to the history of official voting-related discrimination in North Carolina, PX1486 Leloudis Report at 19-21, 33-34, 38-39, 49-52, 58-60, 62-66, how Black voters have borne the effects of discrimination in the areas of education,

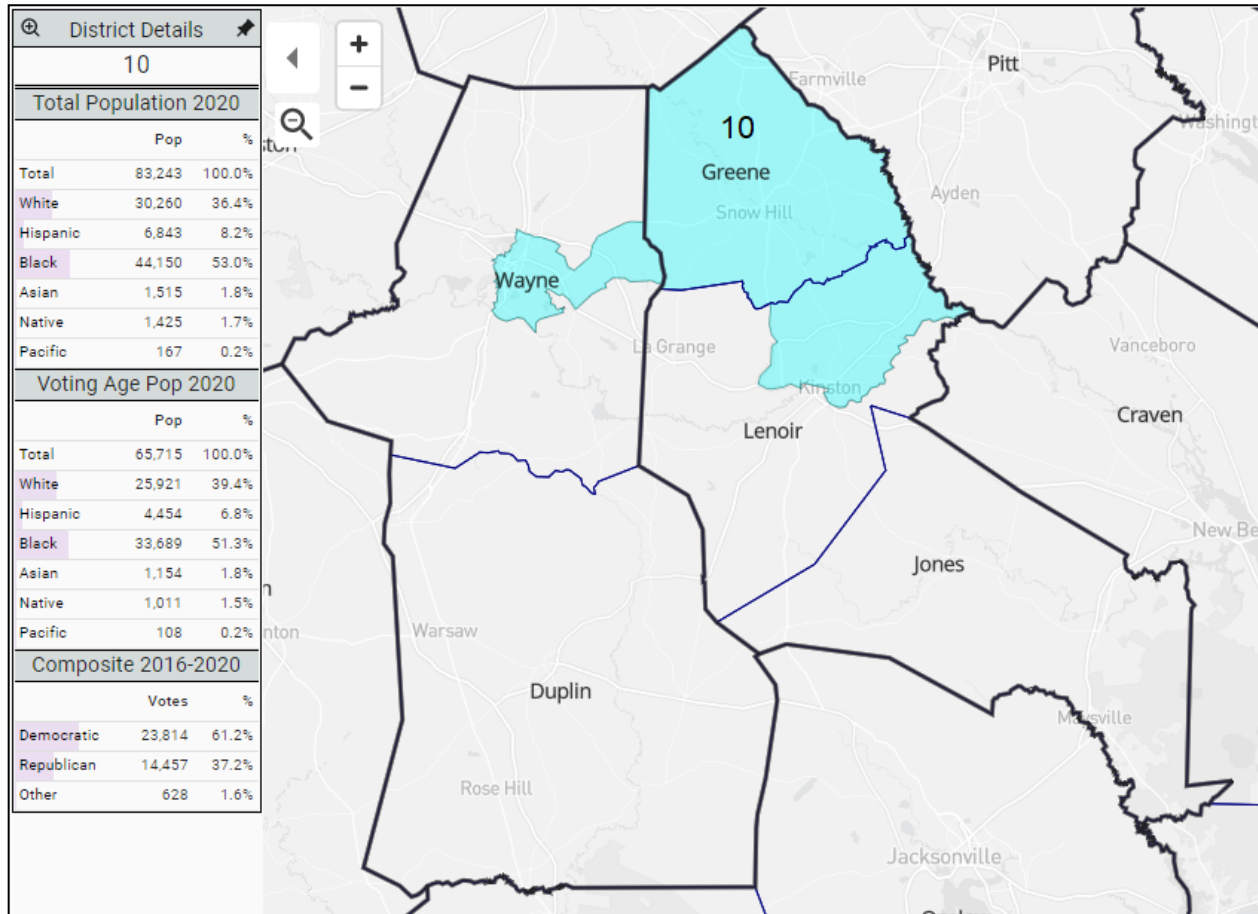
employment, and health, hindering their ability to participate in the political process, *id.* at 11-12, 21-24, 39-44, 47-48, 66-69, the use of overt and subtle racial appeals in political campaigns, *id.* at 11, 15-17 34-35, 54-56, 60-61, and the limited extent to which Black candidates have been successfully elected to public office. *Id.* at 32-34, 63. This Court credited Dr. Leloudis’s testimony in its January 11, 2022 Judgment. *See* Judgment p 189 (¶¶ 578-82). These findings are further consistent with recent holdings in by the Fourth Circuit Court of Appeals and the Superior Court for Wake County. *See generally N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 220–25 (4th Cir. 2016) (holding that “unquestionably, North Carolina has a long history of race discrimination generally and race-based vote suppression in particular” and that “state officials continued in their efforts to restrict or dilute African American voting strength well after 1980 and up to the present day”); *Holmes v. Moore*, 270 N.C. App. 7, 20–23 (2020) (citing *McCrory* and summarizing the discriminatory history of photo ID laws in North Carolina to find that the “historical context in which S.B. 824 was enacted provides support for Plaintiffs’ Discriminatory-Intent Claim.”).

The remedial districts proposed herein in **Figures 2 and 4** (and block assignment files **Ketchie Exhibits 5 and 6**) appropriately 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, and should therefore be adopted by the Court to ensure remedial maps comply with state Constitutional requirements in redistricting. Moreover, because districts are ones in which Black voters prefer Democratic candidates, these districts are independently required by the *Harper* Supreme Court decision to remedy the extreme partisan gerrymandering in the 2021 Enacted Maps, as the creation of these districts will further remedy the disparities statewide of the ability of Democratic voters to coalesce to elect their candidates of choice.

II. Proposed House District 10 Remedial District

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)³:

Figure 1: HD10 *Gingles I* Demonstrative



The RPV analysis attached as **Ketchie Exhibit 1** indicates that Black voters are politically cohesive in the Wayne County precincts utilized by the General Assembly when enacting S.L. 2021-175. For example, the Ecological Regression data for four state-wide races in 2016 and 2020 indicate that candidates of choice for Black voters received 100% of the support from Black voters.

³ See also Ketchie Aff. ¶ 5 (describing method for identifying *Gingles I* demonstrative districts).

See **Ketchie Exhibit 1**. The support calculated by the King's Iterative Ecological Inference and the RxC Ecological Inference similarly show support above 95% in all elections. In each of these elections analyzed, the Black-preferred candidate is also a Democrat.

The data in **Ketchie 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. See Exhibit (last column).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.

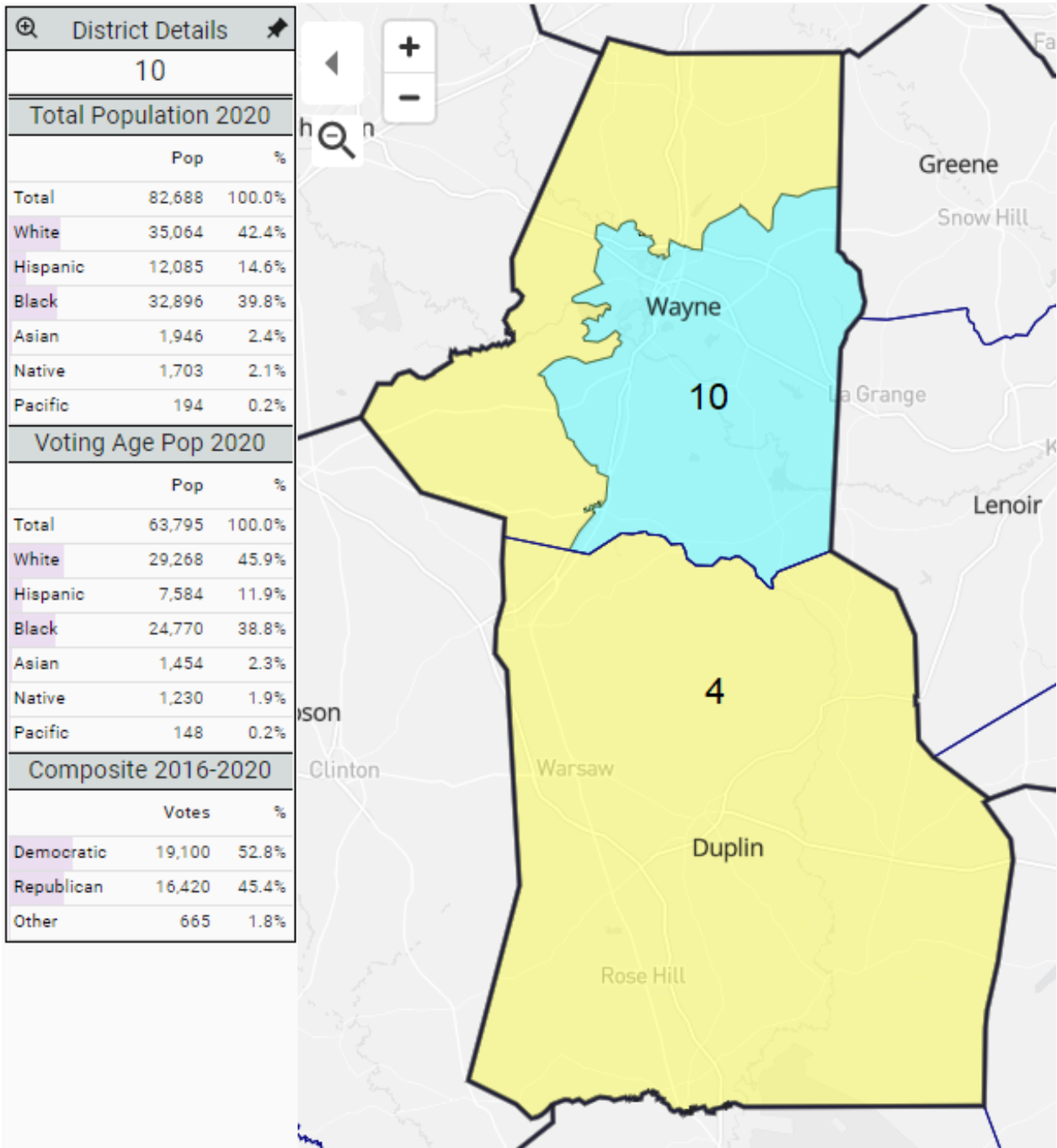
To prevent unlawful vote dilution in violation of Section 2 of the Voting Rights Act, the remedial House map must include a district in this area that will ensure the election of a state representative in this area is equally open to participation by Black voters. Such a remedial district is provided below (Figure 2)⁵:

[Rest of page intentionally left blank]

⁴ This analysis is also consistent with the conclusions of Dr. Lewis offered by Legislative Defendants for this area. See LDTX109 Lewis Rebuttal Report, Ex. B, Table 1; see also Lewis Deposition 70:3-71:2.

⁵ See also Ketchie Aff. ¶ 11 (describing drafting of VRA remedial districts).

Figure 2: HD10 Remedial District



This House District 10 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 **Ketchie Exhibit 2**.⁶ 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 2021 Enacted Map.

There are independent state constitutional grounds for requiring these districts. In its February 14, 2022 Opinion, the North Carolina Supreme Court made 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. *See* 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 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.

III. Proposed Senate District 4 Remedial District

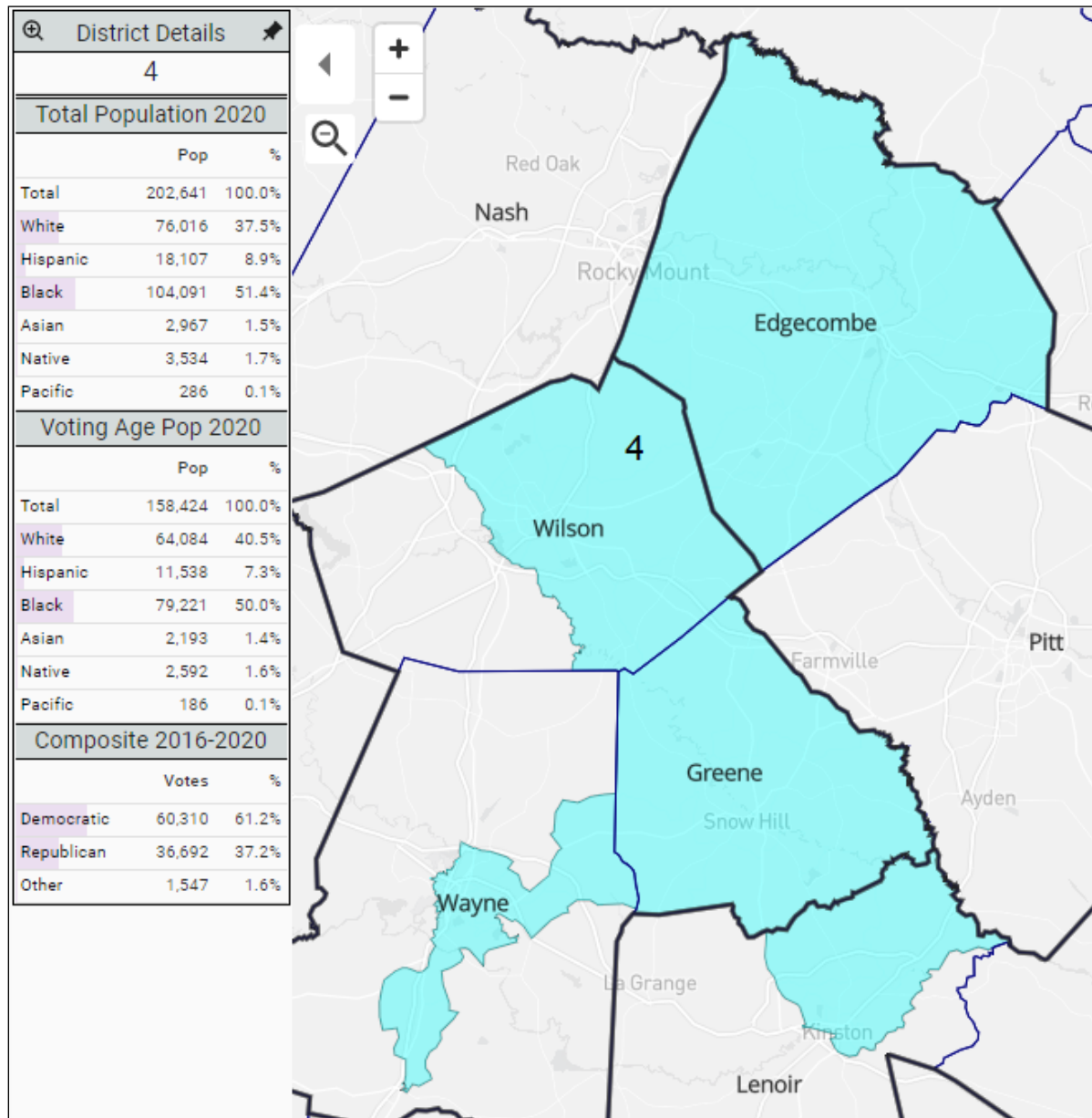
There is a sufficiently large and geographically compact BVAP in the counties east of Raleigh to constitute a majority in a single-member Senate District, as shown by the following “*Gingles I*” demonstrative map (Figure 3)⁷:

[Rest of page intentionally left blank]

⁶ This analysis is further consistent with Dr. Lewis’s opinion that at least 38% BVAP would be required in this area to provide a Black opportunity district. *See* LDTX109 Lewis Rebuttal Report at Table 1 p. 5 (line “LD21-010).

⁷ *See also* Ketchie Aff. ¶ 5 (describing identification of *Gingles I* demonstrative districts).

Figure 3: SD4 *Gingles I* Demonstrative



Furthermore, the RPV analysis attached as **Ketchie 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 **Ketchie Exhibit 3** 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.⁸ 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.

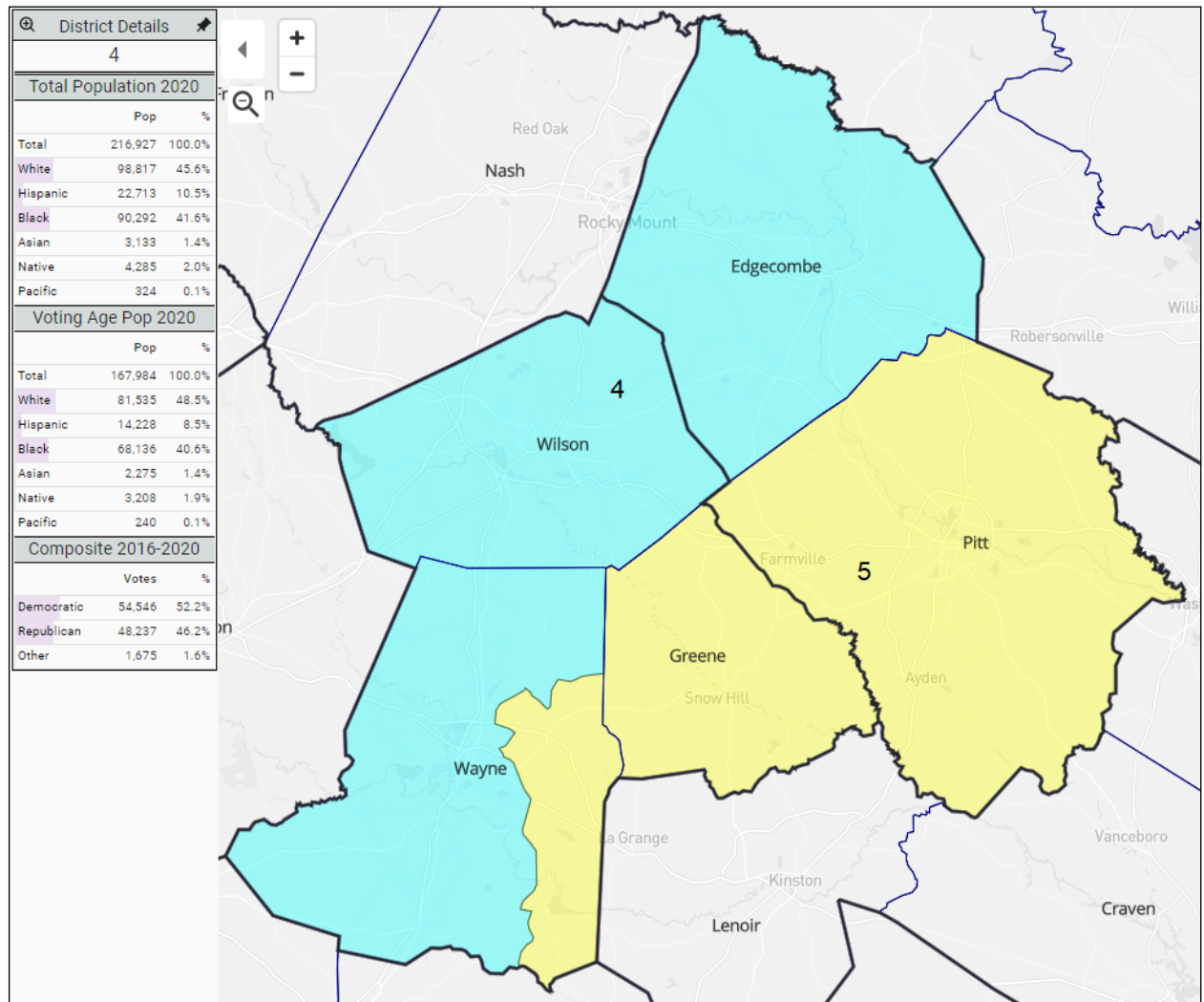
Thus, to prevent unlawful vote dilution in violation of Section 2 of the Voting Rights Act, the General Assembly must draw a district in this area that will ensure the process for electing a state Senator to represent this area is equally open to participation by Black voters. Such a remedial district is provided below (Figure 4)⁹:

[Rest of page intentionally left blank]

⁸ This analysis is also consistent with the conclusions of Dr. Lewis offered by Legislative Defendants. *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.”).

⁹ *See also* Ketchie Aff. ¶ 11 (describing drawing of proposed remedial VRA districts).

Figure 4: SD4 Remedial District



This Senate District 4 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 **Ketchie Exhibit 4**.¹⁰

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

¹⁰ This analysis is further consistent with Dr. Lewis's opinion that at least 37% BVAP would be 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.").

effect on the overall map is limited to these two clusters. Similarly to House District 10, the drawing of this state Senate district is likely to ensure that the map, measured statewide, provides partisan fairness. The RPV analysis provided in **Ketchie Exhibit 4** demonstrates that Black voters in this area prefer Democratic candidates. This provides an independent basis under state 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 state Constitution's Equal Protection Clause, Free Elections Clause, Freedom of Speech Clause, and Freedom of Assembly Clause, and this proposed remedial district harmonizes and balances compliance with the differing requirements under the different state constitutional provisions applicable (whole county provision versus equal protection clause, free elections clause, freedom of speech clause, and freedom of assembly clause).

IV. Explanation and Information Required by February 8 and February 16, 2022 Orders

Pursuant to the Supreme Court's February 4, 2022 Order and Paragraphs 2 and 3 of this Court's February 8, 2022 Order, Plaintiff Common Cause provides the following additional information (to supplement the above explanation) regarding the proposed remedial districts described herein:

1. *The identity of all participants involved in the process of drawing the Proposed Remedial Plans submitted to the Court.*

These two proposed remedial districts were drawn by Christopher Ketchie, Demographer and Data Analyst with the Southern Coalition for Social Justice, in consultation with Plaintiffs' Counsel Allison J. Riggs and Hilary Harris Klein. Ketchie Aff. ¶¶ 3–4.

2. *A description of and explanation for choice of base map to begin the redrawing process and any alternative maps considered.*

No base map was used for the drawing of these remedial districts, however the Duke Academic Clusters were used to inform the drawing of remedial districts that would be narrowly tailored and harmonize the VRA required remedial district with the Whole-County Provision set forth in Article II, Sections 3(3) and 5(3) of the North Carolina Constitution. Ketchie Aff. ¶ 11.

3. *The extent to which partisan considerations and election results data were a factor in the drawing of the Proposed Remedial Plans, and whether the mapmaker adhered to traditional neutral districting criteria and an explanation as to how the mapmaker did so without subordinating them to partisan criteria.*

Partisan considerations and election data were not used in the drawing of the proposed remedial districts. Instead, remedial districts were constructed to ensure adequate BVAP populations in the areas in which the *Gingles I* criteria were met, based upon expert testimony disclosed in this matter and elicited at trial and as described above, as well as ensuring equal population for district size, including how remaining districts in a given cluster would be impacted. Ketchie Aff. ¶ 11. Mr. Ketchie also prioritized harmonizing the remedial district with the Whole-County Provision by minimizing the number of county-clusters traversed in the remedial districts. Ketchie Aff. ¶ 11. Mr. Ketchie then considered minimizing county splits and traversals, minimizing splits of community related boundaries such as municipalities and precincts, and maximizing compactness. Ketchie Aff. ¶ 11. Following the initial draft remedial district, Mr. Ketchie conducted the RPV studies set forth in **Ketchie Exhibits 2 and 4** to ensure the remedial districts would assure Black voters an equal opportunity to elect candidates of choice. Ketchie Aff. ¶ 12. Election data was part of that RPV study, but it was conducted after the drawing of the district lines.

4. *Whether the mapmaker considered incumbency protection.*

Incumbency protection was not considered in the drafting of the proposed remedial districts. Ketchie Aff. ¶ 12.

5. *Partisan Skew, methods of evaluating partisan fairness, and other statistical metrics of translating votes into seats across a plan.*

As these are proposed single districts and not state-wide maps, the state-wide partisan metrics were not evaluated or generated for these proposed remedial districts. However, as set forth above, partisan metrics and specifically racially polarized voting analyses set forth in **Ketchie Exhibits 2 and 4** were utilized to ensure that the proposed remedial districts will provide Black voters with equal opportunity to elect their candidates of choice.

6. *Additional information for use by Special Masters*

Pursuant to Paragraph 2 of the Court's February 16, 2022 Order Appointing Special Masters, Plaintiff Common Cause has further provided the block equivalency files (**Ketchie Exhibits 5 and 6**), ESRI shapefiles for the proposed districts (**Ketchie Exhibits 7 and 8**), color maps of the proposed districts in .PDF format as provided in pages 10 and 14 of this submission, population totals and deviations for each remedial district based on the 2020 Census P.L. 94-171 dataset (**Ketchie Exhibits 9 and 10**), "stat pack" equivalents for the districts (**Ketchie Exhibits 11 and 12**), as well as a description of the criteria and process for drawing the remedial districts in the paragraph 12 of the **Ketchie Affidavit**.

V. Conclusion

For the reasons stated above, the remedial districts proposed by Plaintiff Common Cause are necessary to ensure no unlawful vote dilution for North Carolina's Black voters, and that the

remedial maps fully comply with federal and state Constitutional law as well as the orders and findings of the Supreme Court of North Carolina and this Court.

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



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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day submitted a copy of the foregoing document and appended Exhibits in the above titled action by mail and/or electronic mail, in the manner requested, to the following parties:

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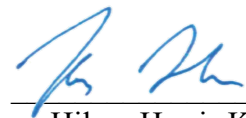
Special Masters

This the 18th day of February, 2022.

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Stephanie A. Brennan
Special Deputy Attorney General
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Senior Deputy Attorney General

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Counsel for the State Defendants



Hilary Harris Klein
Southern Coalition for Social Justice

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

21 CVS 015426

NORTH CAROLINA LEAGUE OF
CONSERVATION VOTERS, INC., et al.,

REBECCA HARPER, et al.,

COMMON CAUSE,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his
official capacity as Chair of the House Standing
Committee on Redistricting, et al.

Defendants.

**AFFIDAVIT OF CHRISTOPHER
DALTON KETCHIE**

NOW COMES Christopher Dalton Ketchie.

I, Christopher Dalton Ketchie, declare as follows:

1. I am over 18 years of age, legally competent to give this Affidavit, and have personal knowledge of the facts set forth in this Affidavit.
2. I am a graduate of North Carolina State University with a master's degree in Forestry and Environmental Resources with a concentration in Geographic Information Systems (GIS). Additionally, I have over 11 years of professional GIS and data analysis experience.
3. I am employed by the Southern Coalition for Social Justice in Durham, North Carolina as a Senior Data Analyst and Quantitative Researcher, which includes the frequent use of GIS.
4. I drew the proposed remedial districts submitted to the Court on behalf of Plaintiff Common Cause in consultation with attorneys Hilary Harris Klein and Allison J. Riggs.

5. I first identified two areas where the 2020 Decennial Census Data indicated geographically compact populations of Black Voting Age Population (BVAP) in North Carolina constituted a majority in single-member House or Senate districts. Using 2020 Census total population numbers and BVAP shading at the precinct level, and considering compactness and community related boundaries such as municipalities and precincts, I drew the VRA demonstrative districts shown in Figures 1 and 3 in the submission by Plaintiff Common Cause in Dave's Redistricting App, <http://davesredistricting.org>.

6. Dave's Redistricting App is a free, publicly available platform that is generally considered a reliable source of demographic data, and sources its total population and voting age population data directly from the Census Bureau. See "About Data," Dave's Redistricting App at <https://davesredistricting.org/maps#aboutdata>.

7. I also generated a racially polarized voting (RPV) study for House District 10 and Senate District 4 enacted by the General Assembly in 2021, S.L. 2021-173 and S.L. 2021-175, which are the districts that geographically correspond to the VRA demonstrative districts in Figures 1 and 3. These RPV studies are appended to this affidavit as **Exhibit 1 (2021 Enacted HD10)** and **Exhibit 3 (2021 Enacted SD4)**.

8. The RPV studies were generated using election results and voter turnout data from the North Carolina State Board of Elections, available at https://dl.ncsbe.gov/?prefix=ENRS/2016_11_08/ for 2016 and https://dl.ncsbe.gov/?prefix=ENRS/2020_11_03/ for 2020. After downloading the raw data files, I removed any administrative precinct data (one-stop absentee, mail absentee, provisional, curbside, and transfer data fields) and joined the election results data to the voter turnout data using a custom precinct ID field. A small number of precincts were combined in the election results files

but not the voter turnout files, and I manually adjusted those precincts in the voter turnout files to reconcile the data, but this did not substantively change the underlying data or results. Finally, I selected the relevant precincts for each district to be analyzed, excluding any precincts that were split by a district boundary.

9. The elections in this analysis were chosen by selecting four statewide contests from 2016 and 2020 that featured a Black candidate running against a White candidate listed below:

- a. 2020 NC Supreme Court Chief Justice – Cheri Beasley (B) vs. Paul Newby (W)
- b. 2020 NC Commissioner of Labor – Jessica Holmes (B) vs. Josh Dobson (W)
- c. 2016 NC Treasurer – Dan Blue (B) vs. Dale Folwell (W)
- d. 2016 Lieutenant Governor – Linda Coleman (B) vs. Dan Forest (W)

10. I then used the eiCompare package in R statistical computing software to generate four commonly used RPV metrics listed below:

- a. Homogenous Precincts
- b. Ecological Regression
- c. King’s Iterative Ecological Inference
- d. RxC Ecological Inference

Each of these metrics use increasingly complex statistical techniques to draw conclusions about individual level behavior from aggregate level data. Detailed descriptions for each function of the eiCompare package can be found at the following link:

<https://cran.r-project.org/web/packages/eiCompare/eiCompare.pdf>.

11. I then drew the proposed remedial districts using 2020 Census total population numbers, county lines, precinct lines, municipal boundaries, and BVAP shading at the precinct level to ensure adequate BVAP populations in the areas in which the *Gingles I* criteria were met, as shown

by the demonstrative districts. This included at least 38% BVAP in House District 10 and *at least* 37% BVAP in Senate District 4, which was informed by expert testimony provided in this matter regarding these areas, as well as ensuring equal population for district size, including how remaining districts in a given cluster would be impacted. I did not model the remedial districts after any previously drawn districts, but I did aim to minimize the number of county clusters, as set forth in the Duke Academic Paper, impacted by each remedial district. Additionally, 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.

12. Finally, I conducted RPV studies on the remedial districts to ensure Black voters would have an equal opportunity to elect candidates of choice. These studies are appended to this affidavit as **Exhibit 2 (HD10 remedial RPV)** and **Exhibit 4 (SD4 remedial RPV)**. I did not otherwise use partisan data in the drafting or analysis of these proposed remedial districts, and I did not consider incumbency protection in drafting proposed remedial districts.

13. Appended to this affidavit as additional exhibits are true and accurate copies of:

- a. the block assignment files for the proposed remedial districts, as **Exhibit 5 (HD10 remedial block file)** and **Exhibit 6 (SD4 remedial block file)**;
- b. the ESRI shapefiles for the proposed districts, as **Exhibit 7 (HD10 remedial ESRI file)** and **Exhibit 8 (SD10 remedial ESRI file)**;
- c. population totals and deviations for each remedial district based on the 2020 Census P.L. 94-171 dataset, as **Exhibit 9 (HD10 remedial totals and deviations)** and **Exhibit 10 (SD4 remedial totals and deviations)**;
- d. and “stat pack” equivalents for the districts, as **Exhibit 11 (HD10 remedial stat pack)** and **Exhibit 12 (SD4 remedial stat pack)**.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 18th day of February, 2022.



Christopher Ketchie

Sworn and subscribed before me this the 18th day of February, 2022.



Notary Public

Name: Talia Ray

My commission expires: 11/6/2024



STATE OF NORTH CAROLINA
COUNTY OF WAKE

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

NORTH CAROLINA LEAGUE OF
CONSERVATION VOTERS, INC., et al.,

REBECCA HARPER, et al.,

COMMON CAUSE,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his
official capacity as Chair of the House Standing
Committee on Redistricting, et al.

Defendants.

INDEX OF EXHIBITS

TO

**AFFIDAVIT OF CHRISTOPHER
DALTON KETCHIE**

Ketchie Exhibit No. Description

- | | |
|------------|---|
| Exhibit 1 | RPV Analysis for 2021 Enacted House District 10 |
| Exhibit 2 | RPV Analysis for remedial House District 10 |
| Exhibit 3 | RPV Analysis for 2021 Enacted Senate District 4 |
| Exhibit 4 | RPV Analysis for remedial Senate District 4 |
| Exhibit 5 | Remedial House District 10 block assignment file (Native) |
| Exhibit 6 | Remedial Senate District 4 block assignment file (Native) |
| Exhibit 7 | Remedial House District 10 ESRI shapefile (Native) |
| Exhibit 8 | Remedial Senate District 4 ESRI shapefile (Native) |
| Exhibit 9 | Remedial House District 10 P.L. 94-171 dataset (Native) |
| Exhibit 10 | Remedial Senate District 4 P.L. 94-171 dataset (Native) |
| Exhibit 11 | Remedial House District 10 “stat pack” |
| Exhibit 12 | Remedial Senate District 4 “stat pack” |

EXHIBIT 1
TO KETCHIE AFFIDAVIT
(RPV for 2021 Enacted House District 10)

RPV in HD10 (SL 2021-175) - Raymond E. Smith Jr.									
Beasley vs. Newby - NC Supreme Court 2020GEN									
	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (0)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Beasley			100.00%	16.41%	99.12%	6.83%	95.31%	11.65%	46.89%
Newby			0.00%	83.59%	0.86%	93.06%	4.69%	88.35%	53.11%
Holmes vs. Dobson - NC Commissioner of Labor 2020GEN									
	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (0)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Holmes			100.00%	14.74%	99.24%	5.67%	96.35%	9.75%	46.31%
Dobson			0.00%	85.26%	1.43%	94.34%	3.65%	90.25%	53.69%
Blue vs. Folwell - NC Treasurer 2016GEN									
	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (0)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Blue			100.00%	15.22%	98.33%	11.34%	96.26%	14.78%	46.45%
Folwell			0.00%	84.79%	0.96%	88.74%	3.74%	85.22%	53.55%
Coleman vs. Forest vs. Cole - Lt. Governor 2016GEN									
	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (0)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Coleman			100.00%	11.99%	98.57%	7.33%	95.73%	11.25%	43.98%
Forest*			0.00%	88.01%	0.94%	92.82%	4.27%	88.75%	56.02%

*Combined Election Results for Republican Candidate Dan Forest and Libertarian Candidate Jacki Cole

EXHIBIT 2
TO KETCHIE AFFIDAVIT
(RPV for remedial House District 10)

RPV in HD10 (Remedial) - Raymond E. Smith Jr.									
Beasley vs. Newby - NC Supreme Court 2020GEN									
	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (0)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Beasley			100.00%	20.27%	99.30%	8.62%	96.10%	14.67%	53.99%
Newby			0.00%	79.73%	1.16%	91.65%	3.90%	85.33%	46.01%
Holmes vs. Dobson - NC Commissioner of Labor 2020GEN									
	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (0)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Holmes			100.00%	18.32%	98.82%	7.30%	95.95%	12.43%	53.53%
Dobson			0.00%	81.68%	1.00%	92.92%	4.05%	87.57%	46.47%
Blue vs. Folwell - NC Treasurer 2016GEN									
	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (0)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Blue			100.00%	18.32%	99.17%	13.24%	97.38%	16.99%	54.24%
Folwell			0.00%	81.68%	1.35%	87.23%	2.62%	83.01%	45.76%
Coleman vs. Forest vs. Cole - Lt. Governor 2016GEN									
	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (0)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Coleman			100.00%	15.71%	99.20%	9.30%	96.31%	13.67%	52.16%
Forest*			0.00%	84.29%	1.05%	90.95%	3.69%	86.33%	47.84%

*Combined Election Results for Republican Candidate Dan Forest and Libertarian Candidate Jacki Cole

EXHIBIT 3
TO KETCHIE AFFIDAVIT
(RPV for 2021 Enacted Senate District 4)

RPV in SD4 (SL 2021-173) - Milton "Toby" Fitch Jr.									
Beasley vs. Newby - NC Supreme Court 2020GEN									
	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (1)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Beasley	94.90%		99.31%	18.74%	98.70%	8.55%	97.38%	10.95%	48.28%
Newby	5.10%		0.69%	81.26%	1.08%	91.40%	2.62%	89.05%	51.72%
Holmes vs. Dobson - NC Commissioner of Labor 2020GEN									
	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (1)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Holmes	95.87%		100.00%	16.96%	99.15%	7.28%	97.96%	8.45%	47.68%
Dobson	4.13%		0.00%	83.04%	0.02%	92.70%	2.04%	91.55%	52.32%
Blue vs. Folwell - NC Treasurer 2016GEN									
	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (2)	≥ 90% White Precincts (1)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Blue	96.55%	15.82%	100.00%	17.62%	99.03%	13.55%	97.42%	15.86%	48.71%
Folwell	3.45%	84.18%	0.00%	82.38%	0.87%	86.26%	2.58%	84.14%	51.29%
Coleman vs. Forest vs. Cole - Lt. Governor 2016GEN									
	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (2)	≥ 90% White Precincts (1)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Coleman	96.76%	13.79%	99.86%	14.28%	99.20%	9.89%	97.87%	11.68%	46.32%
Forest*	3.24%	86.21%	0.14%	85.72%	1.06%	90.23%	2.13%	88.32%	51.96%

*Combined Election Results for Republican Candidate Dan Forest and Libertarian Candidate Jacki Cole

EXHIBIT 4
TO KETCHIE AFFIDAVIT
(RPV for remedial Senate District 4)

RPV in SD4 (Remedial) - Milton "Toby" Fitch Jr.									
Beasley vs. Newby - NC Supreme Court 2020GEN									
	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (4)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Beasley	95.53%		99.34%	18.61%	99.24%	9.24%	98.09%	11.41%	52.96%
Newby	4.47%		0.66%	81.39%	0.85%	90.74%	1.91%	88.59%	47.04%
Holmes vs. Dobson - NC Commissioner of Labor 2020GEN									
	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (4)	≥ 90% White Precincts (0)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Holmes	96.09%		100.00%	16.78%	99.08%	8.15%	98.41%	9.30%	52.42%
Dobson	3.91%		0.00%	83.22%	0.93%	92.02%	1.59%	90.70%	47.58%
Blue vs. Folwell - NC Treasurer 2016GEN									
	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (6)	≥ 90% White Precincts (1)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Blue	96.08%	15.82%	100.00%	17.89%	99.26%	14.62%	98.12%	16.68%	54.32%
Folwell	3.92%	84.18%	0.00%	82.11%	0.73%	85.37%	1.88%	83.32%	45.68%
Coleman vs. Forest vs. Cole - Lt. Governor 2016GEN									
	Homogeneous Precincts		Ecological Regression		King's Iterative Ecological Inference		RxC Ecological Inference		Percent Vote
	≥ 90% Black Precincts (6)	≥ 90% White Precincts (1)	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	Support from Black Voters	Support from White Voters	
Coleman	95.63%	13.79%	99.63%	14.30%	99.15%	10.39%	97.93%	11.69%	51.92%
Forest*	4.37%	86.21%	0.37%	85.70%	0.90%	89.41%	2.07%	88.31%	48.08%

*Combined Election Results for Republican Candidate Dan Forest and Libertarian Candidate Jacki Cole

EXHIBIT 5
TO KETCHIE AFFIDAVIT
(House District 10 remedial block file)

**[SLIP SHEET – FILE SUBMITTED IN
NATIVE FORMAT]**

EXHIBIT 6
TO KETCHIE AFFIDAVIT
(Senate District 4 remedial block file)

**[SLIP SHEET – FILE SUBMITTED IN
NATIVE FORMAT]**

EXHIBIT 7
TO KETCHIE AFFIDAVIT
(House District 10 remedial ESRI file)

**[SLIP SHEET – FILE SUBMITTED IN
NATIVE FORMAT]**

EXHIBIT 8
TO KETCHIE AFFIDAVIT
(Senate District 4 remedial ESRI file)

**[SLIP SHEET – FILE SUBMITTED IN
NATIVE FORMAT]**

EXHIBIT 9
TO KETCHIE AFFIDAVIT
(House District 10 remedial P.L. 94-171
dataset)

**[SLIP SHEET – FILE SUBMITTED IN
NATIVE FORMAT]**

EXHIBIT 10
TO KETCHIE AFFIDAVIT
(Senate District 4 remedial P.L. 94-171
dataset)

**[SLIP SHEET – FILE SUBMITTED IN
NATIVE FORMAT]**

EXHIBIT 11
TO KETCHIE AFFIDAVIT
(House District 10 remedial “stat pack”)

User:

Plan Name: **HD10 Remedial District**

Plan Type:

Measures of Compactness Report

Friday, February 18, 2022

3:15 PM

	Reock	Polsby-Popper
Sum	N/A	N/A
Min	0.34	0.22
Max	0.54	0.35
Mean	0.44	0.29
Std. Dev.	0.14	0.09
District	Reock	Polsby-Popper
HD10	0.54	0.35
HD4	0.34	0.22

Measures of Compactness Report

HD10 Remedial District

Measures of Compactness Summary

Reock	The measure is always between 0 and 1, with 1 being the most compact.
Polsby-Popper	The measure is always between 0 and 1, with 1 being the most compact.

HD10 Remedial District Partisan Composite Index

(applying the 2016-2020 Partisan Composite described at <https://davesredistricting.org/maps#aboutdata>)

District	Dem	Rep	Oth
Proposed Remedial House District 10	52.78%	45.38%	1.84%
Resulting House District 4	33.53%	65.03%	1.45%

User:

Plan Name: **HD10 Remedial District**

Plan Type:

Political Subdivision Splits Between Districts

Friday, February 18, 2022

3:12 PM

Number of subdivisions not split:

County	99
Voting District	2,665

Number of subdivisions split into more than one district:

County	1
Voting District	1

Number of splits involving no population:

County	0
Voting District	0

Split Counts

County

Cases where an area is split among 2 Districts: 1

Voting District

Cases where an area is split among 2 Districts: 1

County	Voting District	District	Population
<i>Split Counties:</i>			
Wayne NC		HD10	82,688
Wayne NC		HD4	34,645
<i>Split VTDs:</i>			
Wayne NC	2530	HD10	4,464
Wayne NC	2530	HD4	1,366

EXHIBIT 12
TO KETCHIE AFFIDAVIT
(Senate District 4 remedial “stat pack”)

User:

Plan Name: **SD4 Remedial District**

Plan Type:

Measures of Compactness Report

Friday, February 18, 2022

3:23 PM

	Reock	Polsby-Popper
Sum	N/A	N/A
Min	0.32	0.28
Max	0.40	0.30
Mean	0.36	0.29
Std. Dev.	0.06	0.01
District	Reock	Polsby-Popper
SD4	0.32	0.28
SD5	0.40	0.30

Measures of Compactness Report

SD4 Remedial District

Measures of Compactness Summary

Reock	The measure is always between 0 and 1, with 1 being the most compact.
Polsby-Popper	The measure is always between 0 and 1, with 1 being the most compact.

District	Dem	Rep	Oth
Proposed Remedial Senate District 4	52.22%	46.18%	1.60%
Resulting Senate District 5	51.43%	46.54%	2.03%

User:

Plan Name: **SD4 Remedial District**

Plan Type:

Political Subdivision Splits Between Districts

Friday, February 18, 2022

3:24 PM

Number of subdivisions not split:

County	99
Voting District	2,666

Number of subdivisions split into more than one district:

County	1
Voting District	0

Number of splits involving no population:

County	0
Voting District	0

Split Counts

County

Cases where an area is split among 2 Districts: 1

County	Voting District	District	Population
<i>Split Counties:</i>			
Wayne NC		SD4	89,243
Wayne NC		SD5	28,090

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

NORTH CAROLINA LEAGUE OF
CONSERVATION VOTERS, INC., *et al.*,

Plaintiffs

and

COMMON CAUSE,
Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL, in his
official capacity as Chair of the House Standing
Committee on Redistricting, *et al.*
Defendants.

Case No. 21 CVS 015426

REBECCA HARPER, *et al.*,
Plaintiffs

v.

REPRESENTATIVE DESTIN HALL, in his
official capacity as Chair of the House Standing
Committee on Redistricting, *et al.*
Defendants.

Case No. 21 CVS 500085

**PLAINTIFF COMMON CAUSE'S OBJECTIONS TO
LEGISLATIVE DEFENDANTS' REMEDIAL MAPS**

Pursuant to Paragraph 9 of the North Carolina Supreme Court's February 4, 2021 Order and this Court's February 8, 2021 Order on the Submission of Remedial Plans, Common Cause herein submits its objections to the Legislative Defendants' Remedial Maps enacted by the General Assembly last week and submitted on February 18, 2022: S.L. 2022-3 (the "LD Congressional

Map”), S.L. 20222-2 (the “LD Senate Map”) and S.L. 2022-4 (the “LD House Map”). In support of its objections, Plaintiff Common Cause appends to this submission the expert report of Jonathan Mattingly and Gregory Herschlag (**Exhibit 1**, the “Mattingly Expert Report”), jointly designated with the *Harper* Plaintiffs, as well as an addendum to that report (**Exhibit 2**, the “Mattingly Addendum”), and the Second Affidavit of Christopher Ketchie (**Exhibit 3**, the “Second Ketchie Affidavit”).

The LD Remedial Maps are plainly unconstitutional when evaluated using the correct metrics using appropriate data, which differ significantly from the metrics scores, using manipulated and inaccurate data, submitted by the Legislative Defendants on February 18, 2022. Despite clear instruction from this Court and the North Carolina Supreme Court on the process and substantive requirements for constitutional remedial plans, the Legislative Defendants have failed once again to undertake the proper analysis required by *Stephenson* or consider all the appropriate factors to ensure equal voting power for voters, with the result of producing maps that fall short of the established Constitutional requirements. In their disclosures, Legislative Defendants blatantly disregarded clear direction from this Court on the required transparency for this process to provide “[t]he identity of all participants involved in the process of drawing the Proposed Remedial Plans submitted to the Court.” Feb. 8 Order on Submission of Remedial Plans ¶ 3(c). *See* LD Br. at 54 (failing to identify the “outside legal counsel, whose roles were restricted to providing legal advice” as having participated in the drawing process).¹ Legislative Defendants also provided a one-sided story of Senate negotiations that do not comport with contemporaneous

¹ To the extent that attorney client privilege protects the substance of that advice, it does not protect the disclosure of such counsel’s identity, nor does the Court’s order.

statements by other legislators,² and appear to have made no effort to incorporate public participation or the extensive public commentary received in the fall of 2021.

This lack of transparency is telling and reveals the same strategies of subterfuge and misdirection used by the Legislative Defendants this past fall to execute the extreme partisan gerrymanders already struck down by the North Carolina Supreme Court, right down to drawing maps through undisclosed legal counsel. *See* Dec. 29 Order on Mot. to Compel at 4–6. Legislative Defendants’ Remedial Maps thus deserve the same level of scrutiny as the 2021 Enacted Maps, and not the deference that maps produced in a fair and transparent process otherwise might.

Thankfully, the constitutional shortcomings of the Legislative Defendants Remedial Maps can be swiftly and easily remedied. For the LD House Map, the implementation of Common Cause’s proposed remedial House District 10, submitted on February 18, 2022, will bring this map into state Constitutional compliance, and prevent harmful vote dilution by altering just two districts within one county cluster, and thus not implicating the *Stephenson* rules at all. The LD Senate Map can similarly be brought within Constitutional bounds by the adoption of Common Cause’s remedial Senate District 4 and incorporating alternative cluster proposals from the remedial legislative process, as can the LD Congressional Map. Regardless of the approach taken by the Court in directing its Special Masters, it is abundantly clear that Legislative Defendants’ Remedial Maps cannot be accepted without modification.

² *See, e.g.,* See, e.g., Senator Dan Blue (@DanBlueNC), Twitter (Feb. 16, 2022, 2:28pm), <https://twitter.com/danbluenc/status/1494030901650640897?s=21> (“This process has not been collaborative, and it is clear to me that Senate Republicans had no real interest in finding a legislative solution.”); Senator Dan Blue (@DanBlueNC), Twitter (Feb. 17, 2022, 3:05pm), <https://twitter.com/danbluenc/status/1494402702775828481?s=21> (“The House compromise has made the stalemate in the Senate all the more disappointing. Senate Republicans appear to think they know better than the Supreme Court.”).

I. Objections to Legislative Defendants' Remedial Senate Map

The LD Senate Map constitutes an unlawful partisan gerrymander because it still diminishes and dilutes North Carolinians' voting power based on partisan affiliation by making it nearly impossible for voters who prefer one political party to elect a governing majority reflecting the will of the electorate. *See* NCSC Opinion ¶ 160. The North Carolina Supreme Court directed courts to compare the “relative chances of voters from each party electing a supermajority or majority of representatives under various possible electoral conditions,” *id.* at 161, which can be accomplished by examining the plausible number of representatives elections under various elections, as well as looking at the relative chances of election a majority or supermajority under various scenarios. The Supreme Court also noted “multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander” including “mean-median difference analysis[,] efficiency gap analysis[,] close-votes, close-seats analysis[,] and partisan symmetry analysis” which, in combination, may demonstrate “a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan” to render it presumptively constitutional. *Id.* at ¶ 163. And while the Court gave some examples of thresholds, i.e., a mean-median difference of 1% or less using a “representative sample of past elections,” *id.* at ¶ 166, and an efficiency gap above 7% based upon prior federal case law, *id.* at ¶ 167, these were all characterized as “possible” metrics, *id.* at ¶ 164, with the overall objective of informing a determination of whether maps treat voters equally.

Legislative Defendants' submission ignores these instructions, losing the forest for the trees and instead relying predominantly on two metrics, using incomplete and skewed data, to support their proposed plans, mean-median difference and efficiency gap. For the LD Senate Plan, Legislative Defendants assert a mean-median of -0.65% and efficiency gap of -3.97%. *See* LD Br.

pp. 23-24. These scores are incorrect for reasons easily ascertained on the record. First, they are not based upon a “representative sample of past elections” but rather a much narrow set that Legislative Defendants appear to have hand-picked to render the statistics they wanted. Dr. Barber applied just 12 elections despite the more appropriate and broader set of elections that are publicly available, purportedly because these are the 12 elections used by Dr. Mattingly in his expert report during the merits phase. But Dr. Mattingly used the 12 elections to demonstrate the *cluster-level* bias, while using a broader set of 16 elections for his statewide analysis. *See* PX PX629 Mattingly Report at 11, 22 (using 16 elections to analyze statewide results for the House and Senate, respectively). In addition to this error, Legislative Defendants’ expert, Dr. Barber, confusingly appears to have collated votes across elections before performing his calculations, instead of the appropriate analysis of performing calculations on individual elections and averaging them.³

A look at the full set of relevant metrics for the Senate plan, calculated properly and using representative sets of elections, reveals the partisan skew of this map and why Legislative Defendants pursued the odd strategy they did:

Metric	Mattingly (Ex. 1)⁴	Additional Comparators⁵
Mean-Median	1.304%	2.2% R Source: PlanScore
Efficiency Gap	4.072%	4.8% R Source: PlanScore
Partisan Symmetry (Partisan Bias)	4.0125 seat bias	4.8% R Source: PlanScore

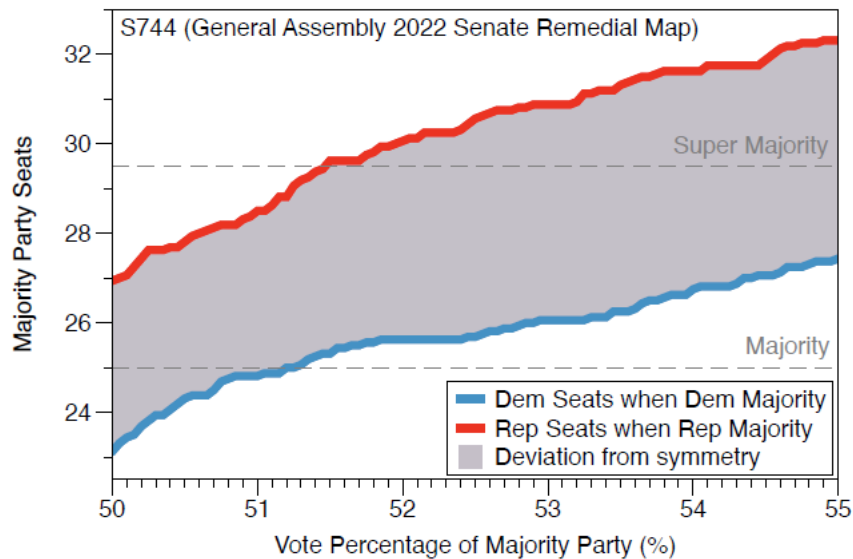
³ This error was explained in depth by Dr. Moon Duchin in the February 21, 2022 submission by Plaintiff NCLCV. *See* Second Duchin Rep. at 14.

⁴ Dr. Mattingly and Dr. Herschlag calculated their metrics using the results of sixteen recent statewide elections: *See* Ex. 1, Mattingly Expert Report p. 1. These Senate metric scores are reflected from Pages 6-7 of their report.

⁵ The source data and methodology for calculating these additional comparators is disclosed in the Second Ketchie Affidavit, and is all based upon publicly available information. *See* Ex. 3, Second Ketchie Aff. at ¶ 11.

Plausible Number of Representatives Elected Comparison	29-30 R seats with 52% R vote share v. 25-26 D seats with 52% D vote share	22D-28R / 21D-29R Source: DRA Composite / PlanScore
Relative Chances of Electing Majority (26) or Supermajority (30)	R supermajority (or close) with 48 – 49% R votes D majority with 51-52% votes	R Majority: 4/6 Scenarios D Majority: 0/6 Scenarios R Supermajority: 1/6 Scenarios D Supermajority: 0/6 Scenarios Source: Second Ketchie Affidavit

Figure 5.2 from the Mattingly Expert Report (Exhibit 1) shows just how asymmetrical the LD Senate Map is, as shown by the multi-seat gap in performance for each party based on voting percentage:



To bring the LD Senate Map within constitutional bounds, the Court should first implement the proposed remedial Senate District 4 proposed by Common Cause, which will improve the partisan bias in the map overall and prevent unlawful vote dilutions for voters of color, as supported in detail by Common Cause’s February 18, 2022 submission. In the interest of judicial

economy, those points will not be repeated here. However, Legislative Defendants made several erroneous assertions in their February 18, 2022 Brief that will be briefly addressed here.

First, Legislative Defendants erroneously contend that federal precedent, and in particular *Bartlett v. Strickland*, somehow prohibit the drawing of Common Cause’s proposed remedial districts because the proposed remedial districts contain less than 50% Black Voting Age Population. *See* LD Br. at 41. This is plainly not the case, as demonstrated by language in that decision expressly *sanctioning* these remedial districts. *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.”).

Second, Legislative Defendants try to argue their point by purposefully confusing the *Gingles I* demonstrative districts provided by Common Cause⁶ with the proposed remedial districts. This includes even excerpting the wrong figure at page 49 of their brief, and contending at page 51 that the Common Cause remedial Senate District 4 would reach into Pitt County when it would not. *See* Plaintiff Common Cause’s Proposed Remedial Districts at p. 14 Figure 4 (showing a proposed remedial Senate District 4 within Edgecombe, Wilson, and Wayne counties). Such misdirection cannot overcome the plain facts: all three *Gingles* criteria are satisfied in these geographic areas, as shown by figures 1 and 3 of Common Cause’s February 14 submission (which show a sufficient and geographically compact BVAP populations to constitute majorities in single-member districts) and the RPV studies in Exhibits 1 and 3 the Ketchie Affidavit appended to that submission (which show racially polarized voting in the 2021 Enacted Districts corresponding to these areas).⁷

⁶ *See* Figure 1 (HD10 *Gingles I* demonstrative) and Figure 3 (SD4 *Gingles I* demonstrative) in Plaintiff Common Cause’s Proposed Remedial Districts, February 18, 2022.

⁷ Legislative Defendants also asserted, without any support, that “To prove the presence of the third *Gingles* threshold condition, Common Cause is obligated to provide evidence of legally significant racially polarized

Instead of addressing the RPV studies provided by Plaintiff Common Cause, Legislative Defendants instead rely on the Lewis expert report from December 2021 that was performed using incomplete and insufficient statistical analysis,⁸ and which analyzes not whether legally-significant racially polarized voting exists, but rather whether Dr. Duchin's definition of "effective Black districts" was met anywhere in the Enacted Plans.⁹ Furthermore, Dr. Duchin confirmed at trial she never conducted a *Gingles* analysis at all, rendering Legislative Defendants' apparent reliance on her analysis inapposite. *See* T2 479:18–22 (Duchin) (Judge Shirley: "So you didn't do a *Gingles* analysis?" Dr. Duchin: "That's right.>").

Legislative Defendants also submitted a supplemental Lewis expert report on February 18, 2022, that further shows Senate District 4 in the LD Senate Map has zero chance of electing a candidate of choice for Black voters. *See* Exhibit B to Lewis Supplemental Report at p. 4 (line "SCH22-4-004"). The supplemental Barber report submitted by Legislative Defendants on February 18, 2022 similarly shows that the BVAP level for the Senate district was intentionally reduced. *See* Barber Supplemental Report at 41 (at line "Fitch"). This proves the LD Senate Map destroys what was otherwise shown to be a functioning crossover district, providing yet another independent state law basis under the North Carolina Equal Protections Clause (Article I, Section

voting in a larger area of the state demonstrating that black voters in enacted HD10 and SD 4 could constitute a compact majority in a single member district but have been unable to elect their candidate of choice because they were submerged into a majority white districts." LD Br. at p. 48. In addition to having no support in the law, this runs contrary to direction from courts that the analysis must be district specific. *See Covington v. North Carolina*, 316 F.R.D. 117, 173 (M.D.N.C. 2016) (finding the General Assembly had failed to substantiate drawing purported VRA remedial districts because "none of the evidence Defendants have cited--without additional proof and district-specific analysis--can constitute a strong basis in evidence demonstrating that any of the challenged districts were reasonably necessary as drawn to avoid a Section 2 violation" where "evidence regarding *Gingles*' third factor in any particular district is sparse to non-existent."), *summarily aff'd*, 137 S. Ct. 2211 (2017); *id.* at 174 ("[W]hen drawing the challenged districts, Defendants made no district-specific assessment regarding the third *Gingles* factor (as properly understood).").

⁸ *See* Common Cause Appellant Br. at 72; Lewis Dep. Tr. 13:3–17:2 (stating that the analysis was done "on a highly-expedited timeline" and that "it would have been prohibitive" to do his normal analysis)

⁹ *See* LDTX109 Lewis Report at 5–7; *see also* Lewis Dep. Tr. 15:21–16:15 ("I don't have an opinion about, you know, what constitutes a level of racially polarized voting that would require some sort of action.")

19) for implementing the remedial Senate District 4 submitted by Common Cause. *Cf. Bartlett v. Strickland*, 556 U.S. at 24 (“[I]f there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments.”).

Finally, Legislative Defendants are wrong that Common Cause’s proposed remedial districts would be racial gerrymanders prohibited by *Shaw v. Reno*, 509 U.S. 63, 649 (1993) and *Alabama Legis. Black Caucus v. Alabama*, 575 U.S. 254 (2015). The remedial districts are narrowly tailored to adhere to traditional redistricting criteria and allow Black voters an equal opportunity to elect their candidates of choice, and were not drawn with race as a predominating factor. *Compare* February 18, 2022 Affidavit of Christopher Ketchie at ¶ 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), *with Alabama Legis. Black Caucus*, 575 U.S. at 272 (“[A] plaintiff pursuing a racial gerrymandering claim must show that race was the predominant factor motivating the legislature’s decision to place significant number of voters within or without a particular district.” (internal quotation omitted)). Even if they were drawn with race as a predominating factor (which they were not), these remedial districts do not violate prohibitions on racial gerrymandering because they are narrowly tailored to serve several, independent, compelling government interests. *Alabama Legis. Black Caucus*, 575 U.S. at 272. The remedial Senate District 4 (and House District 10) prevent vote dilution for Black voters in violation of state Constitutional prohibitions and the Voting Rights Act, and are independently justified on each basis to bring the Senate map into Constitutional compliance with the prohibition on partisan gerrymandering.

In addition to incorporating the remedial Senate District 4 proposed by Common Cause, the Court should direct its Special Masters to bring the LD Senate Map into Constitutional compliance by modifying the same county cluster groupings that Legislative Defendants themselves acknowledged had Republican support and should be modified during the legislative process, *see* Ex. 1 at email from Sen. Paul Newton (Wake/Granville, Mecklenburg/Iredell, and New Hanover Counties), and those that were otherwise considered during the legislative process (Cumberland, Guilford, Forsyth, and Buncombe). These cluster options are further appropriate for modification because all but one were found to be partisan outliers by this Court, *see* Judgment ¶¶ 241–46 (Wake/Granville); 283–92 (Mecklenburg/Iredell); 249–56 (Cumberland); 259–67 (Guilford); 270–80 (Forsyth); 303–08 (Buncombe), and were the focus of public commentary requesting fair districts that keep communities of interest whole.

A map that incorporates Common Cause’s Remedial Senate District 2 and the alternative proposed clusters that were tabled during the legislative process would likely comport with constitutional requirements with a mean-median difference of -0.2%, efficiency gap of 1.0%, and Partisan Symmetry of -0.7%. *See* Ex. 3, Second Ketchie Affidavit ¶ 21. Plaintiff Common Cause understands the other Plaintiffs in this matter have proposed alternative Senate maps that may present viable options. Regardless of how the Court chooses to direct the Special Masters in ensuring a constitutional Senate map, the LD Senate Map cannot be approved or implemented in its current form.

II. Objections to the LD Remedial State House Map

The LD House Map also falls short of constitutional standards, but can be brought within constitutional bounds by implementing the proposed House District 10 submitted by Common Cause on February 18, 2022.

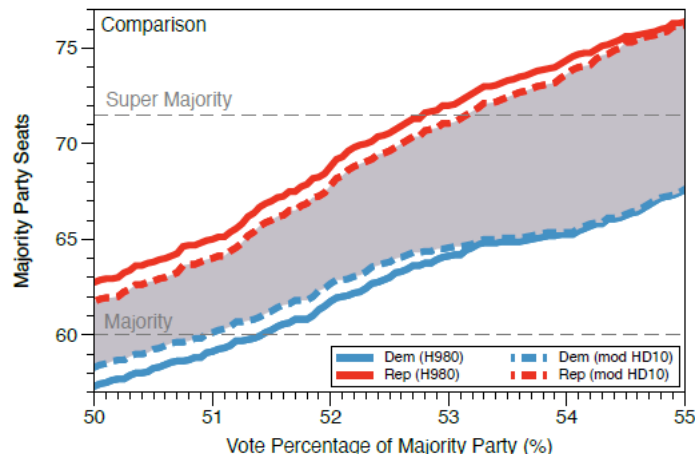
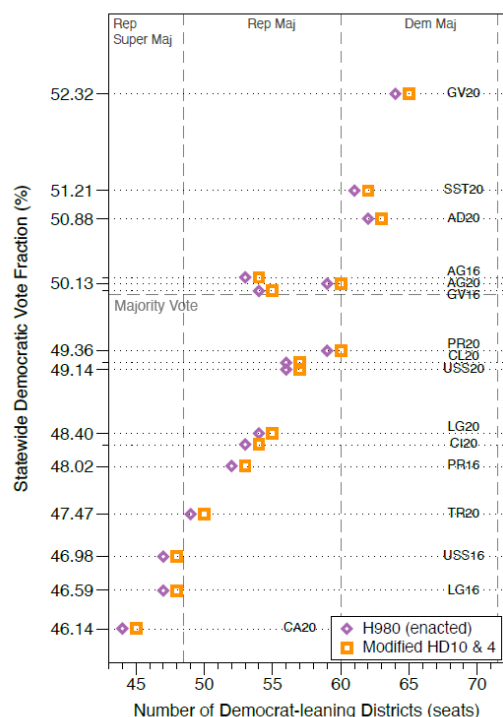
As with the Senate map, Legislative Defendants’ asserted efficiency gap of -0.84% and mean-median of -.7%, *see* LD Br. at 15, are incorrect. Instead, the appropriate data used in these metrics show that this map, although less skewed on partisan grounds, is too biased to pass Constitutional muster:

Metric	Mattingly Rep. (Ex. 1)¹⁰	Additional Comparators¹¹
Mean-Median	1.45%	1.4% R Source: PlanScore
Efficiency Gap	3.23%	3.0% R Source: PlanScore
Partisan Symmetry (Partisan Bias)	1.575 seat average deviation	2.9% R Source: PlanScore
Plausible Number of Representatives Elected Comparison	6.59375 seats average deviation	57D-63R / 58D-62R Source: DRA Composite / PlanScore
Relative Chances of Electing Majority (61) or Supermajority (72)	<i>See Figure below</i>	R Majority: 4/6 Scenarios D Majority: 1/6 Scenarios R Supermajority: 1/6 Scenarios D Supermajority: 0/6 Scenarios

These issues are remedied with the incorporation of the proposed House District 10 proposed by Common Cause on February 18, 2022. This modification consistently improves upon the partisan symmetry score of the enacted State House Map, as shown by Figures 2.1 and 2.2 one from the Mattingly Addendum (**Exhibit 2**):

¹⁰ Dr. Mattingly and Dr. Herschlag calculated their metrics using the results of sixteen recent statewide elections: *See* Ex. 1, Mattingly Expert Report at p. 1. These metrics and their analysis of the LD Congressional Map can be found at pages 3-5 of their report.

¹¹ The source data and methodology for calculating these additional comparators is disclosed in the Second Ketchie Affidavit, and is all based upon publicly available information. *See* Ex. 3, Second Ketchie Aff. at ¶ 18.



This modification significantly reduces the partisan bias of the LD House Map by consistently increasing the number of Democratic-leaning districts seats across an entire range of electoral potentials (left Figure 2.1) and bringing the symmetry of how Democratic-leaning and Republican-leaning voters are treated (right Figure 2.2). This modification also reduces the mean-median difference and efficiency gaps of the House map. *See* Ex. 2, Mattingly Addendum at 2 (stating modified House map has a reduced mean-median difference of 1.01% and efficiency gap of 2.61%); Ex. 3, Second Ketchie Aff. ¶ 22 (calculating mean-median difference of 1.2% R, efficiency gap of 2.6% R, and partisan Bias of 2.5% R).

Furthermore, as with the proposed remedial Senate District 4, the proposed remedial House District 10 would also prevent unlawful vote dilution, as supported by Plaintiff Common Cause’s February 18, 2022 submission and supporting materials. The supplemental Lewis expert submitted by Legislative Defendants further shows that House District 10 in the LD House Map has zero

chance of electing a candidate of choice for Black voters. *See* Exhibit B to Lewis Supplemental Report p. 1 (line “H980 Third Edition-010”). The supplemental Barber report submitted by Legislative Defendants on February 18, 2022 similarly shows that the BVAP level for this House district was intentionally reduced. *See* Barber Supplemental Report p. 30 (at line “Smith, R.”).

The fact that Legislative Defendants agreed to remedy other House districts begs the question of why they still intentionally destroyed the functioning crossover district in House District 10 in the LD House Map without any legitimate explanation on the record, reinforcing the need for the remedial district proposed by Common Cause to comport with the North Carolina Equal Protections Clause. *Cf. Strickland*, 556 U.S. at 24 (“[I]f there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments.”).

III. Objections to Legislative Defendants’ Remedial Congressional Map

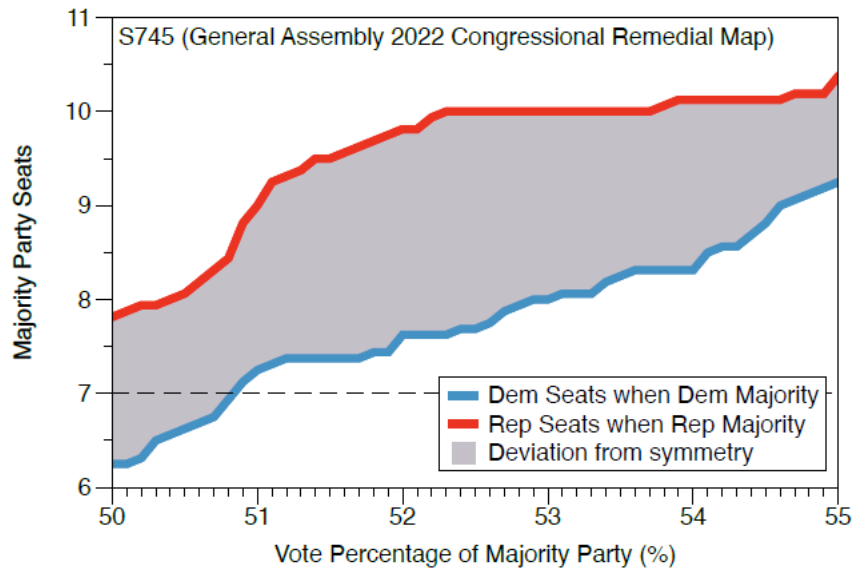
As with the Senate and House maps, the LD Congressional map does not comply with the Constitutional requirements against partisan gerrymandering and should not be adopted by this Court. Legislative Defendants again assert inaccurate median-mean (-0.61%) and efficiency gap (-5.29%) scores, *see* LD Br. at 27, which differ significantly with the scores on those metrics based upon an appropriate set of past electoral results:

Metric	Mattingly (Ex. 1)	Additional Comparators¹²
Mean-Median	1.01%	1.1% R Source: PlanScore
Efficiency Gap	2.7180%	6.4% R Source: PlanScore
Partisan Symmetry (Partisan Bias)	1.575 seats	4.9% R Source: PlanScore

¹² *See* Ex. 3, Second Ketchie Affidavit ¶ 19.

Plausible Number of Representatives Elected Comparison	8-9 R seats with 51% R vote share v. 7-8 D seats with 51% D vote share	6D-8R / 4D-10R Source: DRA Composite / PlanScore
Relative Chances of Electing Majority (8)	See figure below	R Majority: 5/6 Scenarios D Majority: 1/6 Scenarios

Figure 4.2 from the Mattingly Report shows just how biased the LD Congressional Map is, as demonstrated by the lack of overlap and large seats-wide gap between how either party fairs depending on vote percentage:



If Legislative Defendants had examined just 20 random plans from the Mattingly ensemble, they would have had a 99.998% of finding a plan with greater partisan symmetry. Ex. 1, Mattingly Expert Report at p. 3.

Accordingly, the Court should direct its Special Masters to bring the LD Congressional Map into Constitutional compliance. The proposed alternative by Senator Chaudhry, which was

originally drawn and proposed during the 2021 legislative process,¹³ provides a viable Constitutional alternative that is grounded in the legislative record, with the exception of its split of Wake Forest University from the rest of the Triad. Senator Chaudhuri's proposed map would pair a significant part of the university community with the mountain counties in the northwestern part of the state in District 5, rather than keeping the entirety of the community of interest together with the Triad in District 6. Keeping Wake Forest University whole within the Triad-based Congressional district is important to ensure that the Congressional representative is responsive to the university's needs. Splitting university communities has occurred in North Carolina both frequently and recently,¹⁴ and North Carolina's university students have consistently called out this unfair practice.¹⁵

IV. Conclusion

The North Carolina Constitution guarantees the voters of the state the right to elect state and federal representatives under district plans that provide their votes with substantially equal voting power. NCSC Opinion ¶ 222. The Legislative Defendants' Remedial Maps fail to do so, and further fail to remedy unlawful vote dilution for voters of color. For the reasons provided above, the Legislative Defendants' Remedial Maps must not be implemented without modification, and instead the Court should select a plan that comports with the constitutional requirements.

¹³ We understand this is the Congressional remedial plan offered by the Harper Plaintiffs, originally filed as S.B. 738, and proposed and tabled during the legislative process for the 2021 Congressional Map. *See* Bill Summary for S.B. 740 / S.L. 2021-174, <https://ncleg.gov/BillLookUp/2021/S740>, at entry for 11/2021 Senate showing "Amend Tabled A1", linking to <https://webservices.ncleg.gov/ViewBillDocument/2021/53325/1/S740-BD-NBC-9229>.

¹⁴ *See* Trial T3 867:23–869:3 (Rep. Hawkins) (discussing the East Carolina University split in the Enacted House Plan).

¹⁵ *See, e.g., Bryan Warner, NC A&T Students Speak Out on Campus Gerrymandering, Common Cause* (Mar. 22, 2016), <https://www.commoncause.org/north-carolina/democracy-wire/nc-at-students-speak-out-on-campus-gerrymandering/>.

Respectfully submitted, this the 21st day of February, 2022.



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EXHIBIT 1
TO COMMON CAUSE OBJECTIONS
(Mattingly Report)

Remedial Report : Congressional and NC Senate Plans

Greg Herschlag and Jonathan C. Mattingly

February 21, 2022

1 Introduction and summary

We have been asked by the Harper Plaintiffs and the Common Cause Plaintiffs to analyze two redistricting maps for both the North Carolina Congressional districts and the North Carolina Senate districts. Specifically, we will examine the Congressional and Senate maps that were recently passed by the General Assembly in laws 2022-3 (Congressional, S745), 2022-2 (Senate, S744), as well as alternative maps put forward by the Harper plaintiffs. The comments and analysis addressing the Harper Plaintiffs' proposed map were done solely at the request of the Harper Plaintiffs and not by the Common Cause Plaintiffs.

Because of the language in the court ruling, our primary tool of analysis is to examine partisan symmetry, which is the idea that a specific vote share should translate into a specific seat share, independent of which party received that vote.[1] The exact translation of votes to seats need not be known ahead of time; the important aspect of symmetry is that the translation is the same for both parties. As one example, under a map that has partisan symmetry, if the Republicans receive 55% of the vote and 70% of the seats, then when the Democrats receive 55%, they will also receive 70% of the seats. Prioritizing symmetry does not translate into any proportionality standard. However under a symmetric map, the party that wins the majority of the vote should win the majority of the seats (or at least not be in the minority).

The Supreme Court's order also mentioned other metrics that can give some insight into the symmetry properties (as well as other properties) of a map, including the mean-median difference and the efficiency gap. We prefer to report directly on measures of partisan symmetry and focus on those in this report, but we also report mean-median difference and efficiency gaps.

We examine partisan symmetry characteristics of the four maps under 16 historic elections from 2016 and 2020: 2016 Attorney General, 2016 Governor, 2016 Lieutenant Governor, 2016 Presidential, 2016 U.S. Senate, 2020 State Auditor, 2020 Attorney General, 2020 Commissioner of Agriculture, 2020 Commissioner of Insurance, 2020 Commissioner of Labor, 2020 Governor, 2020 Lieutenant Governor, 2020 Presidential, 2020 Secretary of State, 2020 Treasurer, and 2020 U.S. Senate.

We find that the plaintiff maps show significantly greater amounts of symmetry than the recently passed maps put forward by the North Carolina legislature. We also demonstrate that if twenty maps were drawn from our original ensemble, which was constructed without regard to partisan symmetry, it would be extremely likely to find a map with significantly superior partisan symmetry when compared with the legislature's enacted remedial maps. In other words, even drawing maps at random, it is not difficult to draw maps that achieve significantly better partisan symmetry than the legislature's proposed remedial maps.

2 Qualifications

We are Professors of Mathematics at Duke University. Dr. Mattingly is also a Professor of Statistical Science at Duke University. His degrees are from the North Carolina School of Science and Math (High School Diploma), Yale University (B.S.), and Princeton University (Ph.D.). He grew up in Charlotte, North Carolina, and currently lives in Durham, North Carolina. Dr. Herschlag's degrees are from Taylor Allderdice (High School Diploma), University of Chicago (B.S.), and the University of North Carolina at Chapel Hill (Ph.D.). He has lived in North Carolina since 2007.

Both of us lead a group at Duke University that conducts non-partisan research to understand and quantify gerrymandering. This report grows out of aspects of our group's work around the current North Carolina legislative districts which are relevant to the case being filed.

Dr. Mattingly previously submitted an expert report in *Common Cause v. Rucho*, No. 18-CV-1026 (M.D.N.C.), *Diamond v. Torres*, No. 17-CV-5054 (E.D. Pa.), *Common Cause v. Lewis* (N.C. Sup. Ct No. 18-cvs-014001), and *Harper v. Lewis*

(No. 19-cv-012667) and was an expert witness for the plaintiffs in *Common Cause v Rucho* and *Common Cause v. Lewis*. Dr. Herschlag previously submitted an affidavit in *North Carolina v. Covington*, No. 1:15-cv-00399. We are being paid at a rate of \$400/per hour for this work. Much of the work, including the randomly generated maps, derives from an independent research effort, unrelated to this lawsuit, to understand gerrymandering nationally and in North Carolina specifically. Some of the analysis described in this report was previously released publicly as part of a non-partisan effort to inform the discussion around the redistricting process.

3 Methods

We evaluate the proposed plans using a partisan symmetry metric described below. We also report the the mean-median difference and the efficiency gap. Each of these metrics was calculated using the results of sixteen recent statewide elections: 2016 Attorney General, 2016 Governor, 2016 Lieutenant Governor, 2016 Presidential, 2016 U.S. Senate, 2020 State Auditor, 2020 Attorney General, 2020 Commissioner of Agriculture, 2020 Commissioner of Insurance, 2020 Commissioner of Labor, 2020 Governor, 2020 Lieutenant Governor, 2020 Presidential, 2020 Secretary of State, 2020 Treasurer, and 2020 U.S. Senate. In many analyses, we also consider the uniform swing of the elections under consideration which allows us to consider a varied range of statewide partisan vote fractions over multiple plausible voting patterns.

In line with the classic definition of partisan symmetry, the North Carolina Supreme Court explained, “voters are entitled to have substantially the same opportunity to electing a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised” a given percentage “of the statewide vote share in that same election.” *Harper v. Hall*, No. 413PA21, slip op. ¶169 (N.C. Feb. 14, 2022). To implement this directive, we measure the partisan symmetry by calculating the number of seats awarded to the party winning the majority of votes in pairs of elections that have total statewide partisan vote shares which are symmetric about the 50% level. Examples of symmetric pairs are 49% and 51% or 48% and 52%. We then report the absolute difference in the number of seats awarded. If both parties were treated symmetrically, this difference would be zero.

To take an example: we begin with the results of the 2016 Governor election and apply a “uniform swing” to reflect a 48% Democratic statewide vote share for that election. We calculate how many Republican representatives would be elected with this 48% Democratic vote share. We then apply a uniform swing to the election so that it reflects the corresponding, reciprocal Democratic vote share—i.e., 52%. We then compute the number of Democratic representatives that would be elected with that 52% Democratic vote share. We then calculate the absolute difference between the number of Republican representatives elected with 48% Democratic vote share and the number of Democratic representatives elected with a 52% Democratic vote share. Thus, if 8 Republicans were elected with 48% Democratic vote share, and 7 Democrats were elected with 52% vote share, the absolute difference would be 1 seat. (Because the figure is absolute, the value is always positive. It does not reflect which party benefits from the asymmetry; it captures only the degree of asymmetry.) We repeat this process using several sets of vote fractions which are equidistant from the majority line of 50%. Namely, we consider 45% and 55%, 46% and 54%, 47% and 53%, and 49% and 51%.

Reciprocity in a single election does not speak to possible variations in the spatial voting patterns seen across the state in different elections. Therefore, we repeat this procedure across the 16 historic statewide elections listed above, and then calculate an average of the absolute difference between the number of Republican seats elected (under the lower Democratic vote share) and the number of Democratic seats elected (under the higher Democratic vote share). The metric thus captures the average, absolute deviation, across elections and across vote shares, between the number of seats that the two parties are expected to elect at the same given vote share. Lower numbers reflect greater partisan symmetry, and in particular, reflect a more “equal opportunity to electing a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised” a given percentage “of the statewide vote share in that same election.” *Harper* slip op. ¶169.

We emphasize that we consider the average deviation across 16 different elections, thereby capturing the degree of partisan symmetry exhibited by the map across a variety of different election climates. This is very different from considering a single electoral vote pattern constructed by averaging elections to create a different, possibly unobserved, vote pattern, and only then assessing the deviation.

In addition to examining the averaged deviation from partisan symmetry, we also examine the mean-median difference and the efficiency gap. The mean-median is defined to be the difference between the average Democratic vote share and the median Democratic vote share.¹ The efficiency gap is defined to be the difference in wasted votes across the two parties

¹Here we define Democratic/Republican vote share to be the fraction of the vote that went to one party compared with the vote going to both parties, i.e. $D/(R + D)$ where D and R are the Democratic and Republican votes in a district.

divided by the total vote for the two parties. Wasted votes are found by summing overall votes in losing districts and all votes in winning districts that are more than half the total votes; for example, if D and R are the Democratic and Republican votes in a district, and $D < R$ then the Democrats would have wasted D votes and the Republicans would have wasted $R - (D + R)/2$ votes. When computing the efficiency gap we uniformly swing each election to range from 45% to 55% of the vote in increments of 1%, which provides greater diversity to the elections considered.²

4 Congressional Districts

Using the set of statewide elections listed in Section 3, the partisan symmetry of the Harper Plaintiffs’ proposed congressional map – as measured using the metric described below, which reflects the average deviation in seats won between the parties given a particular vote share – is 0.36875 seats. In practical terms, this means that for any given statewide election, the number of Democratic and Republican seats elected at a given party vote fraction will more often than not be the same number; and the expected difference averaged across a range of sixteen statewide elections is only 0.36875 seats. Only 96 of the 80,000 sampled congressional plans both accounted for incumbency and had a partisan symmetry score of less than 0.40 seats.

The legislature’s 2022 remedial congressional plan has an average partisan symmetry deviation of 1.575 seats – meaning the average seat deviation between the parties given the same vote share is 4 times as high as it is in Harper plaintiffs proposed plan. This reflects that, under the enacted plan, Republicans win 8 or 9 seats when they get 51% of the vote, while Democrats win 7 or 8 seats when they get 51% of the vote. If the map makers would have examined just 20 random plans from our ensemble, they would have found a plan with higher partisan symmetry than the S745 plan with a 99.998% chance. Furthermore, there would be a 98.56% chance that at least one of those plans would have a seat deviation of less than 1. The 2022 enacted remedial Congressional plan has a mean-median gap of 1.01%. The average efficiency gap calculated by conducting uniform swings on these election results, ranging from 45% to 55% Democratic vote share, is 7.312%.

As to other partisan fairness metrics identified in the Supreme Courts order and opinion: The average mean-median difference for the Harper Plaintiffs’ proposed map is 0.4504%. The average efficiency gap calculated by conducting uniform swings on these election results, ranging from 45% to 55% Democratic vote share, is 2.7180%.

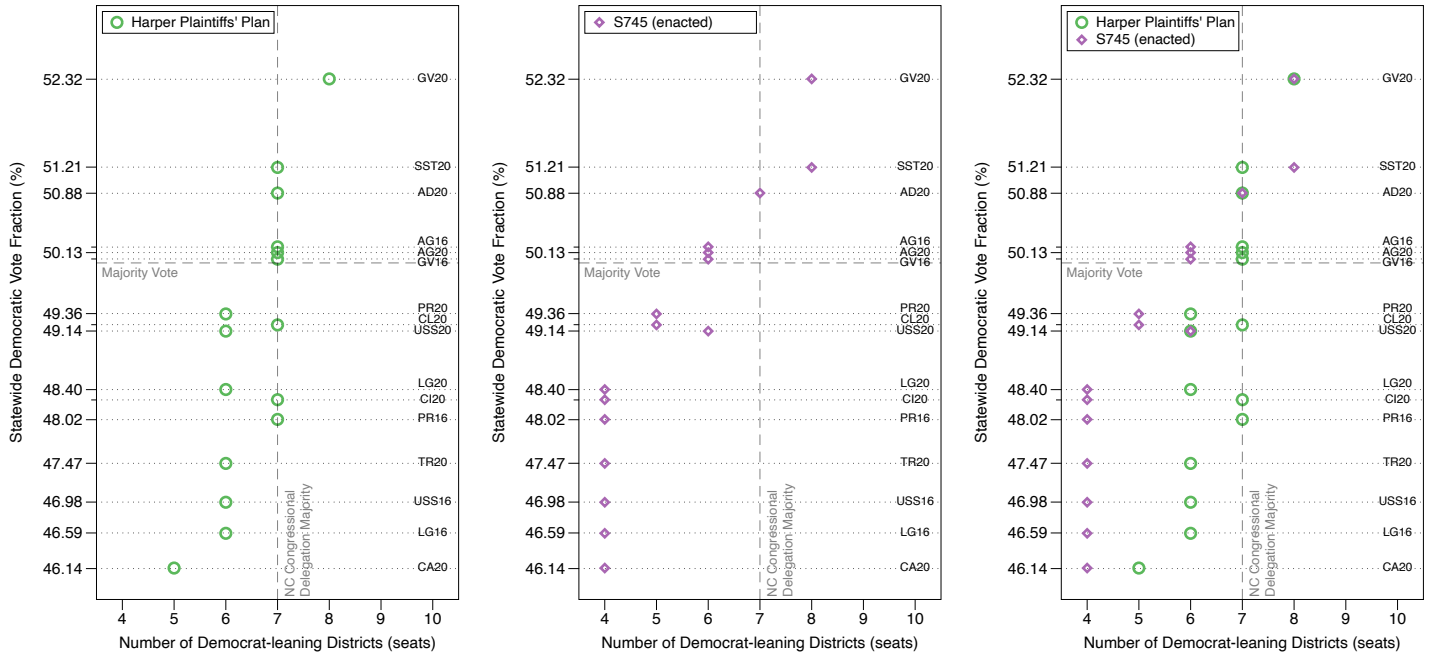


Figure 1: We show the number of seats (horizontal axis) compared with the statewide vote (vertical axis) in our 16 historic elections under the Harper Plaintiffs’ map (left), and the enacted map (S745; middle). We also directly compare the two maps (right)

²When performing a uniform swing analysis, it is more efficient to estimate the efficiency gap using the Democratic/Republican vote fractions as opposed to the vote. Under equal votes in each district, the use of the fractions gives the exact same result, however, it will provide a slight difference if this is not true. When employing uniform swings, we use the vote fractions. In our experience, this slightly different formulation creates little difference in the values because the populations are balanced across districts.

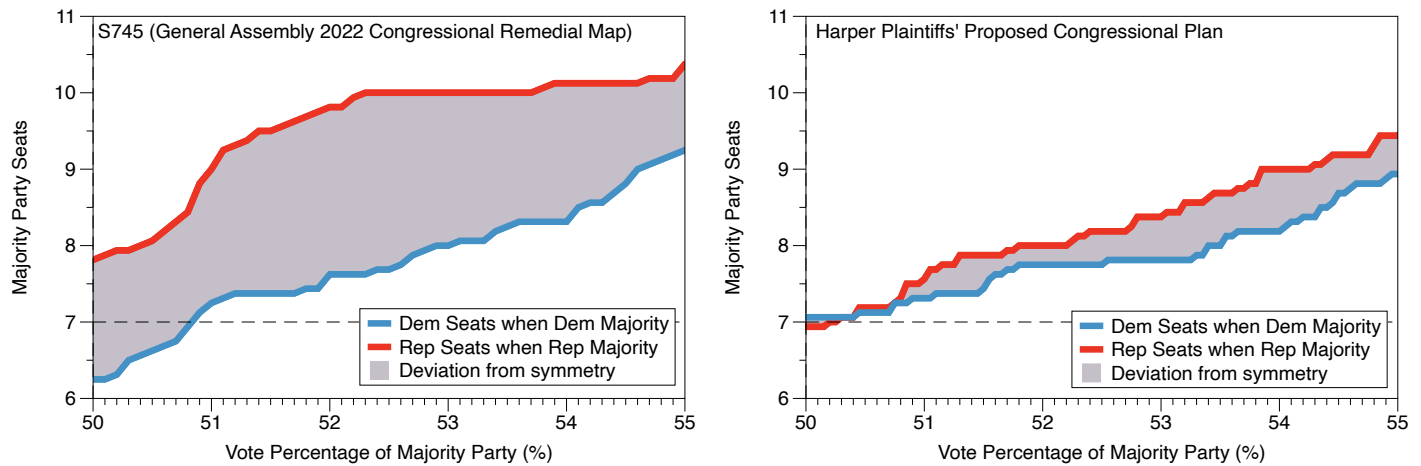


Figure 2: We show the statewide vote percentage won by the party in the majority of the vote (horizontal axis) compared with the statewide seats won by the majority party (vertical axis) in our 16 historic elections under the enacted map (S745; left), and the Harper Plaintiffs' plan (right). In a perfectly symmetric map, the blue line would always coincide with the red line.

To better illuminate the extent to which the two maps treat the parties symmetrically, we plot in Figure 1 what would be results of congressional elections run with historical elections mentioned in Section 3. We begin by noticing that the Harper Plaintiffs' proposed map always gives at least half of the seats to the party which wins the majority of the votes. In contrast, the Legislature's S745 map only gives the Democrats at least half the seat in three of the six elections where they win the majority while always giving the Republicans at least half the seats in the elections where they win the majority of the votes. One can also understand the degree to which the maps produce seat counts which are symmetric. In a symmetric map, the behavior in the bottom half of these plots should "mirror" the behavior in the top half.

To better examine this, we calculate the seats won by the party with the majority of the vote under the sixteen specified elections when they are shifted, using the uniform swing hypothesis, to have a statewide Democratic share ranging from 45% to 55%. We then average these 16 seat counts over each of the statewide vote fractions. We plot this average in Figure 2 as a function of the statewide majority vote fraction. When the Democrats are in the Majority (Democratic vote shares of 50%-55%) we use a blue curve and plot the Democratic seat share. When the Republicans are in the Majority (Democratic vote shares of 45%-50%), we use a red curve and plot the Republican seat share. If the map is symmetric, the seats elected in response to Democratic majority votes will be the same as the seats elected in response to Republican majority votes, and the two curves will lie on top of each other. The gray shaded region emphasizes the deviation from ideal partisan symmetry.

Looking at Figure 2, we see that there is a significant deviation from symmetry in the legislature's proposed 2022 remedial Congressional plan while the Harper Plaintiffs' proposed plan shows a high degree of symmetry, particularly between 49% and 51%. Both maps favor the Republicans with respect to their deviation from partisan symmetry, as shown by the fact that the red curve is above the blue curve.

Democratic Elections						Republican Elections					
		S745 (Cong.)		Plaintiffs' Cong.				S745 (Cong.)		Plaintiffs' Cong.	
Election	Democratic Vote (%)	Dem. Seats	Dem. Split or Won Majority	Dem. Seats	Dem. Split or Won Majority	Election	Republican Vote (%)	Rep. Seats	Rep. Split or Won Majority	Rep. Seats	Rep. Split or Won Majority
GV16	50.05	6	No	7	Yes	PR20	50.64	9	Yes	8	Yes
AG20	50.13	6	No	7	Yes	CL20	50.78	9	Yes	7	Yes
AG16	50.20	6	No	7	Yes	USS 20	50.86	8	Yes	8	Yes
AD20	50.88	7	Yes	7	Yes	LG20	51.60	10	Yes	8	Yes
SST20	51.21	8	Yes	7	Yes	CI20	51.73	10	Yes	7	Yes
GV20	52.32	8	Yes	8	Yes	PR16	51.98	10	Yes	7	Yes
						TR20	52.53	10	Yes	8	Yes
						USS 16	53.02	10	Yes	8	Yes
						LG16	53.41	10	Yes	8	Yes
						CA20	53.85	10	Yes	9	Yes

Table 1: We summarize Figure 2 on the congressional two maps with the above table. Pay particular attention to the number of times which map fails to give a party the majority of seats when they win the majority of the votes. Notice that this only occurs for the Democrats.

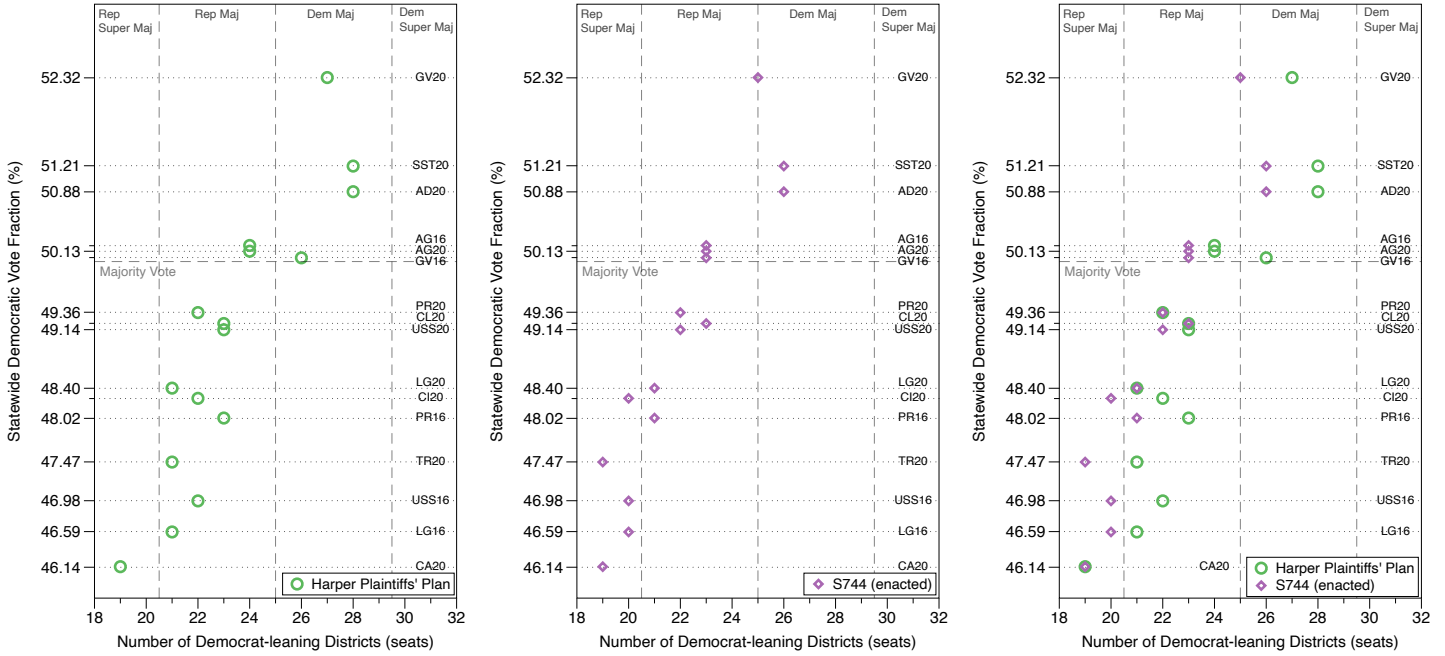


Figure 3: We show the number of seats (horizontal axis) compared with the statewide vote (vertical axis) in our 16 historic elections under the Harper Plaintiffs’ map (left), and the NC Legislature’s enacted map (S744; middle). We also directly compare the two maps (right).

5 Senate Districts

Using the set of statewide elections listed in Section 3, the partisan symmetry of the Harper Plaintiffs’ proposed senate map – as measured using the metric described above for the congressional plans, which reflects the average deviation in seats won between the parties given a particular vote share – is 1.04375 seats.³

The legislature’s 2022 enacted remedial senate plan has an average partisan symmetry deviation of 4.0125 seats – meaning the average seat deviation between the parties given the same vote share is again 4 times as high as it is in Harper plaintiffs proposed plan. This reflects that, under the enacted plan, Republicans win 29 or 30 seats when they get 52% of the vote, while Democrats win 25 or 26 seats when they get 52% of the vote. This is enough to potentially grant the Republicans a supermajority, whereas the Democrats either split the chamber or gain the smallest possible majority. If the map makers would have examined just 1 random plan from our ensemble, they would have found a plan with higher partisan symmetry than the S744 plan with a 99.6% chance. Furthermore, there would be a 92.5% chance that at least one of those plans would have a symmetry deviation of less than 3 seats. If they had considered 20 plans, they would have been essentially guaranteed to find one with a symmetry deviation of less than 3 seats. The 2022 enacted remedial Senate plan has a mean-median gap of 1.304%. The average efficiency gap calculated by conducting uniform swings on these election results, ranging from 45% to 55% Democratic vote share, is 4.072%.

As to other partisan fairness metrics identified in the Supreme Courts order and opinion: The average mean-median difference for the Harper Plaintiffs’ proposed senate map is 0.228%. The average efficiency gap calculated by conducting uniform swings on these election results, ranging from 45% to 55% Democratic vote share, is 1.955%.

In Figure 3, we plot what would be results of North Carolina Senate elections run with historical elections mentioned in Section 3. We begin by noticing that both the Harper Plaintiffs’ proposed NC Senate map and the Legislature’s S744 map always give at least half of the seats to the Republican Party when they win the majority. The Harper Plaintiffs’ proposed NC Senate map gives the majority of the seats to the Democrats in four out of six elections where they win the majority of the votes while the Legislature’s S744 map does so in three out of six elections. More telling, the Legislature’s S744 map gives the Republicans the supermajority of seats or close to it, when they receive between 51% and 52% of the votes while the Democrats barely get or share the majority when they receive between 51% and 52% of the votes.

To better understand the extent to which the two plans respond symmetrically to swings in the Democratic or Republican

³We remark that the coarse averaging of the measure we use is a rough approximation for the area of the gray regions shown in Figure 4. In this case, the 45%,55% vote pairing is over-weighted and drives the average up (there are only 4 other number we are averaging with). If we would have instead averaged the seat deviation across all vote fractions between 50%-55%, the deviation would have been closer to 0.5.

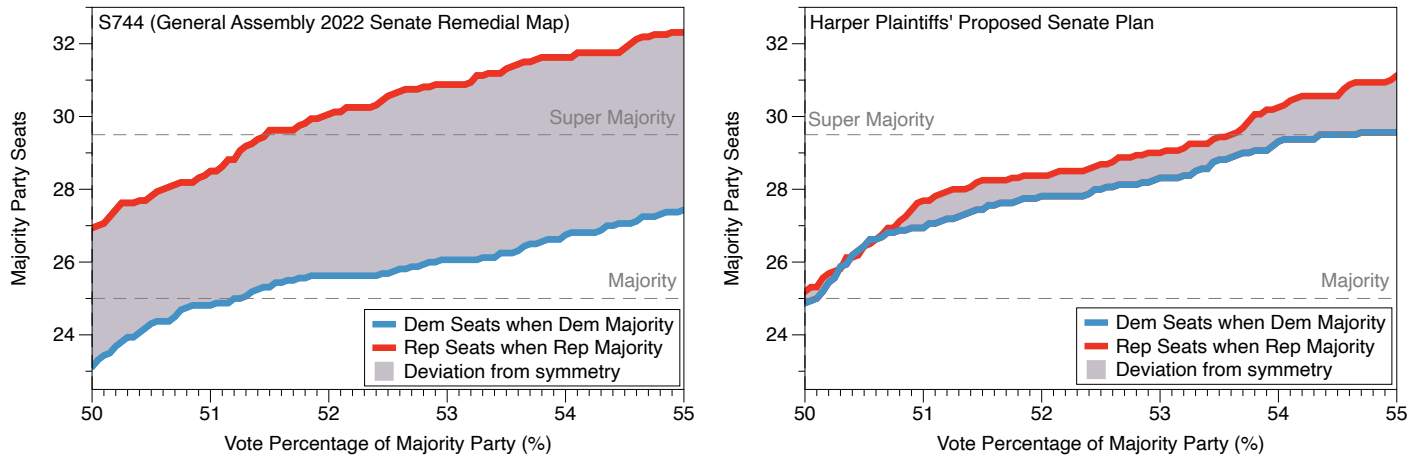


Figure 4: We show the statewide vote percentage won by the party with the majority of the vote (horizontal axis) compared with the statewide won seats by the majority party (vertical axis) in our 16 historic elections under the enacted map (S744; left), and the Harper Plaintiffs' plan (right). In a perfectly symmetric map, the blue line would always coincide with the red line

direction, we calculate the seats won by the party with the majority of the vote under the sixteen specified elections when they are shifted, using the uniform swing hypothesis, to have statewide Democratic share ranging from 45% to 55%. We then average these 16 seat counts over each of the statewide vote fractions. We plot this average in Figure 4 as a function of the statewide majority vote fraction. When the Democrats are in the Majority (Democratic vote shares of 50%-55%) we use a blue curve. When the Republicans are in the Majority (Democratic vote shares of 45%-50%), we use a red curve and plot the Republican seat share. If the response to Democratic majority votes is the same as Republican majority votes the two curves will be on top of each other. The gray shaded region emphasizes the deviation from ideal partisan symmetry.

It is clear from Figure 4 that the Legislature's S744 map is significantly less symmetric than the Harper Plaintiffs' plan. It is particularly striking that Harper Plaintiffs' plan shows almost perfect symmetry for deviations immediately around 50%. Beyond that range the Harper Plaintiffs' plan actually treats Republicans more favorably than Democrats.

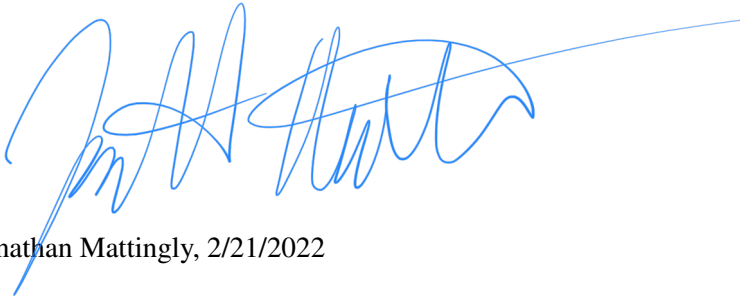
References

- [1] Bernard Grofman and Gary King. The future of partisan symmetry as a judicial test for partisan gerrymandering after *LULAC v. Perry*. *Election Law Journal*, 6(1):457–472, 2007.

We declare under penalty of perjury under the laws of the state of North Carolina that the foregoing is true and correct to the best of our knowledge.

A handwritten signature in black ink, appearing to read "Greg Herschlag".

Greg Herschlag 2/21/2022

A handwritten signature in blue ink, appearing to read "Jonathan Mattingly".

Jonathan Mattingly, 2/21/2022

EXHIBIT 2
TO COMMON CAUSE OBJECTIONS
(Mattingly Addendum)

Remedial Addendum on the House Districts

Greg Herschlag and Jonathan C. Mattingly

February 21, 2022

1 Introduction

This is an addendum to our report entitled “Remedial Report : Congressional and NC Senate Plans”. This report addresses the NC House plan and is prepared at the request of the Common Cause Plaintiffs. The methods used here are further elaborated in that document. We begin by comparing the Legislature’s enacted remedial plan (H980) with a modification proposed by the Common Cause Plaintiffs. We then point out that the Legislature’s enacted remedial plan (H980) is far from the most symmetric plan possible. Looking in our previously generated ensemble, which was not generated with this in mind, it was easy to find many plans which had a better partisan symmetry characteristics than H980.

2 Analysis of House Plan H980

We continue by analyzing the House district plan H980. We do so by comparing it with (i) the Ketchie modification, and (ii) plans in our ensembles. The Ketchie modification keeps the H980 largely unchanged, but redraws House Districts (HD) 10 and 4 in order to, consistent with Common Cause’s theory of the case, create an opportunity for Black voters to elect their choice. To be clear, we did not do any racially polarized voting studies in this area. As Dr. Mattingly noted in his addendum report in trial, increasing the BVAP in HD 10 also makes it much more likely to produce another Democratic House District. We compare H980 with our ensemble to investigate the extent to which the General Assembly sought to improve upon the overall plan’s partisan symmetry.

We begin by analyzing the average deviation from partisan symmetry across the 16 historic elections under symmetric uniform swings (e.g. 49% and 51% or 48% and 52%). For the H980 plan, we find an average deviation of 6.59375 seats. When making the modifications from Ketchie in HD10 and 4, we find that this deviation drops to 5.3. We examine the partisan outcomes over the 16 elections for both H980 and the modifications in Figure 1 (left). We see that the Ketchie modification consistently leads to one more Democratic district across all of the historic elections and thus consistently improves upon the partisan symmetry score of the enacted State House map.

To better understand the extent to which the two plans respond symmetrically to swings in the Democratic or Republican direction, we calculate the seats won by the party with the majority of the vote under the sixteen specified elections when they are shifted, using the uniform swing hypothesis, to have statewide Democratic share ranging from 45% to 55%. We then average these 16 seat counts over each of the statewide vote fractions. We plot this average for the H980 plan and the Ketchie modification in Figure 2 as a function of the statewide majority vote fraction. When the Democrats are in the Majority (Democratic vote shares of 50%-55%) we use a blue curve. When the Republicans are in the Majority (Democratic vote shares of 45%-50%), we use a red curve and plot the Republican vote share. If the response to Democratic majority votes is the same as Democratic majority votes the two curves will be on top of each other. The gray shaded region emphasizes the deviation from ideal partisan symmetry where the two curves lie one on top of the other.

In addition to improvements in partisan symmetry, we also examine the mean-median score and efficiency gap. For the former, we average over the 16 elections. For the latter, we take uniform swings on each election from 45%-55% in increments of 1% and average over the resulting 16×11 elections. The enacted H980 plan has an averaged mean-median score of 1.45%, whereas the Ketchie modification reduces this to 1.01%. We see a similar reduction in efficiency gap: The enacted H980 plan has an averaged efficiency gap of 3.23%, whereas the Ketchie modification reduces this to 2.61%.

We next turn to compare the H980 map with the ensembles used in Dr. Mattingly’s report of this case. We examine an ensemble of plans that does not consider municipal preservation and minimizes the double-bunking of incumbents. If the mapmakers had simply picked 20 random plans from our ensemble, then with 99.9989% probability the mapmakers would have found at least one plan with a better partisan symmetry than the Legislature’s remedial plan. Similarly, the chance that

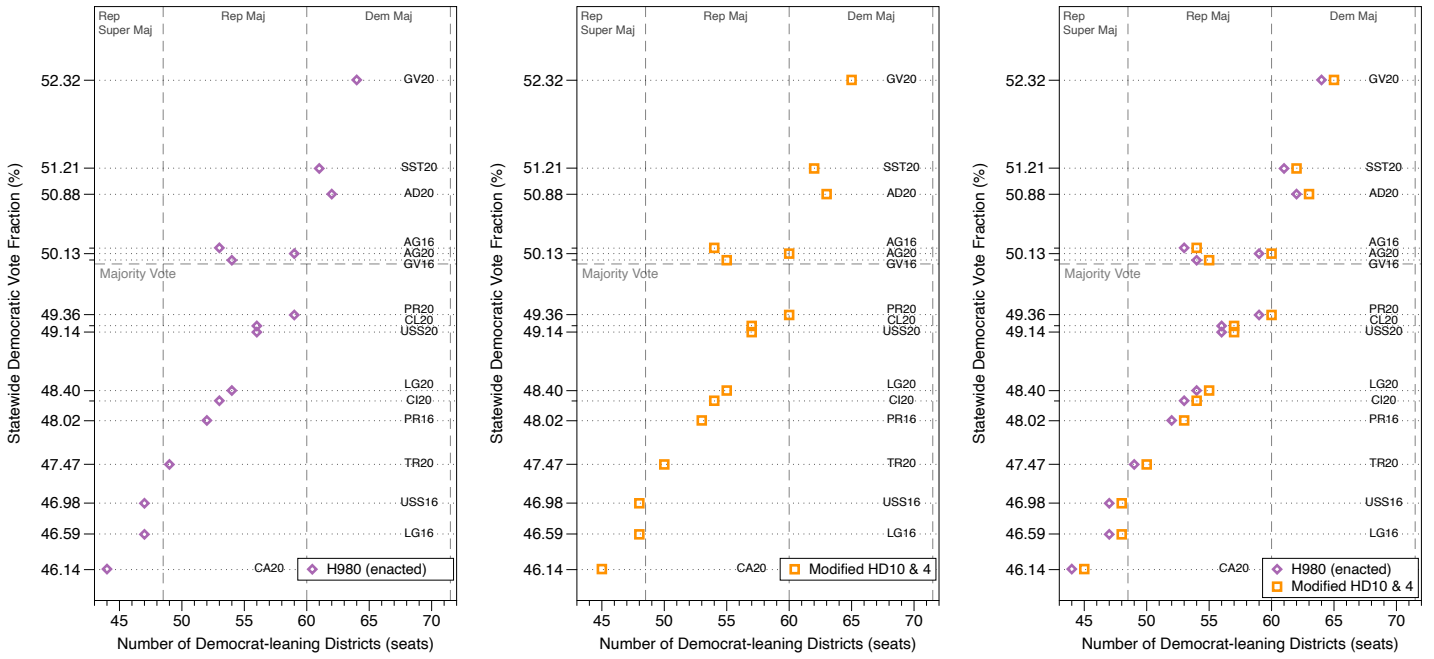


Figure 1: We show the number of seats (horizontal axis) compared with the statewide vote (vertical axis) in our 16 historic elections under the enacted map (left), the Ketchie modification (middle), and then directly compare them in the same plot (right).

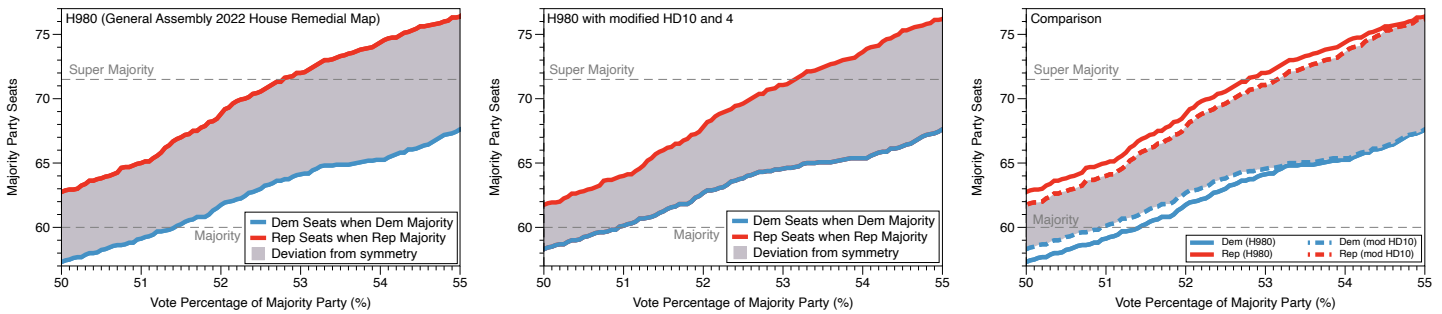


Figure 2: We show the statewide vote of the majority of the vote (horizontal axis) compared with the statewide won seats by the majority party (vertical axis) in our 16 historic elections under the enacted map (H980; left), and the modified plan (middle). We compare the difference in the deviation (right). In a perfectly symmetric map, the blue line would always coincide with the red line

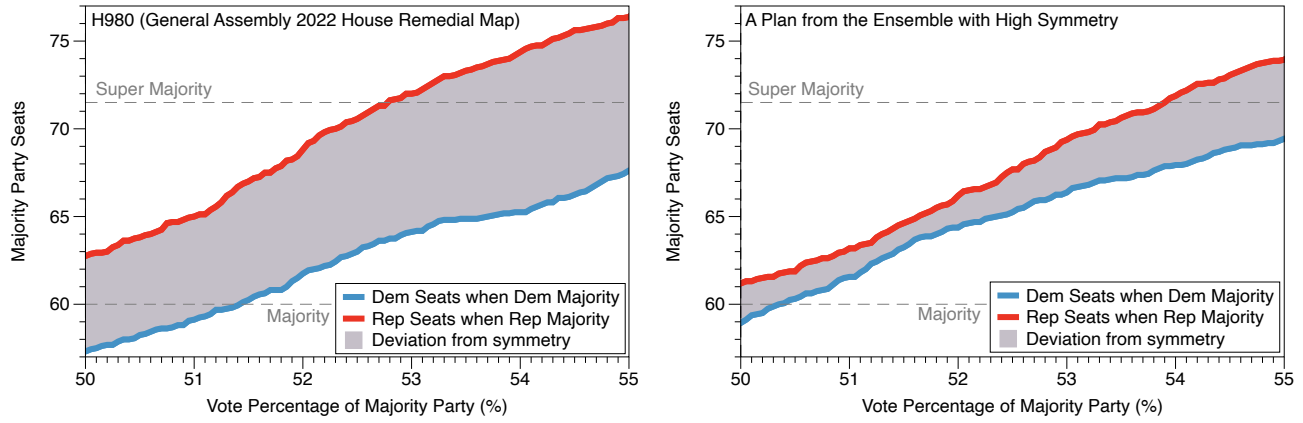


Figure 3: We show the statewide vote of the majority of the vote (horizontal axis) compared with the statewide won seats by the majority party (vertical axis) in our 16 historic elections under the enacted map (H980; left), and a plan from our ensemble that has high partisan symmetry deviation of (deviation less than 3 seats on average; right). In a perfectly symmetric map, the blue line would always coincide with the red line

one of those 20 plans would have a partisan symmetry deviation score below 5 is 90.8%. In short, it would not have been a difficult task to find a map that was better at achieving partisan symmetry than what the legislature proposed remedial plan.

We conclude by demonstrating the difference in partisan symmetry between the H980 plan and randomly chosen plans with partisan symmetry deviation less than 3, which would be easy to obtain by searching through the plans we submitted to the court. We demonstrate the result in Figure 3.

We declare under penalty of perjury under the laws of the state of North Carolina that the foregoing is true and correct to the best of our knowledge.

A handwritten signature in black ink, appearing to read "Greg Herschlag".

Greg Herschlag 2/21/2022

A handwritten signature in blue ink, appearing to read "Jonathan Mattingly".

Jonathan Mattingly, 2/21/2022

EXHIBIT 3
TO COMMON CAUSE OBJECTIONS
(Second Ketchie Affidavit)

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

21 CVS 015426

NORTH CAROLINA LEAGUE OF
CONSERVATION VOTERS, INC., et al.,

REBECCA HARPER, et al.,

COMMON CAUSE,

Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL, in his
official capacity as Chair of the House Standing
Committee on Redistricting, et al.

Defendants.

**SECOND AFFIDAVIT OF
CHRISTOPHER DALTON KETCHIE**

NOW COMES Christopher Dalton Ketchie.

I, Christopher Dalton Ketchie, declare as follows:

1. I am over 18 years of age, legally competent to give this Affidavit, and have personal knowledge of the facts set forth in this Affidavit.
2. I am a graduate of North Carolina State University with a master's degree in Forestry and Environmental Resources with a concentration in Geographic Information Systems (GIS). Additionally, I have over 11 years of professional GIS and data analysis experience.
3. I am employed by the Southern Coalition for Social Justice in Durham, North Carolina as a Senior Data Analyst and Quantitative Researcher, which includes the frequent use of GIS.
4. In support of Plaintiff Common Cause's objections to the remedial maps enacted by the North Carolina General Assembly in February 2022, I calculated the scores for several metrics of

these maps evaluating partisan performance using publicly available data and analytical tools. These metrics include the mean-median difference, efficiency gap, partisan symmetry / partisan bias, the plausible number of representatives elected across different electoral conditions, and the relative chances of electing a majority or (for state legislative maps) supermajority by a given political party.

5. I used the publicly available platform PlanScore to calculate the mean-median, efficiency gap, partisan symmetry / partisan bias, plausible number of representatives elected, and one of the six scenarios I used to determine the relative chances of electing majority or supermajorities. PlanScore is a project of the nonpartisan Campaign Legal Center, and is considered a reliable platform for calculating partisan metrics. See <https://planscore.campaignlegal.org/#!2020-ushouse>.

6. I used the publicly available platform Dave's Redistricting App (DRA) to calculate the plausible number of representatives elected and four of the six scenarios I used to determine the relative chances of electing a majority or supermajority, as described in more detail below. DRA is also considered a reliable platform for evaluating legislative maps and calculating partisan metrics. See <https://davesredistricting.org/maps#home>.

7. Both PlanScore and DRA draw their election data from the Voting and Election Science Team (VEST), based out of the University of Florida and Wichita State University. This data is available at <https://dataverse.harvard.edu/dataverse/electionscience>. PlanScore's election data and methodology can be found here: <https://planscore.campaignlegal.org/models/data/2021D/>. DRA's election data and methodology can be found here: <https://davesredistricting.org/maps#aboutdata>.

8. For the metrics that were calculated using PlanScore, I downloaded the shapefile for the proposed remedial Senate plan from the General Assembly website, then uploaded the shapefile

to PlanScore's "Score A Plan" page, which can be found at <https://planscore.campaignlegal.org/upload.html>. Once the shapefile was successfully uploaded, I selected the new prediction method to calculate the comparators below.

9. For the metrics that were calculated using DRA, I downloaded the block assignment file for the proposed remedial Senate plan from the General Assembly website, then imported the block assignment file to DRA using the import tool which can be found at <https://davesredistricting.org/maps#>. Once the block assignment file was successfully imported, I selected the "Statistics" tab at the top right of the screen and downloaded the demographics (including election data) as a .csv file and used this to calculate the comparators below.

10. For the metrics that were not calculated directly with either PlanScore or DRA, I downloaded North Carolina VEST data from the VEST Github page, which can be found at <https://github.com/alarm-redist/census-2020/tree/main/vest-2020/nc>. I imported 2020 VEST data into Maptitude, imported the block assignment file for the remedial Senate plan into Maptitude, and selected the relevant election (2020 North Carolina Chief Justice) as my summary field. I then exported the tabular data to a .csv file to calculate the performance of the plan using that election.

11. The results for the Legislative Defendants' remedial Senate Map S.L. 2022-2 are shown in the following table:

Metric	Score
Mean-Median	2.2% R
Efficiency Gap	4.8% R
Partisan Symmetry (Partisan Bias)	4.8% R
Plausible Number of Representatives Elected Comparison	22D-28R / 21D-29R (DRA / PlanScore)

Relative Chances of Electing Majority (26) or Supermajority (30)	R Majority: 4/6 Scenarios D Majority: 0/6 Scenarios R Supermajority: 1/6 Scenarios D Supermajority: 0/6 Scenarios
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12. The percentages in the median-mean difference, efficiency gap, and partisan symmetry scores in the chart above indicate a bias towards Republican candidates.

13. The mean-median difference measures a party's median vote share minus its mean vote share, across all of a plan's districts. The greater the difference between a plan's median vote share and a plan's mean vote share, the greater the bias that plan exhibits against one party. PlanScore provides a detailed explanation of mean-median difference here: <https://planscore.campaignlegal.org/metrics/meanmedian/>.

14. The efficiency gap compares each party's number of unnecessary votes across all of a plan's districts. Unnecessary votes are defined as every vote that it is not necessary for victory in a given electoral district, including every vote above the 50% plus one threshold cast for the winning party/candidate in a given district, and every vote cast for the losing candidate in a given district. The efficiency gap is then calculated by subtracting all of one party's total unnecessary votes from the other party's total unnecessary votes, and dividing that difference by the total number of votes cast. The more unequal the numbers of unnecessary votes cast for each party, the further away from zero the efficiency gap will be. PlanScore provides a detailed explanation of efficiency gap here: <https://planscore.campaignlegal.org/metrics/efficiencygap/>. I calculated efficiency gap using PlanScore, as detailed above.

15. Partisan symmetry/partisan bias is the difference between 50% of the seats in a plan and the share of seats a party would expect to win on a given plan in a perfectly tied election (where each party received exactly 50% of the total votes cast). To calculate partisan symmetry/partisan

bias, the observed vote share in each district is shifted by the amount necessary to simulate a tied statewide election. The greater the difference between seat share in a hypothetical perfectly tied election and 50%, the greater level of partisan bias in the plan. PlanScore provides a detailed explanation of partisan symmetry/partisan bias here: <https://planscore.campaignlegal.org/metrics/partisanbias/>. I calculated partisan symmetry/partisan bias using PlanScore, as detailed above.

16. The plausible number of representatives elected comparison was derived by evaluating the plan according to the partisan lean calculated for each district by the PlanScore and DRA election composites. I counted each district as a performing district for whichever party was favored by the composite, and then added up the total number of performing districts for each party to come to the final totals. I calculated the plausible number of representatives elected comparison using both PlanScore and DRA, as detailed above.

17. The relative chances of electing a majority or supermajority was derived by evaluating the plan's performance under six different election scenarios and evaluating how many of these scenarios would elect a Republican or Democratic majority, or a Republican or Democratic supermajority, using the proposed Senate plan. I calculated these metrics using PlanScore, DRA, and Maptitude, as detailed above. The only scenario that was not calculated directly with PlanScore or DRA was the 2020 Chief Justice of the North Carolina Supreme Court race. The six scenarios are:

- a. PlanScore composite
- b. DRA composite
- c. 2020 Presidential
- d. 2020 Governor

e. 2016 Lieutenant Governor

f. 2020 Chief Justice of North Carolina Supreme Court

18. For the remedial enacted House Map, S.L. 2022-4, I followed the process outlined above to calculate additional metrics to aid in the Court's review of the proposed House plan.

Metric	Score
Mean-Median	1.4% R
Efficiency Gap	3.0% R
Partisan Symmetry (Partisan Bias)	2.9% R
Plausible Number of Representatives Elected Comparison	57D-63R / 58D-62R (DRA / PlanScore)
Relative Chances of Electing Majority (61) or Supermajority (72)	R Majority: 4/6 Scenarios D Majority: 1/6 Scenarios R Supermajority: 1/6 Scenarios D Supermajority: 0/6 Scenarios

19. For the remedial enacted Congressional Map, S.L. 2022-3, I followed the process outlined above in Paragraphs 4–14 to calculate additional metrics to aid in the Court's review of the proposed Congressional plan.

Metric	Score
Mean-Median	1.1% R
Efficiency Gap	6.4% R
Partisan Symmetry (Partisan Bias)	4.9% R
Plausible Number of Representatives Elected Comparison	6D-8R / 4D-10R (DRA / PlanScore)
Relative Chances of Electing Majority (8)	R Majority: 5/6 Scenarios

	D Majority: 1/6 Scenarios
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Senate Alternative Map Metrics

20. Using the same methods described above, I generated the metrics for an alternative Senate plan that starts with S.L. 2022-2 as a base plan but incorporates districts from the following amendments that were tabled from the legislative process, which are available on the General Assembly website at <https://www.ncleg.gov/BillLookUp/2021/S744>:

- a. Common Cause remedial Senate District 4 (submitted on February 18, 2022)
- b. New Hanover (A2)¹
- c. Wake (A3)²
- d. Mecklenburg (as reflected in A9)³
- e. Cumberland (A4)⁴
- f. Guilford (A5)⁵
- g. Forsyth (A8)⁶
- h. Buncombe (A7)⁷

21. Using the same process outlined above, I determined this map would have mean-median difference of 0.2% R, efficiency gap of 1.0% R, and partisan symmetry of 0.7% R.

House Alternative Map Metrics

22. Using the same process outlined above, I generated the metrics for an alternative House plan that starts with S.L. 2022-4 as a base plan and incorporated the Common Cause remedial

¹ Available at <https://webservices.ncleg.gov/ViewBillDocument/2021/53740/0/S744-A-NBC-9432>.

² Available at <https://webservices.ncleg.gov/ViewBillDocument/2021/53738/0/S744-A-NBC-9430>.

³ Available at <https://webservices.ncleg.gov/ViewBillDocument/2021/53720/0/S744-A-NBC-9411>.

⁴ Available at <https://webservices.ncleg.gov/ViewBillDocument/2021/53718/0/S744-A-NBC-9410>.

⁵ Available at <https://webservices.ncleg.gov/ViewBillDocument/2021/53726/0/S744-A-NBC-9417>.

⁶ Available at <https://webservices.ncleg.gov/ViewBillDocument/2021/53743/0/S744-A-NBC-9435>.

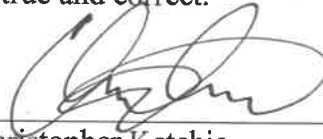
⁷ Available at <https://webservices.ncleg.gov/ViewBillDocument/2021/53723/0/S744-A-NBC-9414>.

House District 10 (submitted on February 18, 2022). I determined this map would have mean-median difference of 1.2% R, efficiency gap of 2.6% R, and partisan symmetry of 2.5% R.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 21st day of February, 2022.



Christopher Ketchie

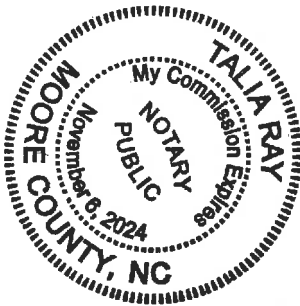
Sworn and subscribed before me this the 21st day of February, 2022.



Notary Public

Name: Talia Ray

My commission expires: 11/6/2024



STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 015426

NORTH CAROLINA LEAGUE, OF
CONSERVATION VOTERS, INC., *et al.*,

Plaintiffs,

COMMON CAUSE,
Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL,
in his official capacity as Chair of the
House Standing Committee on
Redistricting, *et al.*,
Defendants.

FILED
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WAKE CO., C.S.C.
BY

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 21 CVS 500085

REBECCA HARPER, *et al.*,
Plaintiffs,

v.

REPRESENTATIVE DESTIN HALL,
in his official capacity as Chair of the
House Standing Committee on
Redistricting, *et al.*,
Defendants.

ORDER ON REMEDIAL PLANS

FINDINGS OF FACT	4
I. SUMMARY OF REQUIREMENTS FOR REMEDIAL PROCESS	4
II. THE GENERAL ASSEMBLY’S REMEDIAL PLANS AS A WHOLE	6
A. Participants in the General Assembly’s Drawing of Remedial Plans.....	7
B. The General Assembly’s Remedial Criteria for Drawing the Remedial Plans	7
C. The General Assembly’s Racially Polarized Voting Analysis	8
D. Plaintiffs’ Objections and Comments to the Plans	9
E. Report of Special Masters.....	9
III. REMEDIAL CONGRESSIONAL PLAN	10
A. The General Assembly’s Starting Point and Subsequently Proposed Amendments	10
B. Analysis of Partisanship Reflected in the Remedial Congressional Plan.....	11
IV. REMEDIAL SENATE PLAN	12
A. The General Assembly’s Starting Point and Subsequently Proposed Amendments	12
B. Analysis of Partisanship Reflected in the Remedial Senate Plan	13
C. The General Assembly’s Consideration of Incumbency Protection and Traditional Neutral Districting Criteria.....	14
V. REMEDIAL HOUSE PLAN	15
A. The General Assembly’s Starting Point and Subsequently Proposed Amendments	15
B. Analysis of Partisanship Reflected in the Remedial House Plan	16
C. The General Assembly’s Consideration of Incumbency Protection and Traditional Neutral Districting Criteria.....	18
VI. PLAINTIFFS’ ALTERNATIVE REMEDIAL PLANS	19
VII. SPECIAL MASTERS’ INTERIM CONGRESSIONAL PLAN.....	19
CONCLUSIONS OF LAW	20
DECREE	23

THIS MATTER comes before the undersigned three-judge panel pursuant to the February 4, 2022, Order of the Supreme Court of North Carolina (“Supreme Court Remedial Order”) for review of Remedial Redistricting Plans to apportion the state legislative and congressional districts within North Carolina (hereinafter collectively referred to as the “Remedial Plans”) enacted by the North Carolina General Assembly on February 17, 2022. 2022 N.C. Sess. Laws. 2 (also known as Senate Bill 744 and hereafter referred to as “Remedial Senate Plan”); 2022 N.C. Sess. Laws. 4 (also known as House Bill 980 and hereafter referred to as “Remedial House Plan”); 2022 N.C. Sess. Laws. 3 (also known as Senate Bill 745 and hereafter referred to as “Remedial Congressional Plan”).

The Remedial Plans were enacted following entry of the Supreme Court Remedial Order. This Court entered a Judgment on January 11, 2022, wherein the Court upheld the constitutionality of the 2021 Enacted State Legislative and Congressional redistricting plans (hereinafter “Enacted Plans”). Thereafter, Harper Plaintiffs, North Carolina League of Conservation Voters Plaintiffs, and Plaintiff-Intervenor Common Cause (hereinafter collectively referred to as “Plaintiffs”) appealed this Court’s Judgment directly to the Supreme Court of North Carolina. On February 4, 2022, the Supreme Court of North Carolina entered its Remedial Order, with opinion to follow, adopting in full this Court’s findings of fact in the January 11, 2022, Judgment; however, the Supreme Court concluded that the Enacted Plans are unconstitutional under N.C. Const., art. I, §§ 10, 12, 14, and 19 and remanded the action to this Court for remedial proceedings. On February 14, 2022, the Supreme

Court filed its full opinion in this action. *Harper v. Hall*, 2022-NCSC-17 (Feb. 14, 2022).

Pursuant to the Supreme Court Remedial Order and full opinion, and after reviewing all remedial and alternative plans submitted to this Court, as well as additional documents, materials, and information pertaining to the submitted plans, including the report of this Court's appointed Special Masters and comments received from the parties, this Court sets out the following:

FINDINGS OF FACT

I. Summary of Requirements for Remedial Process

1. The Supreme Court's Order required the submission to this Court of remedial state legislative and congressional redistricting plans that "satisfy all provisions of the North Carolina Constitution"; both the General Assembly, and any parties to this action who chose to submit proposed remedial plans for this Court's consideration, were required to submit such plans, and additional information, on or before February 18, 2022, at 5:00 p.m.

2. The Supreme Court's Order also provided for a comment period in which parties to these consolidated cases were permitted to file and submit to this Court comments on any plans submitted for this Court's consideration by February 21, 2022 at 5:00 p.m.

3. The Supreme Court's Order also mandated that this Court must approve or adopt constitutionally compliant remedial plans by noon on February 23, 2022.

4. This Court subsequently entered an order on February 8, 2022, providing initial guidance on the remedial phase of the litigation before this Court,

requiring written submissions containing the information the Supreme Court set forth in its Order pertaining to redistricting plans in general and the ordered Remedial Plans specifically. The written submissions were required to provide an explanation of the data and other considerations the mapmaker relied upon to create any submitted proposed remedial plan and to determine that the proposed remedial plan was constitutional—*i.e.*, compliant with the Supreme Court Remedial Order. The full opinion of the Supreme Court, *Harper v. Hall*, 2022-NCSC-17, thereafter provided further guidance for the Remedial Plans.

5. On February 16, 2022, this Court entered an Order appointing three former jurists of our State appellate and trial courts—Robert F. Orr, Robert H. Edmunds, Jr., and Thomas W. Ross—to serve as Special Masters for the purposes of: 1) assisting this Court in reviewing any Proposed Remedial Plans enacted and submitted by the General Assembly or otherwise submitted to the Court by a party in these consolidated cases; and, 2) assisting this Court in fulfilling the Supreme Court’s directive to this Court to develop remedial plans based upon the findings in this Court’s January 11, 2022, Judgment should the General Assembly fail to enact and submit Proposed Remedial Plans compliant with the Supreme Court’s Order within the time allowed. This Appointment Order also required the submission of additional information, data, and materials for review by the Court, the parties, and the Special Masters.

6. The Appointment Order further provided that the Special Masters were authorized to hire assistants and advisors reasonably necessary to complete their

work. Pursuant to this authorization, the Special Masters hired the following advisors to assist in evaluating the Remedial Plans:

- a. Bernard Grofman: PhD in political science from the University of Chicago, and currently the Jack W. Peltason Endowed Chair and Distinguished Professor at the University of California, Irvine, School of Social Sciences;
- b. Tyler Jarvis: PhD in mathematics from Princeton University, and currently a Professor at Brigham Young University's College of Physical and Mathematical Sciences;
- c. Eric McGhee: PhD in political science from the University of California, Berkeley, and currently a Senior Fellow at Public Policy Institute of California, a non-partisan, non-profit think tank; and,
- d. Samuel Wang: PhD in Neurosciences from Stanford University, and currently a Professor of neuroscience at Princeton University and Director of the Electoral Innovation Lab.

7. The Court finds that these advisors were reasonably necessary to facilitate the work of the Special Masters to provide this Court with an analysis of the Remedial Plans.¹

II. The General Assembly's Remedial Plans as a Whole

8. Pursuant to the Supreme Court's directive, the General Assembly enacted Remedial Plans and, through the Legislative Defendants, timely submitted the Remedial Plans to this Court on February 18, 2022.

¹ On February 20, 2022, counsel for Harper Plaintiffs submitted a notice of communications wherein the Court was informed that Dr. Wang and Dr. Jarvis had contacted some of Harper Plaintiffs' retained experts by email regarding their algorithms and analysis models. Legislative Defendants subsequently filed a motion to disqualify Dr. Wang and Dr. Jarvis from assisting the Special Masters. The Special Masters have provided additional review of the issues presented in this motion, as noted in the Report attached to this Order, and the Court will address the Motion in a separate order that will be filed contemporaneously herewith.

A. Participants in the General Assembly's Drawing of Remedial Plans

9. The House participants involved in the drawing of the Remedial Plans consisted of twenty-one Republican members and one Democratic member, with five Republican staff members and two Democratic staff members.

10. The Senate participants involved in the drawing of the Remedial Plans consisted of four Republican members and five Democratic members, with four Republican staff members and one Democratic staff member.

11. The General Assembly members were also supported by fifteen Legislative Analysis and Bill Drafting Division staff members, as well as four Information Systems Division staff members.

12. Legislative Defendants, through counsel, also relied for limited purposes on their experts and non-testifying experts in this case, including Clark Bensen and Sean Trende for statistical analysis, Dr. Jeffrey Lewis to conduct a Racially Polarized Voting Analysis for both the 2021 and the 2022 districts, and Dr. Michael Barber for statistical analyses of the Remedial Plans and other BVAP-related information.

B. The General Assembly's Remedial Criteria for Drawing the Remedial Plans

13. The General Assembly's Remedial Criteria governing the remedial map drawing process were those neutral and traditional redistricting criteria adopted by the Joint Redistricting Committees on August 12, 2021, (received into evidence at trial as exhibit LDTX15) unless the criteria conflicted with the Supreme Court Remedial Order and full opinion.

14. Although expressly forbidden by the previously-used August 2021 Criteria, the General Assembly as part of its Remedial Criteria intentionally used partisan election data as directed by the Supreme Court's Remedial Order. The General Assembly did so by loading such data into Maptitude, the map drawing software utilized by the General Assembly in creating districting plans. The elections used by the General Assembly to evaluate the projected partisan effects of district lines were as follows: Lt. Gov 2016, President 2016, Commissioner of Agriculture 2020, Treasurer 2020, Lt. Gov. 2020, US Senate 2020, Commissioner of Labor 2020, President 2020, Attorney General 2020, Auditor 2020, Secretary of State 2020, and Governor 2020.

15. The Court finds that the General Assembly's use of partisan data in this manner comported with the Supreme Court Remedial Order.

C. The General Assembly's Racially Polarized Voting Analysis

16. Paragraph 8 of the Supreme Court Remedial Order required the General Assembly to "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."

17. The General Assembly conducted an abbreviated racially polarized voting ("RPV") analysis to determine whether 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 during the remedial process. Legislative Defendants' expert Dr. Jeffery B.

Lewis ran an analysis and concluded that all three Remedial Plans provide African Americans with proportional opportunity to elect their candidates of choice.

18. The Court finds that the General Assembly satisfied the directive in the Supreme Court Remedial Order to determine whether the drawing of a district in an area of the state is required to comply with Section 2 of the Voting Rights Act.

D. Plaintiffs' Objections and Comments to the Plans

19. Pursuant to the Supreme Court's directive, Plaintiffs timely submitted comments on and objections to the Remedial Plans on February 21, 2022.

20. NCLCV Plaintiffs object to the Remedial Senate and Congressional Plans. NCLCV Plaintiffs do not specifically object to the Remedial House Plan but instead request the Court conduct its own analysis of the Remedial House Plan.

21. Harper Plaintiffs object to the Remedial Congressional Plan and Remedial Senate Plan. Harper Plaintiffs do not object to the Remedial House Plan.

22. Plaintiff Common Cause objects to all three Remedial Plans in general and specifically contends the Remedial Senate and House Plans must be redrawn for Senate District 4 and House District 10.

E. Report of Special Masters

23. Pursuant to this Court's Appointment Order, the Special Masters prepared a Report containing their analysis and submitted that Report to this Court for its consideration. The Report is attached to this Order as an exhibit and has been filed with the Court.

24. The Special Masters, and their advisors, conducted an analysis of the Remedial Plans using a variety of metrics to determine whether the submitted maps

meet the requirements of the North Carolina Constitution as set out by the Supreme Court of North Carolina in its Remedial Order and full opinion.

25. The Special Masters' findings demonstrate that the Remedial House and Senate Plans meet the requirements of the Supreme Court's Remedial Order and full opinion.

26. The Special Masters' findings demonstrate that the Remedial Congressional Plan does not meet the requirements of the Supreme Court's Remedial Order and full opinion.

27. This Court adopts in full the findings of the Special Masters and sets out additional specific findings on the Remedial Plans' compliance with the Supreme Court Remedial Order below.

III. Remedial Congressional Plan

A. The General Assembly's Starting Point and Subsequently Proposed Amendments

28. In determining the base map for the Congressional Districts in the Remedial Congressional Plan that was eventually enacted, the Senate started from scratch.

29. There was a House Draft of a remedial congressional plan that was never voted on and therefore never considered by a committee or the full General Assembly.

30. Senator Clark offered one amendment to the Remedial Congressional Plan, a statewide plan, that was tabled.

31. The Remedial Congressional Plans passed the Senate by a vote of 25-19. The “aye” votes in the Senate were solely by members of the Republican party, while the “no” votes in the Senate were solely by members of the Democratic Party. The Remedial Congressional Plan passed the House by voice vote along party lines.

B. Analysis of Partisanship Reflected in the Remedial Congressional Plan

32. The Remedial Congressional Plan reflects key differences from the 2021 Enacted Congressional Plan in the projected partisan makeup of certain districts.

- a. Four congressional districts are some of the most politically competitive in the country (*i.e.*, presidential election differences of less than 5%): District 6, District 7, District 13, and District 14.
- b. Wake and Mecklenburg Counties are only split across two districts unlike in the 2021 Enacted Congressional Plan when each county was split across three districts.

33. The Supreme Court Remedial Order stated that a combination of different methods could be used to evaluate the partisan fairness of a districting plan; of those methods, the General Assembly used the “mean-median” test and the “efficiency gap” test to analyze the partisan fairness of the Remedial Plans.

34. The Court finds, based upon the analysis performed by the Special Masters and their advisors, that the Remedial Congressional Plan is not satisfactorily 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%).

35. The Court finds that the partisan skew in the Remedial Congressional Plan is not explained by the political geography of North Carolina.

IV. Remedial Senate Plan

A. The General Assembly's Starting Point and Subsequently Proposed Amendments

36. In determining the base map for the State Senate Districts, the Senate also started from scratch. The Senate altered two county groupings and adopted groupings for Senate Districts 1 and 2 that were preferred by Common Cause Plaintiffs. The remaining county groupings remained the same. As a result, the 13 wholly-contained single district county groupings in the Remedial Plan were kept from the Enacted Plan.

37. Alternative county groupings were proposed but not adopted.

- a. The Senate considered the Democratic members' preferred alternate grouping for Forsyth County, which pairs it with Yadkin instead of Stokes County, but it was determined that the resulting districts in Alexander, Wilkes, Surry, and Stokes Counties would have been less compact. Additionally, Yadkin County is more Republican than Stokes County.
- b. Alternative county groupings around Buncombe County were considered as well, but the Senate determined that any change from the chosen grouping would have resulted in districts that would have been significantly less compact.

38. The Remedial Senate Plan passed the Senate by a vote of 26-19. The “aye” votes in the Senate were solely by members of the Republican party, while the “no” votes in the Senate were solely by members of the Democratic Party. The Remedial Senate Plan passed the House by voice vote along party lines.

B. Analysis of Partisanship Reflected in the Remedial Senate Plan

39. The process for the development of the Remedial Senate Plan began with separate maps being drawn by the Senate Democratic Caucus and the Republican Redistricting and Election Committee members, respectively. The plans were then exchanged and discussed; however, after the two groups could not come to a resolution, the plan proposed by the Republican Redistricting and Election Committee members was then put to a vote by the Senate Committee and advanced to the full chamber.

40. The Remedial Senate Plan includes ten districts that were within ten points in the 2020 presidential race.

41. The Remedial Senate Plan reflects key differences from the 2021 Enacted Senate Plan in the projected partisan makeup of districts in certain county groupings.

- a. In the Cumberland-Moore County grouping, Senate District 21 is now more competitive.
- b. In the Iredell-Mecklenburg County grouping, one district is more competitive.

- c. In New Hanover County, the districts were made more competitive, resulting in a Senate District 7 that leans Democratic.
- d. In Wake County, Senate Districts 17 and 18 are more Democratic leaning.

42. The Court finds, based upon the analysis performed by the Special Masters and their advisors, that the Remedial Senate Plan is satisfactorily 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%).

43. The Court finds that to the extent there remains a partisan skew in the Remedial Senate Plan, that partisan skew is explained by the political geography of North Carolina.

C. The General Assembly's Consideration of Incumbency Protection and Traditional Neutral Districting Criteria

44. For the Remedial Senate Plan, current members of either chamber who announced retirement or their intention to seek another office were not considered as "incumbents."

45. In the Senate, incumbency was considered evenly. No Senators are double bunched unless as a result of the mandatory county groupings, and no Democratic members are double bunched with other incumbents.

46. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial Senate Plan were applied evenhandedly.

47. The current membership of the General Assembly was elected under a districting plan that was approved by the trial court in *Common Cause v. Lewis and*, as stated above, the General Assembly began anew the process of drawing district lines after choosing county groupings for the remedial state legislative districts in this case.

48. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial Senate Plan do not perpetuate a prior unconstitutional redistricting plan.

49. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial Senate Plan are consistent with the equal voting power requirements of the North Carolina Constitution.

50. The Court finds that the General Assembly did not subordinate traditional neutral districting criteria to partisan criteria or considerations in the Remedial Senate Plan.

V. Remedial House Plan

A. The General Assembly's Starting Point and Subsequently Proposed Amendments

51. In determining the base map for the State House Districts, the House started from scratch after keeping only the 14 districts that were the product of single district county groupings.

52. The Remedial House Plan was ultimately amended by six amendments offered by Democratic Representatives.

- a. Three amendments, drawn by Representative Reives, redrew certain districts in Wake, Mecklenburg, and Buncombe, which were already Democratic leaning, to be more Democratic leaning.
- b. An additional amendment, also drawn by Representative Reives, added an additional district in Cabarrus County that is more Democratic leaning.
- c. An amendment offered by Representative Meyer swapped two precincts in Orange County in order to keep Carrboro whole.
- d. An amendment offered by Representative Hawkins adjusted district lines in Durham County in order to better follow educational district lines.

53. The Remedial House Plan passed the House by a vote of 115-5 and was passed by the Senate by a vote of 41-3. The “aye” votes in the House and Senate were by members of both political parties. The “no” votes in the House and Senate were solely by members of the Democratic Party.

B. Analysis of Partisanship Reflected in the Remedial House Plan

54. The Remedial House Plan reflects key differences from the 2021 Enacted House Plan in the projected partisan makeup of districts in certain county groupings.

- a. Buncombe County, which consisted of 1 Republican and 2 Democratic districts in the Enacted Plan, consists of 3 Democratic districts in the Remedial House Plan.
- b. Pitt County, which consisted of 1 Republican and 1 Democratic district in the Enacted Plan, consists of 2 Democratic districts in the Remedial House Plan.
- c. Guilford County now consists of 6 Democratic leaning districts.
- d. Cumberland County now consists of 3 Democratic districts and 1 competitive district.
- e. Mecklenburg and Wake Counties now consist of 13 Democratic leaning districts each.
- f. New Hanover, Cabarrus, and Robeson Counties now contain an additional competitive district each.

55. The Court finds, based upon and confirmed by the analysis of the Special Masters and their advisors, that the Remedial House Plans are satisfactorily 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%).

56. The Court finds that to the extent there remains a partisan skew in the Remedial House Plan, that partisan skew is explained by the political geography of North Carolina.

C. The General Assembly's Consideration of Incumbency Protection and Traditional Neutral Districting Criteria

57. For the Remedial House Plan, current members of either chamber who announced retirement or their intention to seek another office were not considered as “incumbents.”

58. In the House, incumbency was considered evenly. The only discretionary double bunking in the Remedial House Plan pairs two Republican members. There was no discretionary double bunking of Democratic members. The few double bunked members are double bunked solely as a result of the mandatory county groupings.

59. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial House Plan were applied evenhandedly.

60. The current membership of the General Assembly was elected under a districting plan that was approved by the trial court in *Common Cause v. Lewis* and, as stated above, the General Assembly began anew the process of drawing district lines after choosing county groupings for the remedial state legislative districts in this case.

61. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial House Plan do not perpetuate a prior unconstitutional redistricting plan.

62. The Court finds that the measures taken by the General Assembly for the purposes of incumbency protection in the Remedial House Plan are consistent with the equal voting power requirements of the North Carolina Constitution.

63. The Court finds that the General Assembly did not subordinate traditional neutral districting criteria to partisan criteria or considerations in the Remedial House Plan.

VI. Plaintiffs' Alternative Remedial Plans

64. The following alternative remedial plans for the Court's consideration were submitted by NCLCV Plaintiffs, Harper Plaintiffs, and Plaintiff-Intervenor Common Cause on February 18, 2022 (hereinafter referred to as "NCLCV Alternative Plans"; "Harper Alternative Plans"; "Common Cause Alternative Plans"; or collectively, "Alternative Plans").

65. Although Plaintiffs submitted Alternative Plans, because the Court is satisfied with the Remedial House and Senate Plans, the Court did not need to consider an alternative plan for adoption.

66. Furthermore, the Court, in following N.C.G.S. § 120-2.4(a1), has chosen to order the use of an interim districting plan for the 2022 North Carolina Congressional election that differs from the Remedial Congressional Plan to the extent necessary to remedy the defects identified by the Court.

VII. Special Masters' Interim Congressional Plan

67. As part of their Report, the Special Masters have developed a recommended congressional plan ("Interim Congressional Plan") for this Court to consider due to their findings, which the Court has adopted, that the Remedial Congressional Plan does not satisfy the requirements of the Supreme Court Remedial Order and full opinion.

68. The Court finds that the Interim Congressional Plan recommended by the Special Masters was developed in an appropriate fashion², is consistent with N.C.G.S. § 120-2.4(a1), and is consistent with the North Carolina Constitution and the Supreme Court's full opinion.

Based upon the foregoing findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

1. In *Harper v. Hall*, 2022-NCSC-17, the Supreme Court stated:

We do not believe it prudent or necessary to, at this time, identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander. *Cf. Reynolds v. Sims*, 377 U.S. 533, 578 (1964) (“What is marginally permissible in one [case] may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of . . . apportionment.”). As in *Reynolds*, “[l]ower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation.” *Id.* However, as the trial court’s findings of fact indicate, there are multiple reliable ways of demonstrating the existence of an unconstitutional partisan gerrymander. In particular, mean-median difference analysis; efficiency gap analysis; close-votes, close-seats analysis; and partisan symmetry analysis may be useful in assessing whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew necessarily results from North Carolina’s unique political geography. If some combination of these metrics demonstrates there is a significant likelihood that the districting plan will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan, then the plan is presumptively constitutional.

Id. at ¶163.

² The data files (e.g., block equivalency, shape files, population deviation results) are included in the court file with this order in native format. The equivalent of the “stat pack” has been requested from the Special Masters’ advisor and will be placed in the court file and provided to the parties as soon as available.

2. Plaintiffs have urged upon this court that we must adopt plans that “treat voters of both political parties fairly.” They argue that the “LD Congressional and Senate Plans are not fair.” Further, they argue that the Supreme Court ordered “fair maps” and that “[b]ecause the LD Congressional and Senate Plans are not fair maps, . . . the Court should adopt one of the fairer maps before it – such as the NCLCV Maps.” We see Plaintiffs’ arguments as tantamount to urging this Court to adopt a proportional representation standard, which the Supreme Court, in its order, specifically disavowed. *Id.* at ¶169.

3. The Court concludes that the Remedial Senate Plan satisfies the Supreme Court’s standards.

4. The Court concludes that the Remedial House Plan satisfies the Supreme Court’s standards.

5. Because the Court concludes that the enacted Remedial Senate and House Plans meet the Supreme Court’s standards and requirements in the Supreme Court Remedial Order and full opinion, the Remedial Senate and House Plans are presumptively constitutional.

6. Furthermore, no evidence presented to the Court is sufficient to overcome this presumption for the Remedial Senate and House Plans, and those plans are therefore constitutional and will be approved.

7. The Court concludes that the Remedial Congressional Plan does not satisfy the Supreme Court’s standards.

8. Plaintiffs suggest that if we conclude that a Remedial Plan passed by the General Assembly does not satisfy the Supreme Court's standards, we should simply jettison that plan and adopt one of their plans. We do not believe that our conclusion on the Remedial Congressional Plan—that it fails to satisfy the Supreme Court's standards—automatically results in the adoption of an alternate plan proposed by Plaintiffs. Given that the ultimate authority and directive is given to the Legislature to draw redistricting maps, we conclude that the appropriate remedy is to modify the Legislative Remedial Congressional Plan to bring it into compliance with the Supreme Court's order. *See* N.C.G.S. § 120-2.4(a1).

9. Because the Court concludes that the enacted Remedial Congressional Plan does not meet the Supreme Court's standards and requirements in the Supreme Court Remedial Order and full opinion, the Remedial Congressional Plan is not presumptively constitutional and is therefore subject to strict scrutiny.

10. The General Assembly has failed to demonstrate that their proposed Congressional map is narrowly tailored to a compelling governmental interest, and we therefore must conclude that the Remedial Congressional Map is unconstitutional.

11. The Interim Congressional Plan as proposed by the Special Masters satisfies the Supreme Court's standards and should be adopted by this Court for the 2022 North Carolina Congressional elections.

DECREE


BASED UPON THE FOREGOING findings and conclusions, the Court hereby
ORDERS the following:

1. The Remedial Senate Plan and Remedial House Plan, enacted into law by the General Assembly on February 17, 2022, are hereby APPROVED by the Court.
2. The Remedial Congressional Plan, enacted into law by the General Assembly on February 17, 2022, is hereby NOT APPROVED by the Court.
3. The Interim Congressional Plan as recommended by the Special Masters is hereby ADOPTED by the Court and approved for the 2022 North Carolina Congressional elections.
4. As the Special Masters and their retained experts may be called upon to assist this Court in this matter should the need arise in the future, the prohibition in this Court's prior order appointing the Special Masters against contacting the Special Masters or their experts remains in full force and effect.

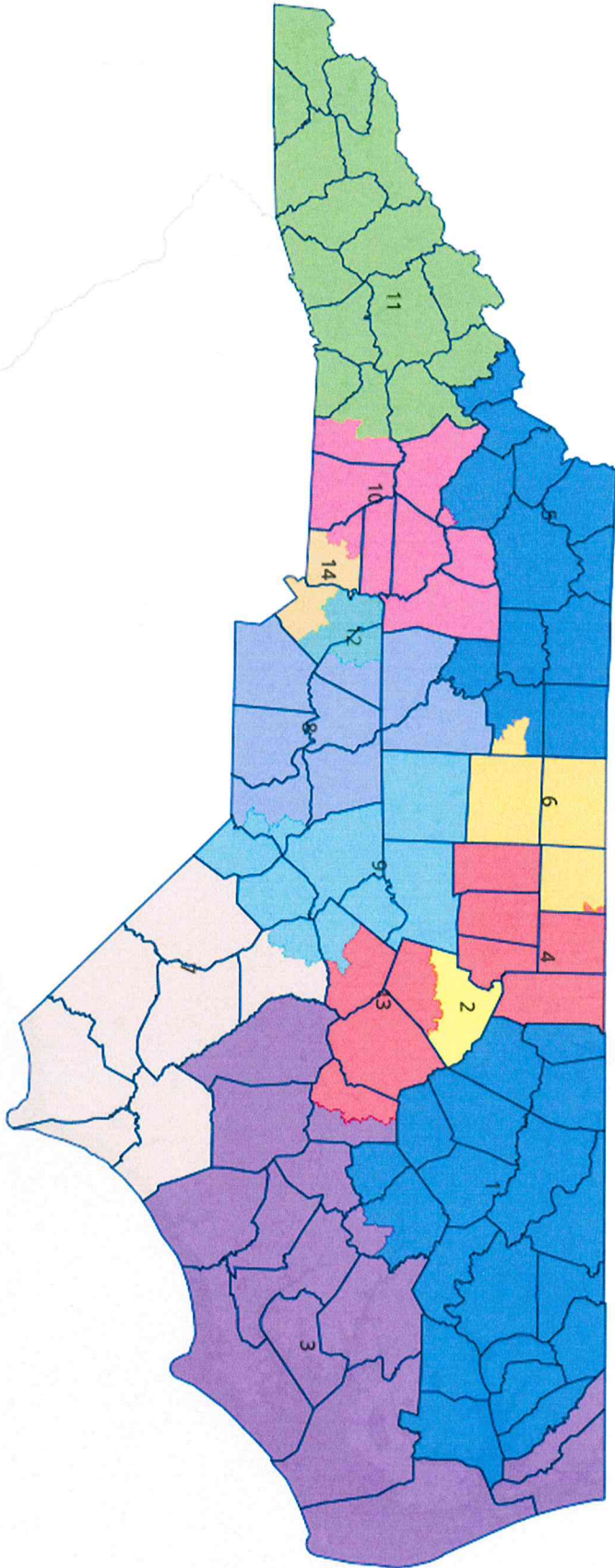
SO ORDERED, this the 23rd day of February, 2022.


A. Graham Shirley, Superior Court Judge


Nathaniel J. Poovey, Superior Court Judge


Dawn M. Layton, Superior Court Judge

Interim Congressional Plan



TO: Judges Shirley, Poovey, and Layton

FROM: Special Masters

DATE: February 23, 2022

SUBJECT: Special Masters' Report – Analysis and Recommendations

Introduction

Pursuant to the trial court's "Order Appointing Special Masters" on February 16, 2022, ¶ 6, the undersigned now file the following report with the three-judge panel in this case.

Motion for Disqualification

In its Order Appointing the three Special Masters, the Court authorized the undersigned Special Masters (hereinafter "Special Masters") to "hire research and technical assistants and advisors reasonably necessary to facilitate [our] work." We subsequently retained Dr. Bernard Grofman, Dr. Tyler Jarvis, Dr. Eric McGhee, and Dr. Samuel Wang to assist us in satisfying our duties as Special Masters. The Curriculum Vitae for each of these individuals (hereinafter referred to as "advisors") is attached to this report. In this same Order, this Court also ordered the "parties and non-parties may not engage in any *ex parte* communication with the Special Masters about the subject matter of this litigation." *Id.*

We have been informed that Legislative Defendants have filed a motion in this case requesting that this Court disqualify Dr. Wang and Dr. Jarvis as advisors to the Special Masters and take further steps to destroy any work product completed by them and otherwise prohibit the undersigned from considering any information or materials obtained from them. We have investigated this matter and below is a detailed review of our findings.

On February 18, 2022, at 1:01 pm, Dr. Wang emailed Dr. Mattingly requesting the underlying data utilized in his analysis of the 2021 redistricting plans. On this same date at 1:57 p.m., Dr. Mattingly responded, and correspondence between Dr. Wang and Dr. Mattingly continued through February 20, 2022 at 10:23 a.m.

On February 18, 2022, at 1:21 p.m., Dr. Wang emailed Dr. Pedgen, expert for Harper Plaintiffs, seeking the underlying data Dr. Pedgen utilized in his analysis of the 2021 redistricting plans. On this same date at 2:31 p.m., Dr. Pedgen responded to Dr. Wang's inquiry, directing him to use the method utilized by Dr. Mattingly, expert for Harper Plaintiffs and Plaintiff Common Cause. On February 19, 2022, at 6:59 a.m., Dr. Wang responded to Dr. Mattingly's correspondence.

On February 19, 2022, at 4:46 p.m., Dr. Jarvis contacted Dr. Mattingly to request clarification on Dr. Mattingly's analysis and underlying data. Later that day, at 8:13 p.m., Dr. Jarvis contacted Dr. Herschlag, Dr. Mattingly's colleague at Duke University, regarding Dr. Herschlag's analysis and underlying data supporting his analysis of the 2021 redistricting plans to which Dr. Herschlag responded on that same date. All email correspondence between Dr. Wang and Dr. Jarvis and the plaintiff experts Mattingly and Pegden is attached to this report and the email correspondence attached is all of the communication that occurred between the advisors and any of the experts of the parties.

The undersigned acknowledge the technical breach of this Court's mandate that *no ex parte* communication occur between parties and non-parties with the Special Masters. The undersigned, however, respectfully recommend that the Court deny the motion for the following reasons:

- First, these communications between the advisors and Drs. Mattingly and Herschlag do not appear to have been made in bad faith and constitute the only communications between them, written or otherwise. The advisors immediately ceased contact with Drs. Mattingly and Herschlag, and have provided copies of the communications. Therefore, all parties are privy to the extent of the communications.
- Second, their communications directed at experts for Harper Plaintiffs were solely for the purpose of proceeding as quickly as possible within the abbreviated time frame allotted for the remedial process.
- Third, the Special Masters emphasize that, while the communications were in the context of the advisors' preliminary steps to evaluate the 2022 Remedial Plans, the communications sought background information pertaining to the earlier analysis of the 2021 Redistricting Plans performed by Drs. Pegden, Mattingly, and Herschlag in the merits stage of this case that was ultimately received and relied upon by the Court at trial. Additionally, as was later determined, the information sought by Dr. Wang and by Dr. Jarvis was publicly available on Dr. Herschlag's website at the time of the communications questioned herein by the Legislative Defendants.
- Finally, though the analysis provided by Drs. Wang and Jarvis was helpful and consistent with the analysis of our other expert advisors, it was not determinative of any recommendations made by the Special Masters to the court.

Review of Proposed Remedial Plans

Pursuant to the North Carolina Supreme Court's opinion, any plan with a mean-median difference of 1% or less (*Harper*, 2022-NCSC-17 at ¶ 166) and an efficiency gap below 7% (*Harper*, 2022-NCSC-17 at ¶ 167) should be considered presumptively constitutional. Additionally, as the Supreme Court recognized, other metrics may be instructive (*Harper*, 2022-NCSC-17 at ¶ 168). The Special Masters considered the full Order and Opinion of the North Carolina Supreme Court along with, the submissions from all of the parties as well as the reports of the advisors and reached the following conclusions:

I. Proposed Remedial House Plan

The advisors as well as the experts of the parties ("experts") all found the efficiency gap of the proposed remedial House plan to be less than 7%. The majority of the advisors and experts found the mean-median difference of the proposed remedial House plan to be less than 1%. In addition to these facts, the Special Masters considered the findings of the advisors on the partisan symmetry analysis, the declination metrics, and their opinions on partisan bias and evidence of partisan gerrymandering. Considering all of this information as well as the totality of circumstances, the Special Masters conclude under the metrics identified by the North Carolina Supreme Court that the proposed remedial House plan meets the test of presumptive constitutionality. Further the Special Masters did not find substantial evidence to overcome the presumption of constitutionality and recommend to the trial court that it give appropriate deference to the General Assembly and uphold the constitutionality of the remedial House plan.

II. Proposed Remedial Senate Plan

All of the advisors and experts found the efficiency gap of the proposed remedial Senate plan to be less than 7%. The majority of the advisors and experts found the mean-median difference of the proposed remedial Senate plan to be less than 1%. In addition to these facts, the Special Masters considered the findings of the advisors on the partisan symmetry analysis, the declination metrics, and their opinions on partisan bias and evidence of partisan gerrymandering. Considering all of this information as well as the totality of circumstances, the Special Masters conclude under the metrics identified by the North Carolina Supreme Court the remedial Senate plan meets the test of presumptive constitutionality. Further the Special Masters did not find substantial evidence to overcome the presumption of constitutionality and recommend to the trial court that it give appropriate deference to the General Assembly and uphold the constitutionality of the remedial Senate plan.

III. Proposed Remedial Congressional Plan

Unlike the proposed remedial House and Senate plans, there is substantial evidence from the findings of the advisors that the proposed congressional plan has an efficiency gap above 7% and a mean-median difference of greater than 1%. The Special Masters considered this evidence along with the advisors' findings on the partisan symmetry analysis and the declination metrics. There is disagreement among the parties as to whether the proposed remedial congressional plan meets the presumptively constitutional thresholds suggested by the Supreme Court. The Special Masters, considering the reports of their advisors and the experts of the parties while giving appropriate deference to the General Assembly, are of the opinion that the proposed remedial congressional plan fails to meet the threshold of constitutionality and recommend that the Trial Court reject the proposed remedial congressional plan as being unconstitutional.

Given the recommendation that the Trial Court reject the proposed remedial congressional plan, and consistent with the instructions from the three-judge panel and the Order of the Supreme Court of North Carolina, the Special Masters have submitted a modified version of the proposed remedial congressional plan submitted by the Legislative Defendants. It is our opinion that the attached plan satisfies the requirements of the Supreme Court.

The following data files for the modified congressional plan are included with this report:

1. Block equivalency files in .CSV format for each district and the plan as a whole;
2. Environmental Systems Research Institute, Inc. (ESRI) shapefiles for each district and the plans as a whole;
3. Color maps in .PDF format of the plan as a whole;
4. Population totals and deviations for each district based on the 2020 Census P.L. 94-171 dataset; and
5. Note: due to time constraints, the functional equivalent of what the General Assembly includes in its "stat pack" is not included with this report; however, if requested we will endeavor to obtain this from Dr. Grofman.

In redrawing certain district lines, the undersigned considered all of the submitted plans and related commentary. Being mindful that the Constitution of North Carolina provides that the General Assembly has the responsibility of redistricting, we focused on the proposed remedial congressional plan submitted by the Legislative Defendants. On that basis, the Special Masters worked solely with Dr. Bernard Grofman and his assistant to amend the Legislative Defendants' plan to

enhance its consistency with the opinion of the Supreme Court of North Carolina, the Constitutions of the United States and of North Carolina, and the expressed will of the General Assembly.

Dr. Grofman prepared a preliminary exemplar map at the Special Masters' request and thereafter at the instruction of the Special Masters prepared three maps for consideration. One of these maps raised potential VRA concerns and so was discarded. A second map did not meet the 1% threshold for mean-median difference and so was likewise discarded. The Special Masters then modified the third prepared map in order to improve the efficiency gap and mean-median difference scores as well as compactness and contiguity measures.

The following parties were involved in the process of redrawing the plans:

- a. Robert F. Orr
- b. Robert H. Edmunds, Jr.
- c. Thomas W. Ross
- d. Dr. Bernard N. Grofman
- e. Zachary R. Griggy (Research Assistant to Dr. Grofman)
- f. Adam H. Steele, Senior Judicial Fellow (for administrative purposes only)
- g. Alison J. Rossi, Judicial Fellow (for administrative purposes only)
- h. Danielle Smith, Judicial Fellow (for administrative purposes only)

Dave's Redistricting App was used in the redrawing of the plan.

The Special Masters believe the modified congressional plan recommended for adoption to the Trial Court achieves the partisan fairness and "substantially equal voting power" required by the Supreme Court of North Carolina without diluting votes under the Voting Rights Act while maintaining the number of county splits, retaining equal population, compactness, and contiguity, as well as respecting municipal boundaries. Dr. Grofman's analysis of the modified congressional plan recommended by the Special Masters indicates that the plan has an efficiency gap of 0.63%, a mean-median difference of 0.69%, seat bias of 0.28%, and vote bias of 0.10%. According to Dr. Grofman, "this is the most non-dilutive plan in partisan terms of any map that has been submitted to the Court."

Accordingly, the Special Masters recommend to the Trial Court that it order the State of North Carolina to utilize the modified congressional plan prepared by the Special Masters in the 2022 Congressional election.

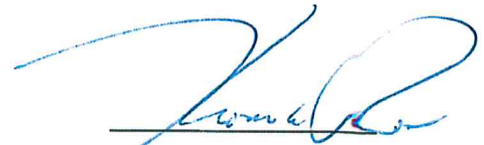
This the 23rd day of February 2022.



Robert H. Edmunds, Jr.



Robert F. Orr



Thomas W. Ross

Acknowledgement

We would like to thank the advisors, Dr. Grofman, Dr. Jarvis, Dr. McGhee, and Dr. Wang for their analysis and advice in the extremely compressed timeframe. Additionally, we would like to thank the Judicial Fellows, Adam Steele, Alison Rossi, and Danielle Smith for their administrative support and assistance in preparing this report and for the long hours of work in bringing this matter to a conclusion.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on the persons indicated below via electronic transmission by e-mail addressed as follows:

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Service is made upon local counsel for all attorneys who have been granted pro hac vice admission, with the same effect as if personally made on a foreign attorney within this state.

This the 23rd day of February 2022.



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STATE OF NORTH CAROLINA

COUNTY OF WAKE

NORTH CAROLINA LEAGUE OF
CONSERVATION VOTERS, INC., *et al.*,

Plaintiffs

and

COMMON CAUSE,
Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL, in his
official capacity as Chair of the House Standing
Committee on Redistricting, *et al.*
Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

FILED

2022 FEB 23 P 3:15

WAKE CO., C.S.C.

BY _____ Case No. 21 CVS 015426

REBECCA HARPER, *et al.*,
Plaintiffs

v.

REPRESENTATIVE DESTIN HALL, in his
official capacity as Chair of the House Standing
Committee on Redistricting, *et al.*
Defendants.

Case No. 21 CVS 500085

PLAINTIFF COMMON CAUSE'S NOTICE OF APPEAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Plaintiff Common Cause, by and through counsel, pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, hereby gives notice of appeal to the Court of Appeals of North Carolina from the Remedial Order entered by the three-judge panel in the Superior Court, Wake

County on Wednesday, February 23, 2022, and all interlocutory orders that merged with the Remedial Order. A Notice of Appeal was e-filed with the Supreme Court of North Carolina on February 23, 2022.

Respectfully submitted, this the 23rd day of February, 2022.



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This is to certify that the undersigned has this day submitted a copy of the foregoing document in the above titled action by mail and/or electronic mail, in the manner requested, to the following parties:

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