STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
COUNTY OF WAKE	21 CVS 015426, 21 CVS 500085

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR., et al.,

Plaintiffs,

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.

NCLCV PLAINTIFFS' COMMENTS ON REMEDIAL MAPS

Pursuant to the Court's February 8, 2022 Order on Submission of Remedial Plans for Court Review ("Feb. 8 Order"), the NCLCV Plaintiffs submit their comments on the Proposed Remedial Plans submitted by the Legislative Defendants (the "LD" Plans).[1]

COMMENTS

I. The Legislative Defendants' Congressional and Senate Plans Fail the Supreme Court's Unambiguous Standards.

When the Supreme Court struck down the plans that the General Assembly enacted in November 2021, it set a clear standard that remedial plans would have to meet: Plans must treat voters of both political parties fairly, so long as North Carolina's unique political geography permits doing so. But the LD Congressional and Senate Plans are not fair. And it is not close.

[1] The NCLCV Plaintiffs are submitting these comments well in advance of the deadline of 5:00 p.m., Monday, February 21, 2022, recognizing that the Court, the Special Masters, and their assistants are tasked with completing their work quickly. The NCLCV Plaintiffs, however, reserve the right to supplement this submission in advance of that deadline.

These plans—passed over unanimous Democratic opposition—are, again, egregiously skewed to favor Republicans. In attempting to avoid that conclusion, the Legislative Defendants focus attention on mean-median and efficiency-gap scores. But even leaving aside that the Legislative Defendants have reported scores that do not accurately reflect their plans' skew (as shown below), the Supreme Court did not order maps with particular mean-median or efficiency-gap scores. It ordered fair maps. Because the LD Congressional and Senate Plans are not fair maps, the Court should not approve them. Instead, the Court should adopt one of the fairer maps before it—such as the NCLCV Maps—or draw its own maps with similar partisan-fairness characteristics.

A. The Supreme Court Required that Redistricting Plans Give "Voters of All Political Parties Substantially Equal Opportunity to Translate Votes into Seats."

The Supreme Court established a clear principle, which the Legislative Defendants barely mention: Under the North Carolina Constitution, redistricting plans must "give … voters of all political parties substantially equal opportunity to translate votes into seats." Opinion ¶ 163, *Harper v. Hall*, No. 413PA21, 2022-NCSC-17 (N.C. Feb. 14, 2022) ("*Harper* Op."). That was no loose language, or offhand remark. It was the Court's carefully considered statement of its holding, as also reflected in its February 4 Order. Order ¶ 6, *Harper v. Hall*, No. 413PA21 (N.C. Feb. 4, 2022) ("*Harper* Order"); *see Harper* Op. ¶¶ 160–163, 179–180.

The Supreme Court located that core principle—a principle of partisan fairness—in the constitutional provisions the Plaintiffs invoked: "When the legislature denies to certain voters … substantially equal voting power," the Court explained, "elections are not free and do not serve to effectively ascertain the will of the people," in violation of the Free Elections Clause. *Harper* Op. ¶ 140. Likewise, when redistricting plans do not treat voters of both parties evenhandedly, they violate the Equal Protection Clause's guarantees of "substantially equal voting power," "substantially equal legislative representation," and equal "representational influence." *Id.* ¶ 148

(quoting *Stephenson v. Bartlett*, 355 N.C. 354, 377, 382, 562 S.E.2d 377, 393, 396 (2002) (*Stephenson I*)). Finally, when a redistricting plan "systematically diminishes or dilutes the power of votes on the basis of party affiliation," it violates the core promises of the Free Speech and Free Assembly Clauses. *Id.* ¶ 157.

The Legislative Defendants invite the Court to gloss over that core partisan-fairness principle in favor of a narrow focus on mean-median differences and efficiency gaps. But even if the Legislative Defendants' calculations were correct—and in fact, they are flawed—the Supreme Court did not hold that the Constitution blesses all plans having, say, a mean-median difference of 1% or less, or an efficiency gap of 7% or less. To the contrary, the Supreme Court expressly cautioned that it was identifying only "possible" metrics. *Id.* ¶ 164; *accord id.* ¶ 165 (Dr. Duchin's "close votes, close seats" measure "could be considered"); *id.* ¶ 166 (mean-median difference "could be a threshold"); *id.* ¶ 167 (recounting what other "courts have found" with respect to the efficiency gap). The constitutional ***principle*** the Supreme Court announced was the one quoted above: Plans must "give … voters of all political parties substantially equal opportunity to translate votes into seats," and any "meaningful … skew" can be constitutional only if it "***necessarily*** results from North Carolina's unique political geography." *Id.* ¶ 163 (emphasis added). If a map meets that standard, it is presumptively constitutional. And if not, not.

Indeed, the Supreme Court wisely refrained from establishing "precise mathematical thresholds" that conclusively "demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Id.* ¶ 163. That is so not just because mean-median scores and efficiency gaps are evidentiary tools rather than constitutional principles, but also because—as the academic literature makes clear—each specific metric has properties that can conceal partisan bias under

some conditions.[2] In fact, the public record here shows that the Legislative Defendants initially proposed one congressional plan, only to pull it in favor of one that "score[d]" better on the specific measures had they decided to feature. Steve Doyle, WGHP, *NC General Assembly Approves New Congressional Map*, https://bit.ly/3By1hpr (Feb. 18, 2022); *accord* LD Br. 6, 24. The Legislative Defendants thus did not endeavor to give "voters of all political parties substantially equal opportunity to translate votes into seats." *Harper* Op. ¶ 163. They instead set out to draw the most pro-Republican maps they could, so long as they could ***also*** say that they achieved particular scores on (carefully chosen) metrics.

That is not the remedy the Supreme Court directed. Now that the Enacted Plans have been invalidated as unlawful partisan gerrymanders, Plaintiffs are entitled to a remedial plan "that will fully correct past wrongs" and provide all voters genuinely equal opportunity. *See N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 239–40 (4th Cir. 2016) (invalidating voter-identification law in full, despite the General Assembly's post-suit amendment to create an exception for voters who declared they faced a "reasonable impediment" to obtaining identification, because the record did not show that the exception "fully cure[d]" the constitutional harm; because the Court was obligated to "ensure that [the challenged] provisions do not impose any lingering burden on … voters"; and because the exception "falls short of the remedy that the Supreme Court has consistently applied in cases of this nature").

The Legislative Defendants rely heavily on the general proposition that acts of the General Assembly are presumed constitutional. LD Br. 3. But this is a remedial proceeding in which the

[2] Daryl DeFord, et al., *Implementing Partisan Symmetry: Problems and Paradoxes*, POLITICAL ANALYSIS, *preprint available at* https://arxiv.org/pdf/2008.06930.pdf (2021); Ellen Veomett, *Efficiency Gap, Voter Turnout, and the Efficiency Principle*, 17 ELECTION L.J. 249, 252–62 (2018); Mira Bernstein & Moon Duchin, *A Formula Goes to Court: Partisan Gerrymandering and the Efficiency Gap*, 64 NOTICES OF THE AMERICAN MATHEMATICAL SOCIETY 1020, 1022–24 (2017).

General Assembly's redistricting plans have ***already*** been invalidated as extreme partisan gerrymanders. In this context, the Supreme Court has expressly identified what facts would entitle the General Assembly to a presumption of constitutionality: If "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 …, then the plan is presumptively constitutional." *Harper* Op. ¶ 163; *see Harper* Order ¶ 6. Because the LD Congressional and Senate Plans fail to satisfy that standard—as shown in the next section—they are not entitled to a presumption of constitutionality.

B. The LD Congressional and Senate Plans Do Not Give "Voters of All Political Parties Substantially Equal Opportunity to Translate Votes into Seats."

The LD Congressional and Senate Plans badly fail to comply with the principle the Supreme Court established—that districting plans must "give … voters of all political parties substantially equal opportunity to translate votes into seats." *Harper* Op. ¶ 163.

1. The LD Congressional Plan Does Not Treat Voters Evenhandedly.

To see that the LD Congressional Plan fails to satisfy the principle the Supreme Court established, no complicated calculations or statistics are required. The NCLCV Plaintiffs' expert, Dr. Duchin, has overlaid the LD Congressional Plan (along with the equivalent NCLCV and *Harper* maps) on all 52 contested partisan statewide general elections since 2012, which provide a rich dataset that identifies how plans would perform under historical election patterns. *See* Second Report of Dr. Moon Duchin 5 ("2d Duchin Rep."). A map that treated the parties evenhandedly would yield closely divided outcomes in near-tied elections and would treat narrow Democratic victories the same as narrow Republican victories, without favoring one party over the other. *See* NCLCV Br. on Proposed Remedial Plans 13–14 (Feb. 18, 2022) ("NCLCV Br.") (discussing symmetry ideal).

The LD Congressional Plan does not treat the parties evenhandedly:

- ***Near ties.*** Of the 52 elections, 9 elections were near-ties decided by less than 1%. In those elections, Republican candidates ***always*** carry at least 8 of the 14 districts. In two elections, they carry 9 districts. Democratic candidates ***never*** carry an equal seat share in near-tied elections. (All information in these bullet points comes from 2d Duchin Rep. 5.)

- ***1% to 3% victories.*** Of the elections that ***Republican*** statewide candidates won by 1% to 3% (*i.e.*, with 50.5% to 51.5% of the two-party vote statewide), Republican candidates on average carry 9 districts (carrying 10 districts in 4 elections, 9 districts in 3 elections, and 8 districts in 5 elections).

  In the elections that ***Democratic*** statewide candidates won by 1% to 3%, Democratic candidates on average carry 7 districts. That is two fewer seats than Republican candidates win with the same vote share. Thus, the same statewide margin that earns Republican candidates a large majority (typically 9 seats to 5) yields only a ***tie*** for Democrats (7 to 7). Indeed, of the 16 total elections in which Democratic candidates won the majority of votes, Republican candidates win the majority of districts 7 times (or 44%).[3]

- ***3% to 6% victories.*** In the elections that ***Republican*** statewide candidates won by 3% to 6% (*i.e.*, with 51.5% to 53.0% of the two-party vote statewide), Republican candidates on average carry 10 districts.

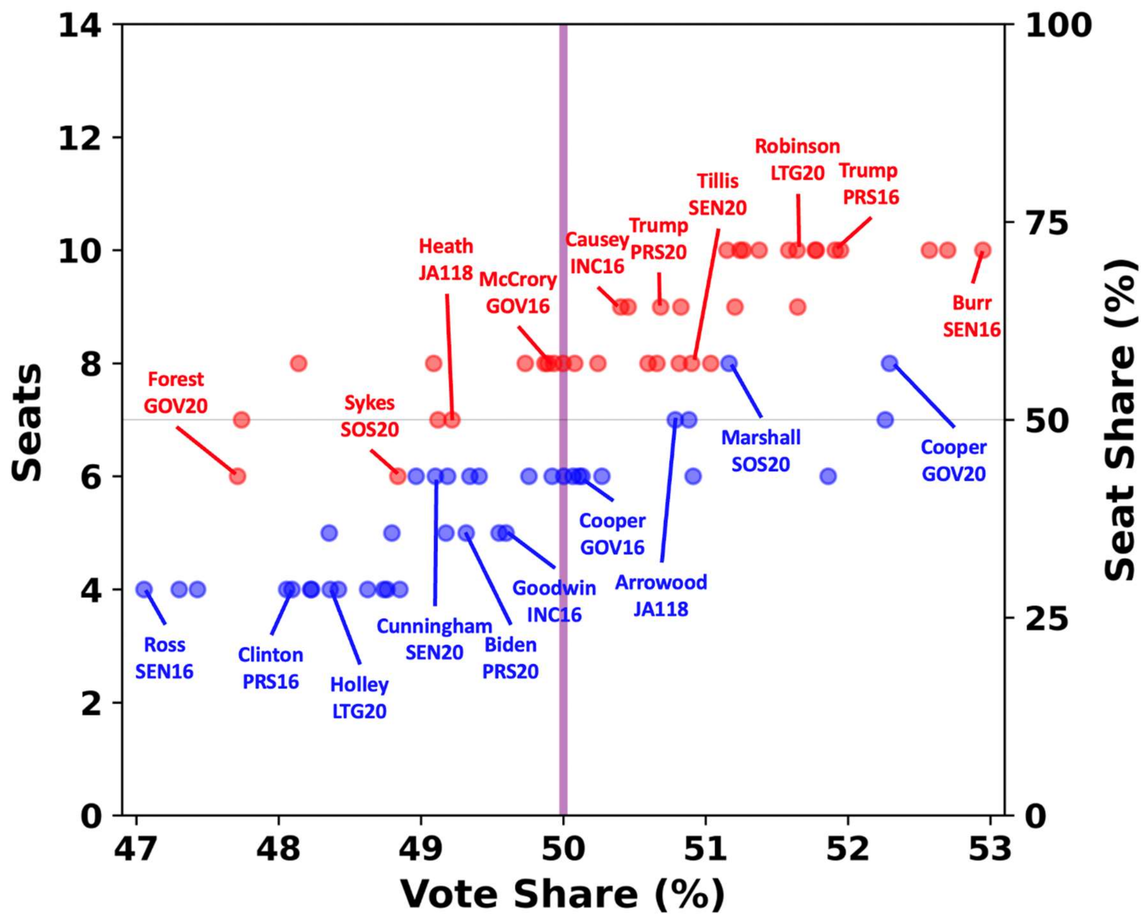
  In the elections that ***Democratic*** statewide candidates won by 3% to 6%, Democratic candidates on average carry 7 districts (receiving 6, 7, and 8 seats in one election each). That is, even when Democratic candidates prevail by substantial margins statewide, and when Republican congressional candidates would carry 10 districts from the same vote share, Democratic candidates still carry only 7 districts.

Figure 1 illustrates this lack of symmetry. In the 38 elections decided by less than 6 points, red dots identify Republican candidates and blue dots identify Democratic candidates. (To keep the figure from becoming indecipherable, only 20 of the 76 candidates are identified, with the candidate's surname and an abbreviation for the office and the election year.) Each dot is situated, left to right, according to the share of the statewide major-party vote that the candidate received. And each dot is situated, top to bottom, according to the number of districts that the candidate

[3] Dr. Barber emphasizes that Republicans carry a majority of districts with a minority of votes in only one of the 12 elections he analyzes. *See* Barber Remedial Report 14–15 (Feb. 18, 2022). But he analyzes only ***four*** elections in which Democratic candidates received a majority of votes.

carried in the LD Congressional Plan. In a perfectly symmetric map, the red dots and blue dots would be thoroughly intermingled—which would show that neither Republican nor Democratic candidates would have an easier time translating votes into seats. In a fair map, as well, when both parties' vote shares are close to 50%, the seat share would also be close to half (here, 7 districts of 14)—and that would be true for both red dots and blue dots, many of which would cluster near the center. By contrast, in a Republican-favoring map, one would expect the red dots generally to be higher and the blue dots generally to be lower. That would signify that, for any given vote share, Republicans carry more seats than do Democrats. That is just what happens in Figure 1.

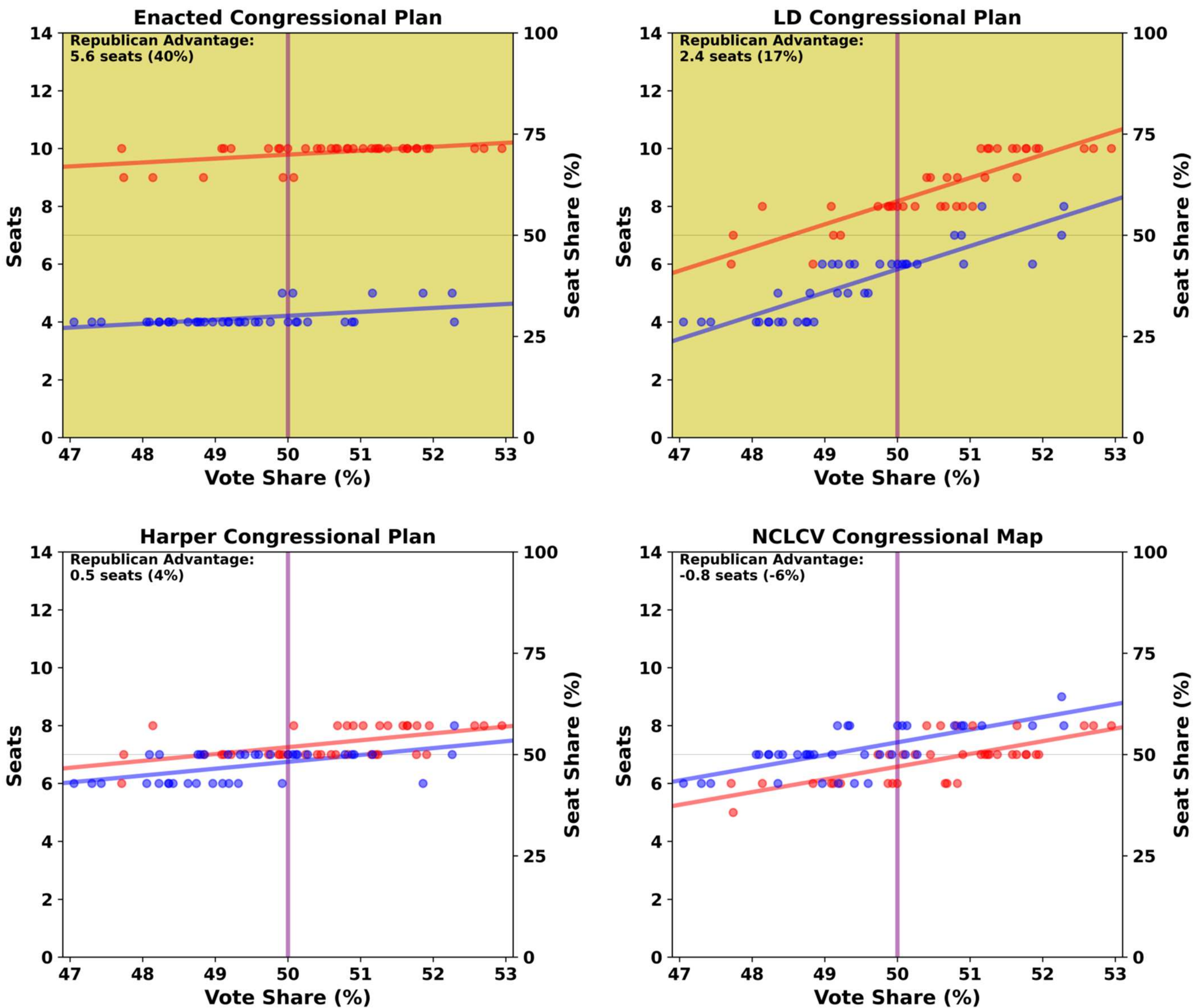
Figure 1: Republican and Democratic Seat Shares for Elections Within 6 Points in the LD Congressional Plan.



Source: Data derived from 2d Duchin Rep. 5.

Figure 2 contains four charts that are similar to Figure 1, with three differences. First, candidate names have been removed for readability. Second, red and blue regression lines have been added. These are simply straight lines that run through the heart of the dots of the same color. The red line is fitted to the red dots and shows how Republicans translate votes into seats; the blue line is fitted to the blue dots and shows how Democrats translate votes into seats. Again, in a perfectly fair, symmetric map, the lines would be identical (so we would see one "purple" diagonal line). Third, Figure 2 depicts four different congressional maps: The top left is the now-invalidated map that the General Assembly enacted in November 2021; the top right is the newly enacted LD Congressional Plan (the same one shown in Figure 1); the bottom left is the remedial congressional plan proposed by the *Harper* plaintiffs; and the bottom right is the NCLCV Congressional Map. These four graphs show that, although the LD Congressional Plan is only about half as biased as the now-invalidated congressional plan, it is still three to four times as biased as either the *Harper* plan or the NCLCV Map. So the gap between Republican seats and Democratic seats—which had been 5.6 seats for the invalidated map—is still 2.4 seats for the LD Plan, compared with less than one seat for either of the Plaintiffs' proposed maps. (A yellow background indicates a map with an especially large partisan skew.)

Figure 2: Republican and Democratic Seat Shares for Elections Within 6 Points in the Enacted Congressional Plan and Proposed Remedial Plans



Source: Data derived from 2d Duchin Rep. 5.

The scores the LD Congressional Plan receives—calculated across all 52 elections, and without the flaws in Dr. Barber's analysis, *see infra* pp. 16–17—confirm the failure to treat voters of both parties evenhandedly. The plan has a partisan-bias score of -6.6%, meaning that in a tied election Republicans would win 56.6% of seats. 2d Duchin Rep. 10. Its mean-median difference is -1.5% (showing that Democrats are more packed and cracked), and its efficiency gap is -9.3%

(similarly showing that Republicans are more efficiently distributed across districts while Democrats have substantially more "wasted" votes). *Id.*

Nor can it be said that this skew "necessarily" results from North Carolina's political geography. This Court now has before it multiple alternative plans that treat voters from both parties far more fairly, while also complying better with North Carolina's traditional neutral districting principles. The NCLCV Plaintiffs have proposed the NCLCV Congressional Map, whose partisan-fairness and geographic characteristics they have detailed in their opening submission. NCLCV Br. 11–18. On all the metrics described in the previous paragraph—on which smaller numbers are better—the NCLCV Congressional Map's scores are ***half*** or less of those of the LD Congressional Plan: Its partisan-bias score is just 3.6%, its mean-median difference is just 0.7%, and its efficiency gap is just 0.6% (or less than a tenth of the LD Congressional Plan's score). 2d Duchin Rep. 10. More important than any particular metric, however, are the fair results this plan achieves. For example, in the 9 near-tied elections decided by less than 1% of the statewide vote, Democratic and Republican candidates both average 7 seats. *Id.* at 5. As explained above, the *Harper* Plaintiffs have also proposed another congressional map and described how it satisfies the Supreme Court's partisan-fairness principle. *See Harper* Plaintiffs' Submission Regarding Proposed Remedial Plans at 5–7 (Feb. 18, 2022).

Another common-sense metric—also discussed in the Supreme Court's opinion—underscores how badly skewed the LD Congressional Plan remains. As Dr. Duchin explains, in an evenhanded map, close elections will generally translate into close seat shares, and any departures will not systematically advantage one party. Duchin Remedial Report 4 (Feb. 18, 2022) (Ex. P to NCLCV Remedial Submission); *see Harper* Op. ¶ 165 ("Under th[e] [close votes, close seats] method, which Dr. Duchin has written about extensively, a plan which persistently resulted

in the same level of partisan advantage to one party when the vote was closer than 52%, could be considered presumptively unconstitutional.”). Hence, while no map will guarantee that the statewide majority of votes will ***always*** yield the statewide majority of seats, close elections under a fair map will generally yield 6 to 8 seats for both parties. Duchin Remedial Report 4. North Carolina has witnessed 33 statewide partisan elections decided by less than 4 points since 2012. And in those elections, the NCLCV Congressional Map translates those close votes into close seats in ***every case***. 2d Duchin Rep. at 5. The LD Congressional Plan violates that standard ***15 times***. *Id.* Every time, the departure favors Republicans.

More than that: The LD Congressional Plan often violates the close votes, close seats standard by ***multiple*** seats (*i.e.*, it yields 10 Republican seats and 4 Democratic seats in elections decided by less than 4 points). Over all 33 close elections decided by less than 4 points, Republican candidates receive ***25 additional seats*** above what a fair map would yield (*i.e.*, counting a 9-to-5 result as a one-seat deviation and a 10-to-4 result as a two-seat deviation). This skew—again, always favoring Republicans—illustrates how the LD Congressional Plan violates the Supreme Court’s directive of evenhanded treatment.

The LD Congressional Plan, moreover, produces these skewed results by ***subordinating*** traditional districting principles. The LD Congressional Plan is less compact than the NCLCV Congressional Map, with a mean Polsby-Popper score of 0.30 (compared with 0.38 for the NCLCV map; higher is better). It splits one more county (14 versus 13 in the NCLCV Map), and many more municipalities (45 total and 33 involving population, compared with just 27 and 19, respectively, in the NCLCV Map). *Compare* N.C. Gen. Assembly, StatPack, SL 2022-3 at 33, 48 (provided with Legislative Defendants’ remedial submission), *with* Ex. M to NCLCV Remedial Submission at 10–25. The NCLCV Congressional Map also avoids splitting voters of the

Piedmont Triad into three districts. The skew in the LD Congressional Plan thus does not stem from traditional neutral districting principles but from the Legislative Defendants' efforts to evade the Supreme Court's command to treat voters of both parties fairly.

Nor can the skew be attributed to any supposed desire to create competitive districts. While the Legislative Defendants claim that the LD Congressional Plan creates four competitive districts, *e.g.*, LD Br. 25, the NCLCV Congressional Map is similarly competitive, PX150 at 13.[4] And the NCLCV Congressional Map creates those competitive elections while also treating both parties fairly. *Supra* p. 10. So the Legislative Defendants cannot point to competitive seats to justify their failure to satisfy the partisan-fairness standard established by the Supreme Court.

2. The LD Senate Plan Does Not Treat Voters Evenhandedly.

Similarly, the LD Senate Plan fails to "give … voters of all political parties substantially equal opportunity to translate votes into seats." *Harper* Op. ¶ 163.

- ***Near ties.*** In the 9 near-tied statewide elections (of 52 total) decided by less than 1%, Republican candidates carry 27 or 28 of the 50 Senate districts in 8 elections; Democratic candidates typically carry 22 or 23 districts, and reach 25 wins—a bare tie—just once. (Again, all information in these bullet points comes from 2d Duchin Rep. 5.)

- ***1% to 3% victories.*** In the elections in which ***Republican*** statewide candidates won by 1% to 3%, Republican candidates carry an average of more than 28 districts and carry a supermajority of 30 districts in several elections.

  In the elections in which ***Democratic*** statewide candidates won by 1% to 3%, Democratic candidates sometimes do not win even a majority of districts and average only 25. In total, Republican candidates carry a majority of districts in 7 elections in which Democratic candidates received a majority of votes (or 44% of the total). 2d Duchin Rep. 5.[5]

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[4] In particular, in the 52 statewide partisan general elections since 2012 that Dr. Duchin analyzed, the NCLCV Congressional Map produces 187 elections—out of 728 total during that period (52 elections times 14 districts)—decided by 6 points or less. PX150 at 20. That is 26% of the total, which is equivalent to 3.6 competitive seats.

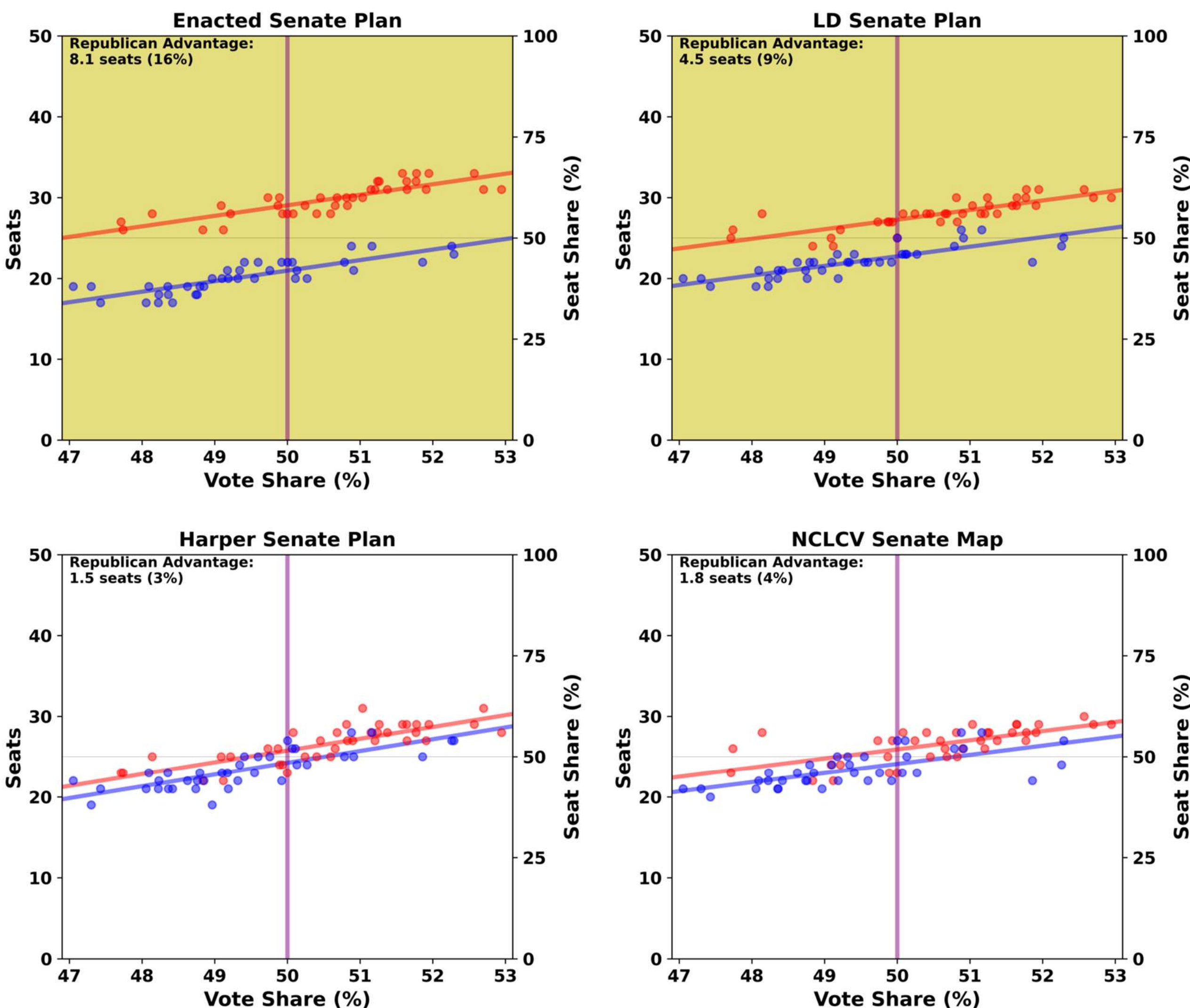
[5] Dr. Barber again emphasizes that Republicans carry a majority of districts with a minority of votes in only one of the 12 elections he analyzes. *See* Barber Remedial Report 35–36. But again, he analyzes only ***four*** elections in which Democratic candidates received a majority of votes.

- ***3% to 6% victories.*** In the 9 elections that ***Republican*** statewide candidates won by 3% to 6%, Republican candidates carry a 30-plus district supermajority 6 times out of 9.

  In the elections that ***Democratic*** statewide candidates won by 3% to 6%, Democratic candidates never carry a majority of Senate districts, averaging only 24 districts. Thus, when the Legislative Defendants trumpet that "Governor Cooper … would have won 25 districts" in the LD Senate Plan, LD Br. 20, they miss the point: Governor Cooper won by more than 4.5 points. The same margin of victory for a Republican candidate would likely yield a Republican ***supermajority***. A fair and symmetric map would not award one party a bare tie for the same margin that would give the other party veto-proof control.

Figure 3 illustrates this lack of symmetry and again shows that the General Assembly retained about half of the partisan skew of the now-invalidated Senate plan. The invalidated plan would have given Republicans an average of 8 more seats than Democrats for a similar vote share in a typically competitive election environment. The LD Senate Plan would give Republicans a 4- or 5-seat advantage. By contrast, the Plaintiffs' proposed maps shrink that figure down to about 1.5 seats. (The residual pro-Republican skew in the Plaintiffs' maps is likely due to the interaction of political geography and the Whole County Provisions, as interpreted by the Supreme Court.)

Figure 3: Republican and Democratic Seat Shares for Elections Within 6 Points in the Enacted Senate Plan and Proposed Remedial Plans



Source: Data derived from 2d Duchin Rep. 5.

The LD Senate Plan has a partisan bias score of -4.4%, a mean-median difference of -2.0%, and an efficiency gap of -4.5%. 2d Duchin Rep. 11.

The NCLCV Senate Map again underscores that, while the Whole County Provision may produce some modest pro-Republican bias, the LD Senate Plan's bias vastly exceeds what political geography "necessarily" yields. *Harper* Op. ¶ 163. On all the metrics just described, the NCLCV Senate Map's scores improve dramatically on those of the LD Senate Plan: The NCLCV Senate

Map's partisan bias is just -1.5%, its mean-median difference is just -0.9%, and its efficiency gap is just -2.0%. Moreover, in the 9 near-tied elections decided by less than 1%, Democratic candidates average between 24 and 25 seats in the NCLCV Senate Map—just as one would expect. When Republican statewide candidates prevail by 1% to 3%, Republican candidates win an average of 27 Senate seats—and when Democratic statewide candidates prevail by 1% to 3%, they receive the same 27 seats on average. And so on. That is the type of fair, symmetric plan the Legislative Defendants could have drawn, but chose not to draw.

A stark illustration of the skew comes from the results the LD Senate Plan yields across all 33 statewide elections decided by 4 points or less. In those close elections, one would expect a fair map to yield something like 23 to 27 seats for each party and to minimize the extent to which departures favor one party or another. 2d Duchin Rep. 4. While the Whole County Provisions produce some departures from that standard in both the NCLCV Senate Map and the LD Senate Plan, the LD Senate Plan does so in ***nine additional elections*** for a total of ***23 additional Republican seats*** (*i.e.*, seats above 27). More than that, the NCLCV Senate Map ***never*** translates a close election within 4 points into a Republican supermajority; the LD Senate Plan does so five times (or 22% of the 23 elections that Republican statewide candidates win by less than 4 points).

The LD Senate Plan yields these skewed results, moreover, while also traversing county lines seven times more than the NCLCV Senate Map (96 versus 89). The two plans' Polsby-Popper scores are nearly identical (0.38 for the LD Senate Plan and 0.37 for the NCLCV Map), and the NCLCV Senate Map splits fewer municipalities (with the LD Senate Plan splitting 65 municipalities and 52 involving population, and the NCLCV Senate Map splitting 51 and 41, respectively). *Compare* N.C. Gen. Assembly, StatPack, SL 2022-2 at 76 (provided with Legislative Defendants' remedial submission), *with* Ex. N to NCLCV Remedial Submission at 10–

26, 77. So again, the LD Senate Plan's poor results on partisan-fairness metrics are not driven by political geography. They are due to partisan gerrymandering. And again, these results violate the Supreme Court's mandate that plans must give all voters "substantially equal opportunity to translate votes into seats." *Harper* Op. ¶ 163.

As with Congress, the skew here cannot be attributed to any supposed desire to create competitive districts. The Legislative Defendants claim that the LD Senate Map creates "10 districts … within 10 points." LD Br. 19–20. But again, the NCLCV Senate Map has the same degree of competitiveness—indeed, more—while also treating voters of both parties more fairly.[6] So again, the Legislative Defendants cannot use competitiveness to cover for their skewed maps.

C. The Statistics the Legislative Defendants Provide Do Not Accurately Reflect the Skew in Their Plans (and Are Beside the Point).

The Legislative Defendants seek to justify their skewed plans largely based on mean-median and efficiency-gap scores calculated by Dr. Barber. The principal answer to those arguments is the one given above: The Supreme Court directed that plans must treat voters of both parties fairly—and if plans flout that principle, no specific metrics can save them from invalidity.

Dr. Barber's calculations, moreover, do not accurately reflect the skew in the LD Congressional and Senate Plans. First, Dr. Barber's selection of elections artificially depresses the skew he calculates. He uses 12 elections that Dr. Mattingly employed for his cluster-by-cluster analysis, rather than the larger 15 election set Dr. Mattingly employed for his statewide analysis. That choice excludes the 2016 Governor and Attorney General races—two close Democratic victories that, under the LD Congressional and Senate Maps, both yield countermajoritarian

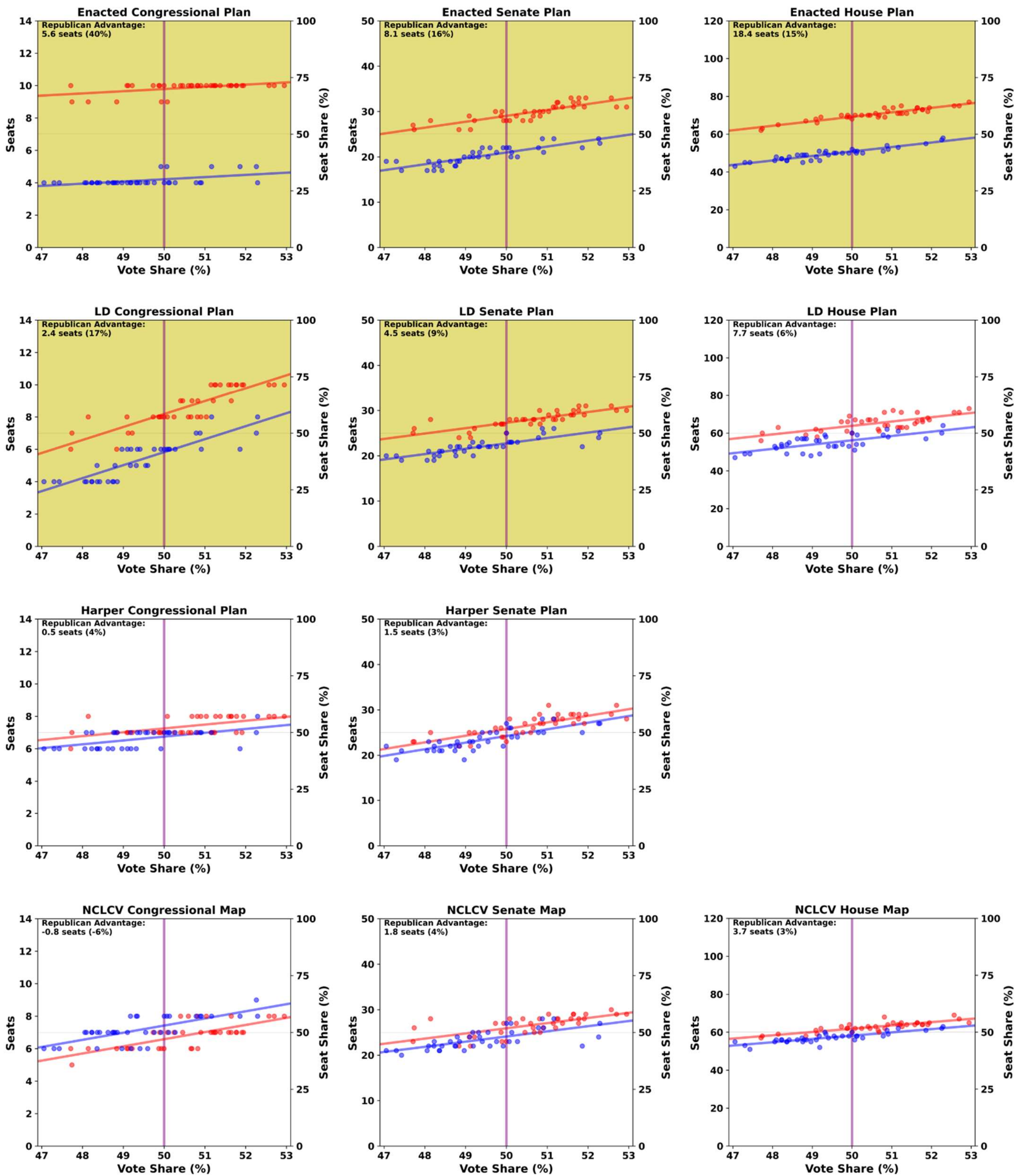
[6] In particular, in the 52 statewide partisan elections since 2012 analyzed by Dr. Duchin, the NCLCV Congressional Map produces 566 elections—out of 2,600 total during that period (52 elections x 50 districts)—decided by 10 points or less. PX150 at 15. That is 21.7%, which is equivalent to 10.9 competitive seats out of 50.

outcomes. *See* 2d Duchin Rep. 14. Second, and more important, Dr. Barber appears to calculate his metrics by adding up votes across ***all 12 elections*** and then performing the calculations (rather than performing the calculations on individual elections and then averaging them). This blending has the effect of submerging the systematic skew that an election-by-election analysis would reveal. As Dr. Duchin explains, for example, "a 'wasted vote'" in the efficiency-gap calculation "is a property of the individual election, not of the composite." *See id.* (illustrating how a "composite" approach skews the outcome).

D. The Court Should Independently Assess the House Plan that Passed with Overwhelming Bipartisan Support.

Unlike the LD Congressional and Senate Plans, the General Assembly enacted a remedial House plan with overwhelming bipartisan support—155 to 5 in the House, and 41 to 3 in the Senate. The NCLCV Plaintiffs urge the Court not to rely on the characterization of the LD House Plan's partisan characteristics in the Legislative Defendants' filing. This characterization is based on the same flawed metrics discussed above. The NCLCV Plaintiffs have assessed the LD House Plan based on their own metrics and analysis, and they trust that the Court and the Special Masters will do the same. To place the LD House Plan and the NCLCV House Map in the context of the same metrics discussed above, the NCLCV Plaintiffs provide the following summary Figure 4, which includes an apples-to-apples comparison of every remedial plan submitted to this Court.

Figure 4: Republican and Democratic Seat Shares Across Remedial Plans.



Source: Data derived from 2d Duchin Rep. 5.

II. There Is No Merit to the Legislative Defendants' Race-Related Arguments.

A. The NCLCV Maps Are Not Racial Gerrymanders.

The Legislative Defendants chose not to undertake the racially polarized voting analysis the Supreme Court required. *Compare Harper* Order ¶ 8 ("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."), *with* LD Br. 31, 39 n.21, 40–43 (various attempts to explain Legislative Defendants' decision not to comply with the Supreme Court's order). Instead, the Legislative Defendants try to distract from that failure by claiming that the NCLCV Maps are unlawful racial gerrymanders. These arguments lack merit.

1. The Legislative Defendants premise their argument on a factual claim that is clearly incorrect: They say that the NCLCV Maps "draw race-based districts with a targeted minority population," and they aver that drawing maps "to maximize the number of effective black districts" in this way is impermissible "racial gerrymandering" in violation of the Fourteenth Amendment. LD Br. 34, 41–42. The NCLCV Maps, however, were not designed to achieve any particular population of minority voters in any district nor to maximize the number of minority opportunity districts. The evidence at trial showed that the algorithm used to create the NCLCV Maps "simultaneously tr[ied] to accomplish a bunch of things," including "population balance, contiguity, compactness, respect for political subdivisions, especially counties, minority electoral opportunity, [and] partisan fairness." 1/5/22 Tr. 818:8–819:1; *see* LDTX189 at 4. That is what mapmakers do all the time (albeit less rigorously) and is far removed from pursuing numerical racial targets or attempting to maximize the number of minority opportunity districts. As a result, the NCLCV Maps are fairer to voters of both parties than the General Assembly's invalidated and

remedial plans ***and*** better comport with traditional districting principles—and they also treat minority voters fairly. This is not racial gerrymandering.

2. Beyond getting the facts wrong, the Legislative Defendants are also wrong on the law. A racial-gerrymandering claim requires proving that the mapmaker "subordinated traditional race-neutral districting principles ... to racial considerations," and that "race was the predominant factor motivating the … decision to place a significant number of voters within or without a particular district." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). As the evidence at trial demonstrated, the NCLCV Maps do not subordinate any traditional race-neutral districting principles to race. Indeed, the NCLCV Maps better comply with traditional race-neutral districting principles than do the Legislative Defendants' plans (both the original and the remedial plans), while also being fair to minority voters. The evidence at trial likewise demonstrated that the NCLCV Maps did not use any "mechanical racial targets" when creating maps that provided minority voters with electoral opportunity. *Cf. Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 267 (2015). The type of consideration of race detailed above—considering race as one factor among many, in drawing districts that better comply with traditional districting principles than the legislature's—is the very opposite of subordinating traditional districting principles to race or allowing race to predominate. *Accord Cooper v. Harris*, 137 S. Ct. 1455, 1468–69 (2017); *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (*Shaw II*); *Shaw v. Reno*, 509 U.S. 630, 649, 658 (1993) (*Shaw I*).

3. The Legislative Defendants' real argument appears to be that ***any*** consideration of race in redistricting is at least presumptively unconstitutional. The U.S. Supreme Court, however, has squarely and repeatedly rejected that argument, including when it was made just three years ago by the General Assembly. In *North Carolina v. Covington*, 138 S. Ct. 2548 (2018), the General

Assembly urged the Supreme Court to reject the Special Master's remedial plan because it was "expressly race-conscious" in "consider[ing] data identifying the race of individuals or voters" to ensure that minority voters received fair electoral opportunity and were no longer packed and cracked into districts. *Id*. at 2554. A near-unanimous Court (with only Justice Thomas dissenting) resoundingly rejected the General Assembly's view of the law. *Id.* In essence, the Legislative Defendants ask this Court to adopt the views of Justice Thomas with respect to the use of race in redistricting. But those views are not the law. *E.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1485 (2017) (Thomas, J., concurring) (joining the Court's opinion finding that North Carolina had engaged in racial gerrymandering "because it correctly applies our precedents," but noting that he would have gone further to find that "North Carolina's concession that it created the district as a majority-black district is by itself sufficient to trigger strict scrutiny").

Indeed, the U.S. Supreme Court has recognized in case after case that mapmakers may consider race so long as they do not run afoul of the Voting Rights Act or the restrictions on racial gerrymandering described above. "[R]edistricting differs from other kinds of state decisionmaking in that the legislature always is ***aware*** of race when it draws district lines, just as it is aware of … a variety of other demographic factors." *Shaw I*, 509 U.S. at 646. Hence, the Supreme Court "never has held that race-conscious state decisionmaking is impermissible in all circumstances." *Id.* at 642 (emphasis omitted); *accord Miller*, 515 U.S. at 916; *Covington*, 138 S. Ct. at 2554; *see also Bethune-Hill*, 137 S. Ct. at 798–800 (holding that even the use of racial percentage targets did not render districts presumptively unconstitutional absent a showing that traditional districting principles were subordinated to racial considerations).

4. Nor is there anything to the Legislative Defendants' claim that the NCLCV Maps should be rejected because they afford too much representation to Black voters. Districts that afford

minorities fair voting opportunity do just that: They give minorities a fair ***opportunity*** to nominate and elect candidates of their choice. As Dr. Duchin explained at trial, this by no means operates as a guarantee of minority representation. 1/5/22 Tr. 441:3–7, 470:20–21, 473:7–74:8; *see Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) ("[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground ….").

And in any event, there is no credible claim that the voting rights of White North Carolinians (who constitute less than 70% of North Carolina's citizen voting-age population) are in any way unfairly diluted by affording minority voters (who constitute more than 30% of the State's population)[7] a fair opportunity in 24% of Senate districts and 29% of congressional districts, as the NCLCV Maps do. PX150 at 12.

B. The LD Senate and Congressional Plans Do Not Remedy the Racial Vote Dilution in the Enacted Plans.

The Supreme Court invalidated the Enacted Plans as unconstitutional partisan gerrymanders and did not reach the NCLCV Plaintiffs' racial-vote dilution claims under the Free Elections and Equal Protection Clauses of the North Carolina Constitution. *Harper* Op. ¶ 223 n.17. As a result, the Supreme Court has not addressed whether the North Carolina Constitution prohibits racial vote dilution in the manner the NCLCV Plaintiffs urged. The NCLCV Plaintiffs note, however, that while the NCLCV Maps fully remedy the racial vote dilution they have alleged (and so would moot the NCLCV Plaintiffs' racial vote-dilution claims), the LD Senate and Congressional Plans do not.

As Dr. Duchin explains, the LD Senate Plan creates only 10 districts (of 50) that permit Black voters to successfully nominate and elect their preferred candidates, which is less than Black

[7] U.S. Census Bureau, Citizen Voting Age Population by Race & Ethnicity (Feb. 19, 2021), https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.2019.html.

voters' share of the State's voting-age population. 2d Duchin Rep. 15. Indeed, the report the Legislative Defendants submitted from Dr. Lewis ***agrees*** that the LD Senate Plan creates only "10 State Senate districts" in which Black voters can elect their preferred candidates using the thresholds he employs. Supp. Report of Dr. Lewis ¶ 14 (Feb. 18, 2022). As a result, Black voters in Forsyth County and in southern Wake County lack the electoral opportunity they would receive under the NCLCV Senate Map. *See* 2d Duchin Rep. 15. Likewise, the LD Congressional Plan contains two, rather than four, Black opportunity districts and thus would unlawfully thwart Black electoral opportunity in the Piedmont Triad and in a stretch of south-central North Carolina running from Richmond County, through Fayetteville, to Duplin County. *Id.*

III. The Court Should Grant Certain Ancillary Relief.

A. The Court Should Address the Residency Requirement in Sections 6 and 7 of Article II.

The NCLCV Plaintiffs respectfully suggest that the Court order relief to address the requirement in Sections 6 and 7 of Article II of the North Carolina Constitution providing that each Senator and Representative, at the time of their election, shall have resided "in the district for which he is chosen for one year immediately preceding his election." That date—November 8, 2021—has already passed. The only maps enacted by that date, however, were the now-invalidated Enacted Plans. And candidates, obviously, may not have yet established residency in their desired districts under the lawful remedial maps that this Court ultimately approves. Hence, this Court should issue the same relief that the *Covington* court provided and order that, if any citizen has established his or her residence in a Senate or House district modified by any remedial redistricting plan adopted or approved by this Court, then that citizen shall be qualified to serve if elected to that office, notwithstanding the requirements that Sections 6 and 7 of Article II of the

North Carolina Constitution would otherwise impose. *See Covington v. North Carolina*, 267 F. Supp. 3d 664, 668 (M.D.N.C. 2017) (three-judge court) (entering similar order).

B. The Court Should Make Clear That Remedial Plans It Adopts Will Govern Until The Census Bureau Release 2030 Redistricting Data.

The Court should also make clear that the maps it adopts will govern all elections until the Census Bureau releases the 2030 redistricting data. While N.C.G.S. § 120-2.4(a)(1) purports to limit the effectiveness of any court-ordered remedial map "for … the next general election only," that statute violates the Constitution's bans on legislative mid-decade redistricting, *see* N.C. Const. art. II, §§ 3(4), 5(4), and is void.

CONCLUSION

The Supreme Court ordered a simple remedy for the General Assembly's unlawful partisan gerrymandering: Draw fair maps. The General Assembly could have done so. But instead, the General Assembly enacted maps that remain severely skewed. Now, the NCLCV Plaintiffs ask the Court to enforce the Supreme Court's mandate and adopt fair maps that genuinely treat all voters fairly and equally, regardless of party, region, or race. Millions of North Carolinians are counting on this Court to keep the Supreme Court's promise of fair maps, free elections, and a government that truly reflects the will of the people.

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Respectfully submitted,

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This 21st day of February, 2022.

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