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, et al., REBECCA HARPER, et al., Plaintiffs, vs. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al., Defendants.	*Consolidated with* 21 CVS 500085

LEGISLATIVE DEFENDANTS OBJECTIONS TO PLAINTIFFS' PROPOSED REMEDIAL PLANS AND MEMORANDUM IN FURTHER SUPPORT OF THE GENERAL ASSEMBLY'S REMEDIAL PLANS

Plaintiffs' proposed Remedial Plans do nothing but prove that the remedial plans enacted by the General Assembly are constitutional. For the reasons stated herein, Legislative Defendants respectfully request this Court issue an order allowing elections to go forward under the General Assembly's collective Remedial Maps.

I. Judicial Review of Redistricting Plans is Not a Beauty Contest.

When a legislature timely enacts remedial districting plans, a reviewing court's analysis is limited to whether the legislative plans are constitutional—courts must "impose remedial actions as narrowly as possible." *Stephenson v. Bartlett*, 355 N.C. 354, 356, S.E.2d 377, 405 (2002) (Orr, J., concurring in part); *See Hines v. Mayor and Town Council of Ahoskie*, 998 F.2d 1266 (4th Cir. 1993) ("[W]here ... the legislative body . . . respond[s] with a proposed remed[ial electoral plan], a court may not thereupon simply substitute its judgment of a more equitable remedy for that of

the legislative body; it may only consider whether the proffered remedial plan is legally unacceptable[.]" (quoting *McGhee v. Granville Cnty.,* 860 F.2d 110, 115 (4th Cir. 1988)). As such, the issue in assessing the General Assembly's remedial plans here is not who has produced the "best" or "most constitutional" maps. *See Daly v. Hunt*, 93 F.3d 1212, 1221 (4th Cir. 1996) (providing that the existence of a "more constitutionally perfect" plan with smaller population variances does not in itself amount to a constitutional violation); *Wilson v. Kasich*, 981 N.E.2d 814, 824 (Ohio 2012) ("[W]hether relators have presented a 'better' apportionment plan is irrelevant in determining whether relators met their burden to establish that the board's . . . 2011 apportionment plan is unconstitutional.").

In its decision to enjoin the 2021 enacted plans, the North Carolina Supreme Court relied upon the findings of fact by the Superior Court that the challenged districts were intentional, pro-Republican redistricting. As related to testimony by the Harper plaintiffs' expert Dr. Mattingly, the superior court justified its findings on an ensemble analysis by Dr. Mattingly in which he studied 12 specific elections. See *infra* at Section III. The North Carolina Supreme Court then identified several mathematical statewide fairness tests and metrics for the General Assembly to use measuring the statewide fairness of any remedial plans it elected to recommend. During the legislative debate over proposed remedial maps, the General Assembly used the same ensemble of 12 statewide elections offered by Dr. Mattingly, used by the Superior Court, and subsequently affirmed by the North Carolina Supreme Court. The General Assembly determined that all three proposed remedial plans satisfied the metrics outlined by the North Carolina Supreme Court under the same ensemble of elections relied upon by the Superior Court Under the unanimous precedent cited above, the function of this court is only to determine whether the proposed remedial plans satisfy the metrics established by the North Carolina Supreme Court. Whether any plans offered

by Plaintiffs are "better' or "more constitutional" is irrelevant. The only relevant issue is whether the legislatively enacted maps are constitutional. *See McGhee*, 860 F.2d at 115 ("If the remedial plan meets those standards, a reviewing court must then accord great deference to legislative judgments about the exact nature and scope of the proposed remedy, reflecting as it will a variety of political judgments about the dynamics of an overall electoral process[.]" (quotation omitted)).; *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015). The United States Supreme Court recognized this principle in *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality), by holding that constitutional districts drawn meeting traditional redistricting criteria "may pass strict scrutiny without having to defeat rival compact districts designed by Plaintiffs' Experts in endless 'beauty contests.'"

II. The Harper Remedial Senate Proposal and the Common Cause Remedial Plans Fail to Comply with the Court's Order and Should Not Be Considered.

This Court's February 16, 2022 Order required the General Assembly and any party submitting a proposed remedial plan to submit "the 'stat pack' or its functional equivalent for the submitted Proposed Remedial Plans." (¶2f). The General Assembly and North Carolina League of Conservation Voters ("NCLCV") Plaintiffs complied with this request. Common Cause Plaintiffs failed to comply with this paragraph of the Courts order as did the Harper Plaintiffs with respect to their Proposed Senate Plan.

Instead, Common Cause produced some reports only on their two proposed remedial districts. In particular, Common Cause failed to provide any reports on municipality splits, population deviation, or how their Remedial districts impact incumbents. Common Cause also failed to show the effect of merging their proposed Remedial Districts into a statewide Senate and House Plan and the ripple effect this would cause statewide. This results in a disjointed apples to

oranges comparison of the Common Cause Remedial Plans to the General Assembly Remedial Plans.

The Harper Plaintiffs with regard to their Proposed Senate Plan, provided essentially none of the materials found in a stat pack and produced a block assignment file without the requisite census block data, rendering it useless. The Harper Plaintiffs provided only county split and population reports, failing entirely to provide measures of compactness or any data on splits of municipalities or VTDs. Like the Common Cause Plaintiffs, Harper Plaintiffs also fail to include any information on incumbency.

Legislative Defendants were forced to take immediate and costly actions to mitigate the harm caused by Harper and Common Cause Plaintiffs. In order to provide the Court and Special Masters with the requisite materials to make an apples to apples comparison, and aid in assessing the plans for the purpose of determining if additional objections were warranted, the following actions had to occur:

- The Director of the General Assembly's Information Systems Division ("ISD"), who was out of town, had to call staff to ensure that any problems related to the data upload could be addressed;
- The Legislative Service Officer was forced to drive to the General Assembly to ensure that the room where Maptitude computers were stored was unlocked;
- Two Central Staff members, who had already spent countless hours this week compiling data to help the General Assembly comply with the Court's order, had to leave family obligations and drive to the General Assembly to produce the required materials for the Harper Senate Map; and
- The Central Staff members then had to work to recreate the Harper BAF and Shapefiles, which were not produced in the required format, with the help of ISD to even get the files to a point where they could be analyzed and used.

All of this was necessary only because Harper and Common Cause plaintiffs failed to comply with the Court's order. Both plans should be stricken from consideration as Remedial Plans for this failure to comply with the Court's order.

III. The Proper Set of Elections to Measure the Remedial Plans Against is the "Mattingly 12" Election Set, Which the General Assembly's Plans Pass.

In finding that certain districts were the product of "intentional pro-Republican redistricting," the Court relied heavily upon Dr. Mattingly's analysis of each county grouping. To conduct his analysis, Dr. Mattingly relied upon 12 elections: 2016 Lt. Governor, 2016 President, 2020Commissioner of Agriculture 2020 Treasurer, 2020 Lt. Governor, 2020 US Senate, 2020 Commissioner of Labor, 2020 President, 2020 Attorney General, 2020 Auditor, 2020, Secretary of State, 2020 Governor. *See e.g.* FOF ¶239. The North Carolina Supreme Court later held that the trial court's findings were not clearly erroneous and adopted them in full. *Harper v. Hall*, 2022-NCSC-17, ¶2 (Feb. 4, 2022).

When the General Assembly began the task of drawing remedial districting plans, Legislative Defendants knew that the plans needed to score well under mathematical tests like the efficiency gap and the mean-median test. On February 14, 2022, the North Carolina Supreme Court clarified standards for these tests that would make them presumptively constitutional. In that Opinion, the North Carolina Supreme Court held that a 1% threshold for mean-median and a 7% threshold for efficiency gap would make plans presumptively constitutional.

In order to conduct the tests to determine if the statewide remedial plans met this threshold, it was not only rational, but also prudent for the General Assembly to use those same elections that Dr. Mattingly used to analyze county groupings, and that this Court relied upon heavily in its January 11, 2022 opinion. And under this set of 12 elections that Dr. Mattingly used in his analysis, the General Assembly's plans meet the thresholds set forth by the North Carolina Supreme Court. However, this is not the case for all proposed remedial plans. A table below shows the scores, as

calculated by Dr. Barber in his Amended Expert Report on Remedial plans[1] under Dr. Mattingly's 12 set of elections:

Test	Remedial Senate	Remedial Congress	Remedial House	Harper Senate	Harper Congress	NCLCV Senate	NCLCV Congress	NCLCV House
Mean Median	-.65%	-.61%	-.7%	.17%	.04%	.34%	1.65%	-1.22%
Efficiency Gap	-3.97%	-5.29%	-.84%	-3.64%	1.03%	.03%	7.92%	-1.43%

As shown above, all of the General Assembly's plans fall within the threshold of presumptive constitutionality as defined by the North Carolina Supreme Court. As such, there is no need to even consider other remedial plans, *see supra* Section I. However, if the Court is inclined to consider other plans, the use of Dr. Mattingly's election set to compare all plans to is appropriate because of the reliance upon the same during the trial. As the Court can see, many of the score differences are small fractions of a percent. For example, the Harper Senate Efficiency Gap and the Remedial Senate Efficiency gap have a difference of just 0.3%. Furthermore, the NCLCV Congressional Plan and the NCLCV House Plan are not appropriate Remedial Plans because they fall outside of the guidance issued by the North Carolina Supreme Court.

1. Harper Plaintiffs Use of New Elections for Analysis is Inappropriate.

After espousing the 12 elections above for the majority of Dr. Mattingly's report, and with the full knowledge that the Superior Court relied upon his analysis using these results, Harper Plaintiffs now use Dr. Mattingly's other, and scarcely used 16-election set. In addition to the 12 elections listed above, they seek to use four additional elections to measure the plans, including

[1] Because of Common Cause Plaintiffs' failure to incorporate their remedial districts into a full statewide plan, and because the efficiency gap and mean-median are measures of statewide plans, no analysis could be conducted on the Common Cause proposed districts. A copy of Dr. Barber's Amended Expert Report is being submitted with these objections.

three from 2016 (Attorney General, Governor, US Senate) and the 2020 Commissioner of Insurance election.

This belies logic. If one set of elections was an appropriate choice to prove the existence of districts that were the product of "pro-Republican redistricting" then why are they not an equally appropriate choice to test whether the districts now meet the mathematical tests laid out in the North Carolina Supreme Court's opinion? As shown by all experts at trial, the choice of elections used to measure these tests can lead to varying results. *See also* Amended Barber Report of 2.21.2022 at FN 12. This is why it is most prudent for the Court to analyze all plans under the set it already found persuasive. But Harper Plaintiffs, having chosen a curated set of elections to attempt to prove the existence of partisan gerrymandering, now want their own plans scored under a different set of elections. This has the appearance of gaming the choice of elections, to make their scores seem better or the General Assembly's scores seem worse. In advocating for the use of a new set of elections, Harper Plaintiffs invite this Court to embrace partisan gamesmanship—an invitation this Court should decline.

Notwithstanding that the General Assembly maintains that the Mattingly 12 is the appropriate set of elections to score the plan against, Dr. Barber in his Amended Report submitted today, scored all proposed remedial plans under Dr. Mattingly's new curated set of elections:

Test	**Remedial Senate**	**Remedial Congress**	**Remedial House**	**Harper Senate**	**Harper Congress**	**NCLCV Senate**	**NCLCV Congress**	**NCLCV House**
Mean Median	-.61%	-.86%	-.92%	.11%	0%	.45%	1.62%	-1.21%
Efficiency Gap	-4.28%	-5.1%	-2.9%	-1.95%	1.22%	-.45%	.83%	-2.16%

Even under the new curated election set, the General Assembly's Remedial Plans are still within the threshold set by the North Carolina Supreme Court. The NCLCV Congressional Plan and House Plan continue to fall well outside of the Court's threshold for Mean-Median.

IV. The Second Affidavit of Dr. Moon Duchin further reveals Plaintiffs Use of Different Election Results and New Standards for Fairness.

On February 20, 2022, Dr. Moon Duchin prepared her Second Affidavit intended to compare the Remedial Maps proposed by the General Assembly and the NCLCV plans. Dr. Duchin's Second Affidavit is an update of her First Affidavit and represents another attempt to justify the NCLCV plans. It should be rejected.

First, explained below, all of the proposed NCLCV plans rely upon race to maximize the number of districts they describe as "Effective Race Districts." These plans infuse race into every line-drawing decision made on their maps and are therefore illegal racial gerrymanders that violate the Fourteenth Amendment. See *infra* at Section VI. The NCLCV plans cannot be used as a valid comparison to the remedial plans.

Dr. Duchin's second affidavit demonstrates the pitfalls of delegating redistricting authority to an expert who has been paid by Plaintiffs challenging a redistricting plan. There are several problems with Dr. Duchin's second affidavit that demonstrate that she is not an objective observer.

First, Dr. Duchin's report demonstrates how all of the versions of the metrics can be changed and manipulated by the expert's use of different election composites that better advance their client's interests. Dr. Duchin incorrectly implies that Dr. Barber selectively chose 12-election set from Dr. Mattingly's analysis. Dr. Duchin failed to acknowledge that the Superior Court expressly relied upon this ensemble in its original findings that the 2021 district plans were intentional pro Republican districts. Barber Report fn. 12. She instead uses different sets of elections for her close-votes-close sets analysis to obtain a different result from what is revealed under her test if the Mattingly-12 election set is used. *Id.* at fn. 16. Using the same set of elections used by the court, Dr. Barber calculated the existence of only one "nonmajoritarian" congressional district included the remedial Congressional Plan. But by refusing to report the results under this

test using the Mattingly 12, Dr. Duchin also ignores that this result was a function of the very close election for Attorney General. Under the AG election, the winning candidate prevailed in Remedial District 12 and Remedial District 14 by less than one half of a percent of the two-party share. A shift of only 1,300 votes and 2,600 votes would have flipped this election from a 8R/6D map to a 6R/8D map, which would also have made this election a "majoritarian" outcome If the smoke is cleared away, and if the same elections used by the Court are used to judge the remedial plans, there is no significant difference between Dr. Duchin and Dr. Barber under Dr. Duchin's close-vote-close seat standard.

Dr. Duchin then moves to a comparison of the remedial plans with plans proposed by the Harper Plaintiffs and the NCLCV. Keep in mind that 60% of Dr. Chen's simulations resulted in nine Republican congressional districts and a few resulted in 10. But under Dr. Duchin's analysis using a different set of elections than the set used by the court, she predicts that the proposed Harper and NCLCV Congressional Plans would result in 7.1 to 7.5 Democratic districts. Both of these numbers exceed Dr. Chen's predictions for Democrat seats by at least 2 and under Dr. Chen's analysis would constitute extreme, intentional, pro-Democrat gerrymanders. (Chen Depo 112:17–114:5 (Dr. Chen admits that a majority of his simulated plans produced a mean-median difference that slightly favors Republicans); Tr. 50:2–12 (Dr. Chen admits that 59.6% of his computer simulated Congressional plans draw nine Republican districts)).

Dr. Duchin also uses different elections sets to measure all of the plans under the efficiency gap, mean medium, partisan bias , and two new tests called the simplified efficiency gap and the "Eguia County Skew," which does not appear to be a peer reviewed standard. While Dr. Duchin projects "better" results for the NCLCV and Harper plans, the only area where the enacted plans

exceed the range set by the North Carolina Supreme Court is for efficiency gap. Second Duchin Aff. At 10.

But there is a significant and undisclosed problem with Dr. Duchin's calculations Having calculated her proposed efficiency gap using different elections than those used by the court and Dr. Barber, on page 13 of her report Dr. Duchin claims to use the Mattingly 12 to criticize Dr. Barber's efficiency gap calculations. But as explained by Dr. Barber, Dr. Duchin uses a different formula to calculate the numbers she projects in her criticism of Dr. Barber. In these calculations, Dr. Duchin calculated a separate EG score for each election and then averaged that across each of the 12 elections. In contrast, Dr. Barber calculated an index based upon the total vote for all elections combined. To confirm the accuracy of Dr. Barber's calculations, we are filing the EG and mean medium scores of the General Assembly Remedial Plans generated by the Maptitude software program used by the General Assembly, and legislatures nationwide for redistricting. *See* Affidavit of Erika Churchill. The EG and mean medium scores calculated by Maptitude essentially match Dr. Barber's calculations, with the differences resulting from rounding decisions. Maptitude would not publish a bizarre formula for calculating the EG since its program is used throughout the United States.

Dr. Duchin's decision to use the Mattingly 12 elections to critique Dr. Barber as compared to the completely different sets of elections used by her to support her calculations, shows the ease with which math formulas can be manipulated to advance the agendas of a client. The fact that the NCLCV and Harper Plaintiffs Congressional Plans both will result in at least 2 extra Democrat seats than the number projected by Dr. Chen casts serious doubt on the credibility of Dr. Duchin's findings.

V. The General Assembly's Remedial Plans Meet Traditional Redistricting Criteria.

1. Remedial House Plans.

The Remedial House plan, which passed the House and Senate with overwhelming bipartisan support, has a Polsby-Popper mean of .38, and a Reock mean of .46.[2] The Remedial House plan double bunks only two sets of incumbents, but all members who are double bunked are Republicans.[3] The Remedial House plan splits only 8 VTDs and 36 counties. The Remedial House plan splits 108 municipalities, but of those, only 75 involve population.

The NCLCV House plan compares poorly to the Remedial House plan under metrics of traditional redistricting criteria. While the NCLCV House plan is slightly more compact under the Polsby-Popper measure, it has a virtually identical Reock mean. The NCLCV House plan pairs significantly more incumbents than the Remedial House plan. In fact, the NCLCV House plan pairs 13 sets of incumbents. Of those that are double bunked, eight sets are Republican with Republican, three sets are Democrat on Democrat, and two sets are Republican on Democrat. This alone can be used to infer a political bias to the detriment of Republican incumbents. *Larios v. Cox,* 300 F.Supp.2d 1320, 1329 (N.D. Ga. 2003) *affirmed, Cox v. Larios,* 542 U.S. 947 (2004). Furthermore, while the author of the NCLCV algorithm, Mr. Sam Hirsch, testified in his deposition that the algorithm did not consider incumbency, nothing prevented the NCLCV Plaintiffs from amending their plans for the remedial phase of this submission to improve upon this metric. (Hirsch Depo. 95:12-23).

Simply looking at the number of incumbent pairings in the NCLCV proposed maps does not tell the full story—the double-bunking in the NCLCV plan appears surgically targeted at

[2] Polsby-popper and reock tests measure compactness.
[3] In counting incumbents for comparison purposes, Legislative Defendants did not list any double bunking where one of the members is not running for re-election to his or her district.

removing senior members of North Carolina House Republican leadership from the General Assembly. Rep. Jimmy Dixon, Senior Chairman of the House Agriculture Committee and the Appropriations Committee charged with providing funding for agriculture, environmental enforcement, and economic development, is double-bunked with House Majority Leader John Bell, an outcome that would severely reduce the voice of Eastern North Carolina in the General Assembly. House Majority Whip Jon Hardister is placed into a heavily Democratic seat with Rep. Amos Quick (D-Guilford). Donny Lambeth, Senior Chairman of the House Appropriations Committee and co-chairman of the committee currently considering Medicaid Expansion in North Carolina, is placed into a heavily Democratic district with Rep. Evelyn Terry (D-Forsyth). Chairman of the Rules and Redistricting Committee, Rep. Destin Hall, is double-bunked with Rep. Ray Pickett (R-Watauga). And the Speaker of the House Tim Moore is double-bunked with Rep. Kelly Hastings (R-Gaston). In fact, it is difficult to find a member of House Republican leadership not targeted for elimination by the NCLCV Plaintiff's proposed map.

The NCLCV Plan also splits 38 counties, and 187 VTDs (171 involving population). This is 23 times more VTD splits than the Remedial House plan. Significantly, under the NCLCV House Plan 19 VTDs are split into three districts, and one VTD is split into four districts. It is precisely these sort of egregious splits that would make it even more difficult for the state and local elections boards to prepare for the upcoming election on an already short time frame.

While the NCLCV House Plan splits fewer municipalities (71, with 59 of those involving population), there are some municipality splits that are particularly egregious. For example, the town of Apex is split into four[4] different house districts, and Sanford, which is a hub for the sandhills region, is split into two different House districts. Monroe, a town of less than 35,000, and

[4] One of these splits does not involve population. The remainder of Apex is split into three districts.

one of the more Republican leaning areas in the Charlotte suburbs is mysteriously split into two districts. Wake Forest, with a population of about half the ideal size of a House district, is split into four different house districts.[5] This is the inherent danger with districts drawn by algorithms. While the algorithm may be able to "optimize" a plan for the fewest number of splits over all, it cannot take into account the human element. Legislative Defendants doubt very much that the residents of Apex or Wake Forest would find it "optimal" to vote in three or more different House districts.

In sum, the NCLCV House plan fails under traditional redistricting criteria when it comes to county, VTD, and municipality splits, as well as their treatment of incumbents. As such, the Court should order the General Assembly Remedial House plan, that was the subject of overwhelming bipartisan support to be used for the 2022 elections.[6]

2. Remedial Senate Plans.

The Senate Remedial Plan is presumptively constitutional because it meets the partisan fairness metrics set by the Supreme Court. More than that, the Senate Remedial Plans, unlike the Plaintiffs' remedial plans, accomplish these partisan fairness goals without ignoring still-

[5] While one split is mandatory because of a small portion of Wake Forest that is in Franklin County, the remaining residents are split amongst three districts. Curiously Wake Forest is also one of the most Republican leaning towns in Wake County.

[6] This chart was created using the Stat Packs submitted to the Court on Friday.

Test	**NCLCV Result**	**GA Remedial Result**
Polsby Popper Mean	.414	.38
Reock Mean	.465	.46
Incumbency	13 (8 R/R, 3 D/D, 2 R/D)	2, (All R/R)
Split VTD	187 (171 involving population)	8 (all involving population)
Municipality	71 (59 involving population),	108 (75 involving population)
Counties	38	36

meaningful neutral criteria. At bottom, the Senate Remedial Plan is the only Senate plan that even attempts to do both.

It is important to restate the fact that the Senate Committee Chairs changed each and every district challenged by the Plaintiffs (that this Court found to exhibit partisan intent) and every change in those districts favored Democrats. Only one district was changed that directionally helped Republicans, Senate District 7 in New Hanover County, but only slightly, and this district was not one of those challenged by the Plaintiffs, nor found to be drawn with partisan intent by the Court. This change in Senate District 7 was done to make the district more competitive and improve the mean-median and efficiency gap scores measuring competition and statewide partisan fairness. Indeed, Senate District 7 is a proverbial "toss-up" district, with President Biden narrowly carrying the seat 49.2 percent to 49.0 percent in 2020. Swapping four VTDs out of Senate District 7 for three different VTDs improved the compactness and competitiveness of the district.

Viewed another way, the Senate Remedial Plan met Plaintiffs' expert Dr. Mattingly's test. In Dr. Mattingly's analysis, these were the most likely partisan outcomes in the following county groupings:

- Guilford-Rockingham: 2 Democrats, 1 Republican
- Forsyth-Stokes: 1 Democrat, 1 Republican
- Cumberland-Moore: 1 Democrat, 1 Republican

In each example above, the proposed Remedial Senate Plan exactly matches Dr. Mattingly's ensemble analysis for most likely partisan outcomes based on the political geography of county groupings. All of this was done without sacrificing neutral redistricting criteria.

The Remedial Senate Plan passed by the General Assembly has a polsby-popper mean of .38 and a reock mean of .44 and double-bunks two incumbents, the bare minimum for this criteria and only because the incumbent pairs residing in a single-district county grouping dictated by the

Stephenson criteria, leaving the General Assembly with no discretion to un-pair these members. The Remedial Senate Plan removes a pairing from the Enacted Senate Plan, Senator Vicki Sawyer (Republican) with Senator Natasha Marcus (Democrat) in Senate District 37. One of the members that is double-bunked in the Remedial Senate Plan is the co-chair of the Senate Committee on Elections and Redistricting, Senator Ralph Hise.

Moreover, the Enacted Senate Plan split 19 VTDs statewide in order to keep as many municipalities within a single county containing population whole as possible. However, during the trial, the Plaintiffs' expert, Dr. Mattingly, testified that this strategy of prioritizing the elimination of municipal splits in the Senate map was done intentionally to favor Republican candidates politically. Therefore, in the Remedial Senate Plan, the Chairs attempted to adhere to the Court's findings by removing all elective VTD splits statewide and prioritizing that criterion over the elimination of municipal splits. The Remedial Senate Plan splits only 3 VTDs statewide, down from the 19 in the Enacted Senate Plan, and all three of these splits in Wake County for the sole purpose of balancing population in that county grouping, which is very close to the minimum population deviation (-4.98 percent), and thus impossible to draw without splitting VTDs. Split VTDs were eliminated in the following counties in the Remedial Senate Plan: Buncombe, Cabarrus, Caldwell, Guilford, Randolph, Sampson, and 7 of the 10 splits in Wake.

The Remedial Harper Plan has a polsby-popper mean of .35 and a reock mean of .42. The Remedial Harper Plan is, therefore, less compact than the Remedial Senate Plan in both measures of compactness. It is important to note that since many of the county groupings and districts are formulaic draws due to the *Stephenson* criteria, the difference in compactness is solely attributable to elective map-drawing decisions in a handful of counties. While the statewide reock and polsby-popper compactness means indicate that the Remedial Senate Plan is slightly better than the Harper

Remedial Plan, since many of the county groupings and districts are the same in the two plans due to the *Stephenson* criteria, this small difference in compactness indicates an even more pronounced difference in compactness in the counties and districts where map-drawing discretion is afforded. The table below compares the Remedial Senate Plan with the Remedial Harper plan on the two compactness measures, reock and polsby-popper, averaging the district compactness ratings withing county groupings where map-drawing discretion is allowed and comparable:

		Remedial Senate Plan		**Remedial Harper Plan**		**Notes**
Counties	***Districts***	***Reock Mean***	***Polsby-Popper Mean***	***Reock Mean***	***Polsby-Popper Mean***	
Iredell, Mecklenburg	37, 38, 39, 40, 41, 42	.41	.44	.39	.28	The Remedial Senate Plan is more compact in both measures.
Granville, Wake	13, 14, 15, 16, 17, 18	.46	.40	.47	.44	The Remedial Harper Plan is slightly more compact in both measures, but splits 22 VTDs (versus 3 for the Remedial Senate Plan) to achieve this.
Guilford, Rockingham	26, 27, 28	.53	.37	.44	.42	The Remedial Senate Plan is more compact using reock; the Remedial Harper Plan is more compact using polsby-popper.
Brunswick, Columbus, New Hanover	7, 8	.34	.36	.33	.37	The Remedial Senate Plan is more compact using reock; the Remedial Harper Plan is more compact using polsby-popper.
Buncombe, Burke, Cleveland, Gaston, Henderson,	43, 44, 46, 48, 49	.44	.39	.40	.32	The Remedial Senate Plan is significantly more compact using both compactness measures.

Lincoln, McDowell, Polk, Rutherford						
Alexander, Forsyth, Stokes, Surry, Wilkes, Yadkin	31, 32, 36	.51	.44	.38	.30	The Remedial Senate Map is significantly more compact using both compactness measures.

The Remedial NCLCV Plan fares better than the Remedial Harper Plan on compactness, with a polsby-popper mean of .37 and a reock mean of .43, but fails to beat Remedial Senate Plan's polsby-popper mean of .38 and reock mean of .44. Again, it is important to note that since many of the county groupings and districts are formulaic draws due to the *Stephenson* criteria, the difference in compactness scores is solely attributable to elective map-drawing decisions in a handful of counties. While the statewide reock and compactness scores indicate that the Remedial Senate Plan is slightly better than the Remedial NCLCV Plan, since many of the county groupings and districts are the same in the two plans due to the *Stephenson* criteria, this small difference in compactness indicates a more notable difference in compactness in the counties and districts where map-drawing discretion is afforded. The table below compares the Remedial Senate Plan with the Remedial NCLCV plan on the two compactness measures, reock and polsby-popper, averaging the district compactness ratings withing county groupings where map-drawing discretion is allowed and comparable:

		Remedial Senate Plan		**Remedial NCLCV Plan**		**Notes**
Counties	***Districts***	***Reock Mean***	***Polsby-Popper Mean***	***Reock Mean***	***Polsby-Popper Mean***	
Iredell, Mecklenburg	37, 38, 39, 40, 41, 42	.41	.44	.46	.47	The Remedial NCLCV Plan is more compact on

						both measures, but ignores incumbents residency and double-bunks two Senators.
Granville, Wake	13, 14, 15, 16, 17, 18	.46	.40	.52	.44	The Remedial Harper Plan is slightly more compact in both measures, but splits 22 VTDs (versus 3 for the Remedial Senate Plan) to achieve this and double-bunks an African American Senator with another incumbent.
Guilford, Rockingham	26, 27, 28	.53	.37	.44	.37	The Remedial Senate Plan is more compact using reock; the two plans tie using polsby-popper. However, the Remedial NCLCV Plan splits 5 VTDs to achieve these compactness scores and double-bunks an African American Senator with another incumbent.
Brunswick, Columbus, New Hanover	7, 8	.34	.36	.51	.45	The Remedial NCLCV Plan is more compact using both measurers. However, the NCLCV Plan ignores traditional districting principles and splits a VTD and runs the population of SD-7 down to -4.99% in a blatant partisan gerrymander.
Buncombe, Burke, Cleveland, Gaston, Henderson, Lincoln, McDowell, Polk, Rutherford	43, 44, 46, 48, 49	.44	.39	.36	.26	The Remedial Senate Plan is significantly more compact using both compactness measures.

Alexander, Forsyth, Stokes, Surry, Wilkes, Yadkin	31, 32, 36	.51	.44	.40	.33	The Remedial Senate Map is significantly more compact using both compactness measures.

The Remedial Harper Plan double-bunks 5 pairs of incumbents. While the Chairs attempted to follow the Supreme Court's directive to consider member residences in drawing the Remedial Senate Plan and successfully eliminated all elective double-bunkings, the Remedial Harper Plan electively pairs these incumbents: Senator Tom McInnis (Republican) and Senator Kirk deViere (Democrat) in a district favoring Democrats and Senator Amy Galey (Republican) and Senator Dave Craven (Republican). Each of these double-bunkings are easily avoidable while following traditional, neutral districting criteria, and demonstrate evidence of partisan bias in that they purposely target two Republican members for elimination. The Remedial NCLCV Plan double-bunks even more members: 8 member pairs, or 32 percent of all current North Carolina Senators. Again, while the Chairs attempted to follow the Supreme Court's directive to consider member residences in drawing the Remedial Senate Plan and eliminate elective double-bunkings, the Remedial NCLCV Plan electively pairs these incumbents:

- Senator Dan Blue (African American Democrat) and Senator Sarah Crawford (white Democrat),
- Senator Gladys Robinson (African American Democrat) and Senator Michael Garrett (white Democrat),
- Senator Paul Lowe (African American Democrat) and Senator Joyce Krawiec (Republican),
- Senator Vicki Sawyer (Republican) and Senator Natasha Marcus (Democrat),
- Senator Chuck Edwards (Republican) and Senator Julie Mayfield (Democrat).

Each of these double-bunkings are easily avoidable while following traditional, neutral districting criteria. It is truly remarkable that the Remedial NCLCV Plan would target three African

American Senators (Blue, Robinson, and Lowe), flouting the Supreme Courts' instructions to consider incumbency evenly, particularly veteran African American members.

The Remedial Harper Plan and the Remedial NCLCV Plan fair even worse when comparing split VTDs. While the Chairs sought to eliminate unnecessary split VTDs in the Remedial Senate Plan, bringing the number of splits down to 3, the Remedial Harper Plan splits 27 VTDs, or nine times as many as the General Assembly's Remedial Senate Plan. Notably, the Remedial Harper Plan splits 22 VTDs in Wake County alone. Subordinating neutral criteria for partisan reasons, our Supreme Court has told us, is a sign of partisan gerrymandering. *Harper v. Hall,* 2022-NCSC-17 ¶¶3,5,180,195,205. The Remedial Harper Plan's draw in Wake County is a clear example, with over seven times as many VTD splits as the Remedial Senate Plan includes statewide. The Remedial Harper Plan also includes split VTDs in Forsyth and New Hanover counties, where they intentionally gerrymander Senator Joyce Krawiec (R-Forsyth) and Senator Michael Lee (R-New Hanover) into Democratic districts. Specifically Senator Lee's district had a VTD split with the effect of running down the population and to remove Republican leaning VTDs for no neutral or population related reason. This is clear evidence of the Harper Plaintiffs splitting VTDs for their own political gain. Likewise the NCLCV Plan splits 5 VTDs in the Guilford Rockingham county grouping in order to attempt to create 3 Democratic leaning districts. This grouping would then be a partisan outlier under Dr. Mattingly's methods. (PX629 p. 36). Again, if splitting VTDs can be considered evidence of intentional partisan gerrymander; that is certainly the case in Forsyth, New Hanover, and Wake counties.

The Remedial NCLCV Plan splits a whopping 49 VTDs, over 16 times as many splits as the General Assembly's Remedial Senate Plan. Even more egregiously than the Remedial Harper Plan, the Remedial NCLCV Plan splits multiple VTDs in the following counties to intentionally

gerrymander the districts for partisan gain: 2 split VTDs in Buncombe, 2 splits in Forsyth, 5 in Guilford, 1 in New Hanover, 22 in Wake County (the same number as the Remedial Harper Plan), and another 17 VTD splits in an additional 7 counties.

Drilling into a few of these examples, the two split VTDs in Buncombe County enabled NCLCV to draw the "Asheville Finger" from Henderson County into downtown Asheville. The two split VTDs in Forsyth County were drawn to target Senator Joyce Krawiec in a district a Republican would be unlikely to win and double-bunk her with African American Senator Paul Lowe (Democrat). The five split VTDs in Guilford demonstrate clear evidence of intentional partisan gerrymander in an attempt to unseat Senate President Pro Tem Phil Berger, drawing him into a Democratic district. But perhaps the most stark example of splitting VTDs and manipulating district population deviations occurs in New Hanover County. In that county, the Remedial NCLCV Plan splits a VTD and draws Senate District 7, home to incumbent Senator Michael Lee (Republican), close to the bare minimum for population deviation, 198,465 people, or -4.9 percent, while the other district that includes parts of New Hanover, Senate District 8, has 214,553 people. This imbalanced population deviation within a county grouping demonstrates the Plaintiff's intent to remove as many Republican voters from the New Hanover-based Senate District 7 as possible to purposefully gerrymander Senator Michael Lee into a Democratic district.

While the Chairs crafted Senate District 7 to be as competitive as possible in the Remedial Senate Plan, improving the partisan fairness scores (mean-median and efficiency gap) statewide, the NCLCV attempts to remove competition in New Hanover County by drawing a safe Democratic seat. Courts have ruled previously that selectively creating districts with wide variations in population deviations, as the NCLCV does in New Hanover, with Senate District 7 at the very bottom of the allowable population deviation range, while Senate District 8 is above

the average ideal population for a Senate district, is evidence of intentional racial or partisan gerrymandering and weakens the strength of a voting bloc in one district while advantaging the other. In this case, the Remedial NCLCV Plan buries as many Republican voters in New Hanover in the already strongly Republican Senate District 8, taking Senate District 7 from a competitive seat to a safe Democratic seat.

In summary, the General Assembly's Remedial Senate Plan is the most compact, pairs the fewest incumbents, and splits the fewest VTDs. The Remedial Senate Plan falls within the Supreme Court's suggested ranges for partisan fairness and competitiveness (mean-median and efficiency gap) and is, therefore, presumptively constitutional. While the NCLCV and Harper plans score slightly "better" than the Remedial Senate Plan on these two metrics, these plans only accomplish this by ignoring traditional, neutral districting criteria. These plans are less compact (much less compact in counties with elective draws, pointing to an intent to gerrymander), intentionally pair more incumbents (purposely targeting certain Republicans, and in the case of the NCLCV map, inexplicitly double-bunking African American members), and split far more VTDs (particularly in counties where the Plaintiffs gratuitously target Republican incumbents, such as Sen. Berger in Guilford, Sen. Krawiec in Forsyth, and Sen. Lee in New Hanover). Like the Remedial House Plan, it is clear that the Remedial Senate Plan scores significantly better on measures of traditional redistricting criteria. The Court should order the General Assembly Remedial Senate plan into use for the 2022 elections. [7]

[7] This chart was created using the Stat Packs submitted to the Court on Friday and the Statpack created by Central Staff on the Harper Senate Plan as discussed in Section II above.

Test	**Harper Result**	**NCLCV Result**	**GA Remedial Result**
Polsby Popper Mean	.35	.369	.38
Reock Mean	.42	.428	.44
Incumbency	4 (3 R/R, 1 D/R)	8 (3R/R; 3D/R; 2D/D)	2 (non-discretionary)

3. **Remedial Congressional Plans.**

A. Choosing One of Plaintiffs Remedial Plans Likely Violates Federal Law.

While Harper and NCLCV Plaintiffs submit remedial maps for consideration, it is likely a violation of federal law for those plans to be ordered for use in any election. The federal Constitution provides that the North Carolina General Assembly is responsible for establishing congressional districts. "The Framers addressed the election of Representatives to Congress in the Elections Clause." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2495 (2019). It provides that "[t]he Times, Places and Manner" of congressional elections "shall be prescribed in each State by the Legislature thereof" unless "Congress" should "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. The Elections Clause harbors no ambiguity; the word "Legislature" was "not one 'of uncertain meaning when incorporated into the Constitution.'" *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). Here, it refers undisputedly to the General Assembly, not the North Carolina courts.

B. Comparison of Remedial Congressional Plans.

The General Assembly Remedial Congressional Plan is one of the most competitive Congressional redistricting plans for any state in the country. By contrast, the NCLCV and Harper plans are far less competitive and less sensitive to the votes of the people of North Carolina. The General Assembly Remedial Congressional Plan contains four districts that were decided by less than 2% in the 2020 Presidential election, including three districts that were decided by less 0.5%.

Split VTD	27 (19 involving population)	49 (39 involving population)	3 (all involving population)
Municipality	72 (61 involving population)	51 (41 involving population)	65 (52 involving population)
Counties	15	15	15

[8]By another measure, the outcome of that election in these three districts was decided by just 3,894 total votes. By contrast, the NCLCV Congressional Plan contains just two districts that were decided by less than 0.5% in the 2020 Presidential election and no other districts decided by less than 2%. The Harper Plan fares even worse. It contains just one district decided by less than 2% in the 2020 Presidential election and no districts decided by less than 0.5%. In sum, if the court were to strike down the General Assembly Remedial Congressional Plan, it would be striking down one of the most competitive Congressional redistricting plans in the country. If the court were to replace that plan with one of plaintiffs' proposals, it would be replacing the plan enacted by the General Assembly with a plan that is far less competitive and less sensitive to the will of the people than the one enacted by the people's chosen representatives. This cannot be what is required by the state constitution.

The Remedial Congressional plan passed by the General Assembly has a polsby-popper mean of .3, a reock mean of .38, and double bunks no incumbents. The Remedial Congressional plan also only splits 14 counties, 15 VTDs and 45 municipalities statewide. Of those, only 33 involve population. This is substantially similar to the Harper proposed congressional plan, the Harper Plan has a polsby-popper mean of .36, a reock mean of .45, and double bunks no incumbents. The Harper Plan also splits 14 counties, splits 14 VTDs and splits 37 municipalities. Of those, 31 involve population. The NCLCV Optimized Congressional Plan has a polsby-popper mean of .38 and a reock mean of .47. Unlike the Remedial Congressional plan and the Harper Plan, the NCLCV Optimized Plan double bunks Congresswoman Adams (D) and Congressman

[8] Tellingly The Republican candidate of Attorney General won District 13 and District 14 by less than one half of one percent of the two-party vote share. A shift of roughly 1,300 votes and 2,600 votes respectively would have thus flipped this election from an 8-R/6-D map to a 6-R/8-D map, which would also have made this election a "majoritarian" outcome under Dr. Duchin's analysis.

Bishop (R) in the same district. The NCLCV Plan splits 13 counties, 16 VTDs and 27 municipalities. Of those 19 involve population splits.

There is no clear "winning" plan that scores significantly better on all accounts. If anything, the Remedial Congressional Plan and the Harper Plan are nearly identical on traditional districting criteria. While the NCLCV and Harper Plans are slightly more compact than the Remedial Plan, these differences are marginal. The NCLCV Optimized Plan is the only plan that double bunks incumbents. The Harper and Remedial Plans split an identical number of counties. The Remedial Plan splits one more VTD than the Harper Plan, but one fewer than the NCLCV Plan. While the NCLCV number of municipality splits is the lowest of the three plans, the splits created by the NCLCV Optimized plan are often egregious, and represent the danger in "optimized" plans that seek the lowest number regardless of communities of interest. Under the NCLCV map, Durham is in four congressional districts (three involving population), Raleigh too is in three congressional districts, and the town of Stallings, with a population of approximately 16,000 people is split into three congressional districts. If the Trial Court found that it was evidence of unconstitutional "pro-Republican redistricting" that the General Assembly split Wake and Mecklenburg *counties* into three congressional districts, how is it constitutional to split the *city* of Durham into four districts, the *city* of Raleigh into three districts, and the tiny town of Stallings into three districts? The Same is true for Sawmill Township where 20 people in a town of 5020 are voting in a separate Congressional district from the rest of the town.

It would be especially troubling for the Harper plan to be selected, given that the map appears to be identical to map CTS-8 which was a rejected by the North Carolina House in a vote of 49-65 during the first redistricting process and tabled 27-22 in the Senate during that same process. It would set a precedent that a plaintiff could have a legislative proposal explicitly rejected

by the North Carolina General Assembly, then run to a state trial court and have that same legislation imposed on the state. Separation of powers prevents such gamesmanship.

The Harper plan is extremely strategic in ensuring that no sitting Democratic incumbent of Congress would ever face a competitive reelection (while not hesitating to endanger Republican incumbents). This violates the North Carolina Supreme Court's order to treat incumbents evenly *Harper v. Hall* 2022 NCSC 17, ¶170. This map also bobs and weaves around Republican voters in Johnston and Wake Counties to avoid drawing a more competitive district in that portion of the state. And while some members of the public have complained about the lack of a "Sandhills district" this map doesn't create one either. Instead it keeps a Republican leaning Harnett County out of that seat while stretching the district to the Charlotte exurbs to pick up Democratic voters in Anson County. It is obviously a map designed to ensure less competition, not more, compared to the General Assembly's chosen map.

The NCLCV plan is even more egregious. The NCLCV plan creates 8 seats won by President Biden in a state where President Biden lost to former President Trump. It clearly fails the partisan metrics set by the North Carolina Supreme Court to skew the map in favor of North Carolina Democrats, and creates simply bizarre seats that no legislature would enact, such as splitting up Northeastern North Carolina and creating a Johnston County to Durham seat.

But regardless, redistricting is not a beauty pageant, see *supra* section I. Nothing requires the Court to pick the most beautiful or "perfect" plan. Rather, the question is quite the opposite--whether the General Assembly Remedial Congressional Plan is constitutional. And it clearly is. In fact, comparing these three plans highlight that <u>none</u> is clearly the "most beautiful" and that each have better or worse points compared to the others. Put another way, how can the Court strike down the General Assembly Remedial Congressional Plan and replace it with a Harper plan that

splits an identical number of counties? Such an action would make a mockery of the State's constitution.[9]

VI. The Use of Race to Draw the NCLCV and Common Cause Plans Renders Them Constitutionally Suspect.

1. Common Cause Plans are not Proper Remedial Plans.

The submission by Common Cause in support of their two proposed remedial districts confirms Legislative Defendants prior arguments. (Legislative Defendants Memorandum Regarding Remedial Maps and Related Material ("LDMem") at 43-52). As we have explained, the two remedial districts proposed by Common Cause do not satisfy the three *Gingles* threshold conditions and constitute illegal racial gerrymanders. *Id*. The racially gerrymandered nature of the Common Cause remedial districts has now become even more obvious based upon the admissions by Common Cause in its submission attempting to defend these districts.

First, Common Cause has now revealed that Christopher Ketchie is the person responsible for its polarization summaries. Whether Mr. Ketchie would qualify as an expert on calculating racial polarization rates is an open question. What we do know is that the Legislative Defendants, and ultimately the voters of North Carolina, have not been given access to Mr. Ketchie's supporting data, outputs, and calculations and that Legislative Defendants have not been able to depose Mr. Ketchie. As a result, Legislative Defendants do not know the process followed by Mr.

[9] This chart was created using the Stat Packs submitted to the Court on Friday.

Test	Harper Result	NCLCV Result	GA Remedial Plan
Polsby Popper Mean	.36	.38	.30
Reock Mean	.45	.47	.38
Incumbency	None	1 (R/D)	None
Split VTD	14	16 (all involving population)	15 (all involving Population)
Municipality	37 (31 involving population)	27 (19 involving population)	45 (33 involving population)
Counties	14	13	14

Ketchie to arrive at the configuration of the Common Cause demonstrative districts. Did Mr. Ketchie simply program his computer to concentrate only on race in his efforts to configure a majority black district before he performed any polarization analysis? As we have explained, it is quite simple to attest to the existence of statistically significant RPV in any majority black district, no matter how the district might look and without regard to its lines being heavily gerrymandered. It is much harder to identify a majority white district in which a black population has been submerged and is therefore unable to elect their candidate of choice. And exactly how did Mr. Ketchie identify the geographic contours of the proposed demonstratives? How many iterations of his drawings had to be made to get to a majority black population and was race the predominate reason (and in fact, the only reason) for any change?

It is also self-evident that Mr. Ketchie's mission was similar to the instructions given to the General Assembly's map drawer in 2011. In both instances, the person directing the map drawer "purposely established a racial target [for districts]: African Americans should make up no less than a majority of the voting age population." *Cooper v. Harris*, 137 S.Ct. 1455, 1468 (2017).

It is telling that the shapes of the Common Cause demonstrative districts (and for that matter their proposed remedial districts) are nowhere to be found in the thousands of simulations generated by the Harper Plaintiffs or the remedial districts proposed by NCLCV. NCLCV has candidly admitted that its proposed maps are a result of programming intended to maximize the number of so called "effective black districts" from which African American can purportedly elect their candidate of choice. NCLCV Brief on Proposed Remedial Plans ("NCLCV Rem. Brief") at 4. The fact that an algorithmic-drawn map, designed to create as many effective black districts as possible, fails to include districts resembling the proposed Common Cause districts, further exposes Common Cause's racial intentions.

Next, as we have already argued, Common Cause now admits that its proposed demonstrative and remedial districts illegally use race as a proxy for politics. See LD Mem. at 51, *citing Bush v. Vera*, 517 U.S. 952, 958 (1996). Common Cause brazenly argues that its remedial districts should be ordered because American-Americans are Democrats and the proposed remedial districts favor Democrats. Common Cause's Proposed Remedial Districts at 7. Thus, according to Common Cause, their proposed remedial districts "are independently required by the *Harper* Supreme Court decision to remedy the extreme partisan gerrymandering in the 2021 Enacted maps" because "the creation of these districts will further remedy the disparities statewide of the ability of Democrats to coalesce to elect their candidate of choice." *Id*. Common Cause makes this argument without any attempt to provide the court with a statewide map that meets the statewide definitions of partisan fairness ordered by the North Carolina Supreme Court. Nor does Common Cause offer an explanation for whether the 2022 Remedial maps continue to violate the Court's criteria for statewide partisan fairness. Nor does Common Cause explain how the adoption of its proposed remedial districts might affect the partisan fairness of the 2022 remedial maps or whether adoption of these two districts would cause the maps to unfairly skew in favor of the Democratic Party. These issues are irrelevant to Common Cause because its bottom line is to maximize the voting strength of black voters (and Democrats) without regard to whether this blatantly unequal treatment of other voters violates the Fourteenth Amendment. *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009).

Finally, well aware of the Supreme Court's decision in *Bartlett* that states cannot be compelled to use race to draw crossover districts, Common Cause offers a remarkably illogical bait and switch theory. They contend that the existence of their non-compact majority-black demonstrative districts compel North Carolina to use race to draw the Common Cause crossover

districts. They make this argument by quoting, completely out of context, a statement in *Bartlett* that it is permissible (but not required) for state legislatures to draw crossover districts. *Id*. at 23. ("Our holding that §2 does not require crossover districts does not consider the permissibility of such districts as a matter of legislative determination…."). It is important to note that the Court in *Bartlett* did not say that it is permissible for a Court to order crossover districts or that plaintiffs can select a crossover district as their preferred remedy in a §2 case. Moreover, both the 2021 enacted plans and the proposed 2022 remedial plans already provide North Carolina with a defense to any §2 lawsuit because both sets of maps include more than a proportional number of districts in which African Americans have an equal opportunity to elect their candidate of choice. (*See* Lewis Report of 2.18.2022; LDTX109). *Johnson v De Grandy*, 512 U,S, 997, 1013-15 (1994). If Common Cause is correct in its interpretation of this one isolated statement in *Bartlett*, then the question remains- why was House District 18, a performing crossover district adopted by the state to avoid §2 liability- found to be illegal by the same *Bartlett* court? In any case, court-imposed districts based upon race, imposed without requiring plaintiffs to litigate their claims in a genuine lawsuit under §2, would constitute an illegal use of race by the court that cannot be justified as serving a compelling government interest.

2. NCLCV Plans are Illegal Racial Gerrymanders and Must be Rejected.

While the North Carolina Supreme Court focused on an alleged failure of the General Assembly to do a polarization analysis in 2021, it seems to have overlooked the fact that none of the plaintiffs (nor any other third party) has ever submitted a statewide polarization study. Specifically, NCLCV has never provided any evidence of any area of the state where it contends the three *Gingles* threshold conditions are present.

Despite the absence of a *Gingles* quality polarization study, NCLCV Plaintiffs have submitted plans based upon an algorithm intentionally programmed to use race to maximize the number of "electoral opportunity" districts. LD Mem at 41. Unsurprisingly, the NCLCV has never produced a listing showing the black voting age population ("BVAP") included in each of its alleged minority opportunity districts. Neither the Legislative Defendants or the court knows the exact BVAP included in these districts and cannot therefore test if the districts perform as alleged by NCLCV. But what we do know is that Dr. Duchin has studied the NCLCV maps and that in her opinion these plans create "effective black districts" that consist of black voting age population as low as 25%. *Id*. at 40. The fact that Dr. Duchin believes that effective districts can be established with less than 50% BVAP, standing alone, confirms that nothing in the NCLCV plans meets the threshold conditions required by *Gingles*.

NCLCV Plaintiffs admit as much in their brief on their proposed remedial map, and by doing so, have confirmed that their plans constitute illegal racial gerrymanders. Consistent with Dr. Duchin's study, NCLCV Plaintiffs argue that their plans give black voters intentionally drawn "opportunity" districts, even in the absence of any of the *Gingles* threshold elements that must be present to justify the use of race in drawing them. NCLCV Rem at 4. Starting with the premise that black voters are "entitled" to a statewide percentage of districts drawn using race, reveals a "maximization" strategy that does not apply to any other group of voters and which violates the Fourteenth Amendment. *Bartlett v. Strickland*, 556 U. S. 1. 14, 15, 21 (2009). This alone renders the NCLCV maps illegal gerrymanders in their entirety.

NCLCV correctly cites *Bartlett* for the proposition that proportionality in the number of districts in which African Americans can elect their candidates of choice "is the baseline for measuring opportunity to elect under § 2." *Bartlett*, 556 U.S. at 29. But *Bartlett* certainly does not

endorse the intentional creation of districting plans that give black voters a number of opportunity districts that exceeds their percentage of the voting age population. But, not surprisingly, because of the NCLCV's premise that African American voters are entitled to the maximum number of opportunity districts, all three NCLCV maps provide African Americans extra-proportionality in the number of districts Dr. Duchin defines as "effective."

In their most recent brief, NCLCV advertises that their congressional plan includes four "effective black districts, or 29% of North Carolina's 14 congressional districts. NCLCV Mem. at 4. They also admit that their proposed senate map establishes 12 effective black districts or 24% of the state's 50 Senate districts. *Id*. Finally, NCLCV Plaintiffs disclose that their proposed House plan establishes 36 out of 120 House districts (30%) as effective black districts. The percentages of effective black districts all exceed the percentage of black voting age population found in the state's voting age population (20%). LD Mem. at 37.

Obviously aware of their exposure to claims of racial gerrymandering resulting from the number of effective black districts created by their proposed plans, NCLCV Plaintiffs argue that these percentages are justified because "protected minority groups constitute just over 30% of North Carolina's adult citizen population." NCLCV Mem. at 4. Other than citing to a Census Bureau Report, NCLCV Plaintiffs offer no definition explaining which minority groups are encompassed within their definition or why they were included. Regardless, these arguments advanced by NCLCV to explain their racially gerrymandered maps are non-starters for several reasons.

First, the type of district in which one or more minority groups constitute a majority of the voting age population is often described as a "coalition district." *Bartlett*, 556 U.S. at 13-14. To date, the Supreme Court has never decided whether states can be compelled to draw coalition

districts in order to comply with §2. *Id*. There is certainly no precedent for a court to order a legislature to draw coalition districts prior to an actual lawsuit under §2. In any case, the issue of coalition districts is irrelevant to this litigation because NCLCV admits that the districts created by their maps are crossover districts, "meaning that Black-preferred candidates can prevail as a result of joint support of African American voters and white Democrats, making it unnecessary for the black voting age population in the district to constitute a majority of the district's population." NCLCV Mem. at 17. In other words, NCLCV admits that the purpose of their algorithm was to determine the targeted percentage of black voters needed to make the district effective without regard to votes cast by other minority groups. The algorithm was not programmed to create a majority minority pool by gathering different minority groups, which collectively could constitute a majority, and then determining if racial bloc voting prevented this combination of minority groups from electing their preferred candidate.

Thus, just as NCLCV has failed to show evidence of the *Gingles* threshold conditions to establish majority black districts, they have utterly failed to offer evidence of threshold conditions which could justify a coalition district. Under *Gingles*, a plaintiff not only has to prove that the minority group (or combination of minority groups) constitute a majority in a geographically compact district, they also have to prove that the minority group or groups are politically cohesive. Put simply, plaintiffs pursing §2 districts must produce evidence that their minority group or groups vote for the same candidate. *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986). NCLCV Plaintiffs have offered absolutely no evidence that black voters are cohesive with any other minority group. To the contrary, for example, past litigation indicates that blacks are not politically cohesive with Native Americans. *Harris v, McCrory*, 158 F.Supp.3d 600, 617 (M.D.N.C. 2016), *aff'd sub. Nom, Cooper v. Harris*, 137 S.Ct. 1455 (2017) (testimony by Congressman Mel Watt

that African Americans in Mecklenburg County are not politically cohesive with Native Americans in southeastern North Carolina)

The NCLCV maps have also been drawn to meet the partisan metrics the North Carolina Supreme Court has now deemed mandatory in measuring the alleged partisan fairness of statewide maps.[10] Obviously, the way a single district is drawn, much less four congressional districts, 12 Senate districts and 36 House districts, impacts the partisan balance of every other district and the entire map. Clearly, NCLCV's admitted motive to create opportunity districts whenever possible (and in excess of black voters' proportional share of the voting age population), necessarily infuse[d] race into every line drawn by the algorithm for every district. *League of United Latin American Voters v Perry*, 548 U.S, 399 , 445-46 (2006). To justify districts drawn based upon race, NCLCV would be required to do a district by district analysis explaining the justification of using race in the drawing of each *Covington*, 316 F.R.D. at 142-65. Given the evidence and record before the court, any order adopting the NCLCV simulated plans would ratify racial gerrymanders that are equally illegal as the districts declared unlawful in *Harris* and *Covington*.

VII. Conclusion.

For the reasons stated herein the Court should decline the Plaintiffs' invitation to judge a redistricting beauty contest, and order the General Assembly's Remedial maps, which are clearly presumptively constitutional under the North Carolina Supreme Court's February 14, 2022 order for use in the upcoming 2022 elections.

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

/s/ Phillip J. Strach

[10] As we have explained, there are several instances where the NCLCV maps do not meet these metrics. See *supra* Section III.

NELSON MULLINS RILEY &
SCARBOROUGH LLP
Phillip J. Strach (NC Bar No. 29456)
phillip.strach@nelsonmullins.com
Thomas A. Farr (NC Bar No. 10871)
tom.farr@nelsonmullins.com
Alyssa M. Riggins (NC Bar No. 52366)
alyssa.riggins@nelsonmullins.com
4140 Parklake Avenue, Suite 200
Raleigh, NC 27612
Telephone: (919) 329-3800

BAKER HOSTETLER LLP
Mark E. Braden* (DC Bar No. 419915)
MBraden@bakerlaw.com
Katherine McKnight* (VA Bar No. 81482)
kmcknight@bakerlaw.com
1050 Connecticut Ave NW, Suite 1100 Washington DC
20036
* Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

It is hereby certified that on this the 21st day of February, 2022, the foregoing was served on the individuals below by email:

Burton Craige
Narendra K. Ghosh
Paul E. Smith
Patterson Harkavy LLP
100 Europa Drive, Suite 420
Chapel Hill, NC 27517
bcraige@pathlaw.com
nghosh@pathlaw.com
psmith@pathlaw.com
Counsel for Plaintiffs Rebecca Harper, et al.

Aria C. Branch
Lalitha D. Madduri
Jacob D. Shelly
Graham W. White
Elias Law Group LLP
10 G Street NE, Suite 600
Washington, DC 20002
ABranch@elias.law
LMadduri@elias.law
JShelly@elias.law
GWhite@elias.law
Counsel for Plaintiffs Rebecca Harper, et al.

Abha Khanna
Elias Law Group LLP
1700 Seventh Avenue, Suite 2100
Seattle, WA 98101
AKhanna@elias.law
Counsel for Plaintiffs Rebecca Harper, et al.

Elisabeth S. Theodore
R. Stanton Jones
Samuel F. Callahan
Arnold and Porter
Kaye Scholer LLP
601 Massachusetts Avenue NW
Washington, DC 20001-3743
elisabeth.theodore@arnoldporter.com
Counsel for Plaintiffs Rebecca Harper, et al.

Terence Steed
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629
tsteed@ncdoj.gov
Counsel for the North Carolina State Board of Elections; Damon Circosta, Stella Anderson, Jeff Carmon III, Stacy Eggers IV, and Tommy Tucker, in their official capacities with the State Board of Elections

David J. Bradford
Jenner & Block LLP
353 North Clark Street
Chicago, IL 60654
dbradford@jenner.com

Counsel for Plaintiffs North Carolina League of Conservation Voters, et al.

Stephen D. Feldman
Robinson, Bradshaw & Hinson, P.A.
434 Fayetteville Street, Suite 1600
Raleigh, NC 27601
sfeldman@robinsonbradshaw.com
Counsel for Plaintiffs North Carolina League of Conservation Voters, et al.

Sam Hirsch
Jessica Ring Amunson
Kali Bracey
Zachary C. Schauf
Karthik P. Reddy
Urja Mittal
Jenner & Block LLP
1099 New York Avenue, NW, Suite 900
Washington,DC 20001
shirsch@jenner.com
zschauf@jenner.com

Counsel for Plaintiffs North Carolina League of Conservation Voters, et al.

Adam K. Doerr
Robinson, Bradshaw & Hinson, P.A.
101 North Tryon Street, Suite 1900
Charlotte, NC 28246
adoerr@robinsonbradshaw.com

Erik R. Zimmerman
Robinson, Bradshaw & Hinson, P.A.
1450 Raleigh Road, Suite 100
Chapel Hill, NC 27517
ezimmerman@robinsonbradshaw.com

Counsel for Plaintiffs North Carolina League of Conservation Voters, et al.

Allison J. Riggs
Hilary H. Klein
Mitchell Brown
Katelin Kaiser
Southern Coalition For Social Justice
1415 W. Highway 54, Suite 101
Durham, NC 27707
allison@southerncoalition.org
hilaryhklein@scsj.org
Mitchellbrown@scsj.org
Katelin@scsj.org

J. Tom Boer
Olivia T. Molodanof
Hogan Lovells US LLP
3 Embarcadero Center, Suite 1500
San Francisco, CA 94111
tom.boer@hoganlovells.com
olivia.molodanof@hoganlovells.com
Counsel for Intervenor Common Cause

/s/ Phillip J. Strach

NELSON MULLINS RILEY & SCARBOROUGH LLP
Phillip J. Strach (NC Bar No. 29456)
phillip.strach@nelsonmullins.com