No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

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BRIEF OF PLAINTIFF-APPELLANT COMMON CAUSE

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BRIEF OF PLAINTIFF-APPELLANT COMMON CAUSE

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ISSUES PRESENTED

1. Did the trial court err in denying Plaintiffs-Appellants' Motion for Sanctions arising out of Legislative Defendants' unlawful failure to preserve and produce secret concept maps used in drawing the Enacted House Map?
2. Did the trial court err in holding that Plaintiffs lack standing?
3. Did the trial court err in holding that the Enacted House, Senate, and Congressional Maps do not violate the Free Elections Clause of the North Carolina Constitution?
4. Did the trial court err in holding that the Enacted House, Senate, and Congressional Maps do not violate the Equal Protections Clause of the North Carolina Constitution?
5. Did the trial court err in holding that the Enacted House, Senate, and Congressional Maps do not violate the Free Speech Clause of the North Carolina Constitution?
6. Did the trial court err in holding that the Enacted House, Senate, and Congressional Maps do not violate the Right of Assembly Clause of the North Carolina Constitution?
7. Did the trial court err in holding that Plaintiffs' Partisan Gerrymandering Claims under the North Carolina Constitution are nonjusticiable?

8. Did the trial court err in holding that the Enacted House, Senate, and Congressional Maps are not racially discriminatory in violation of the Equal Protections Clause of the North Carolina Constitution?
9. Did the trial court err in denying Plaintiff Common Cause's first Claim for Relief under the Declaratory Judgment Act?

STATEMENT OF THE CASE

Following the 2020 Decennial Census, the North Carolina General Assembly enacted new redistricting plans for the North Carolina House of Representatives,[1] North Carolina Senate,[2] and United State House of Representatives[3] on 4 November 2021. *NCLCV* Plaintiffs and *Harper* Plaintiffs, respectively, filed separate suits on 16 and 18 November 2021 challenging the constitutionality of the Enacted Maps and seeking a preliminary injunction.[4] In accordance with N.C.G.S. § 1-267.1, the Chief Justice appointed a three-judge panel to hear *NCLCV* and *Harper* matters on 19 and 22 November 2022, respectively.

The trial court consolidated these respective cases on 3 December 2021. On the same day, the trial court heard and denied *NCLCV* Plaintiffs' and *Harper* Plaintiffs' Motions for Preliminary Injunction. *NCLCV* Plaintiffs and *Harper* Plaintiffs

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1 S.L. 2021-175 (Nov. 4, 2021) (hereinafter "Enacted House Map").
2 S.L. 2021-173 (Nov. 4, 2021) (hereinafter "Enacted Senate Map").
3 S.L. 2021-174 (Nov. 4, 2021) (hereinafter "Enacted Congressional Map"). Collectively, the 2021 plans are referred to as the "Enacted Maps."
4 *NCLCV* Plaintiffs filed their Complaint contemporaneously with a Motion for Preliminary Injunction pursuant to Rules 7(b) and 65 of the North Carolina Rules of Civil Procedure on 16 November 2021. *Harper* Plaintiffs filed their Complaint on 18 November 2021, and a Motion for Preliminary Injunction pursuant to Rule 65 and N.C.G.S. § 1-485 on 30 November 2021.

thereafter filed a notice of appeal with the North Carolina Court of Appeals. On 6 December 2021, a panel of the Court of Appeals initially granted in part a temporary stay enjoining Defendants from opening the candidate-filing period for the 2022 elections. On the same day, the Court of Appeals issued a decision *en banc* denying Plaintiffs' requested temporary stay.

On 8 December 2021, the Supreme Court of North Carolina granted Plaintiffs' preliminary injunction and temporarily stayed the candidate filing period "until such time as a final judgment on the merits of plaintiffs' claims, including any appeals, is entered and remedy, if any is required, has been ordered." R p 893 (Order on Pls Motion). The Order further directed the trial court to hold proceedings on the merits of *NCLCV* Plaintiffs' and *Harper* Plaintiffs' claims and provide a written ruling on or before 11 January 2022. In light of the Supreme Court's directive, the trial court entered a scheduling order on 13 December 2021, supplemented on 28 and 30 December, expediting discovery and scheduling trial to commence on 3 January 2022.

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

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

thereafter submitted, in lieu of pre-trial briefs, an initial stipulation of facts and initial proposed findings of fact and conclusions of law. A three-and-one-half day bench trial was held on 3 through 6 January 2022 before the three-judge panel, who received evidence through record designations, trial exhibits, and trial witnesses. On 11 January 2022, the court issued a ruling in favor of the Defendants on all claims.

Pursuant to the North Carolina Supreme Court's 8 December 2021 Order, all Plaintiffs timely filed notices of appeal with the trial court and the North Carolina Supreme Court on 11 and 12 January 2022. On 14 January 2021, this Court issued an Order setting forth an expedited briefing schedule, and setting a hearing for oral argument on 2 February 2022.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This is an appeal from a final judgment issued 11 January 2022 by a three-judge panel in Wake County Superior Court, convened pursuant to N.C.G.S. § 1-267.1, declaring constitutional the districts in the 2011 legislative and congressional redistricting legislation challenged in this litigation. Appeal is taken in the North Carolina Supreme Court pursuant to this Court's inherent authority, N.C.G.S. § 7A-31, and as set forth in the Order dated 8 December 2021 in this matter. *See* R p 894 ¶ 4 (Order on Pls Motion) ("Any party wishing to appeal the trial court's ruling must file a Notice of Appeal . . . in the trial court and with this Court, and should expect that an expedited briefing and hearing schedule in this Court will commence immediately thereafter.").

STATEMENT OF THE FACTS

I. The 2021 Redistricting Process

A. The Redistricting Committees Adopt Redistricting Criteria.

On 12 February 2021, the U.S. Census Bureau announced that its release of P.L. 94-171 redistricting data would be delayed by the COVID-19 pandemic until the fall of 2021, and that it would deliver the Public Law 94.171 redistricting data to all states by 30 September 2021. Doc. Ex. 3053 (PX131 Members of U.S. Congress).[5] Shortly thereafter, on 24 February 2021, the North Carolina State Board of Elections Executive Director Karen Brinson Bell presented recommendations to the House Elections Law and Campaign Finance Reform Committee to delay the May and July primaries to provide more time for redistricting. Doc. Ex. 4141 (PX216 Presentation by N.C. State Bd. of Elections). The Chairs of the Redistricting Committees did not adopt the recommendation to delay primaries for state-wide elections despite modifying the deadlines for municipalities similarly impacted by the census delay. Doc. Ex. 3696:18-25, 3699:1-8, 3711:3-18 (PX146 Hise Dep. Tr.).

The Chairs of the Redistricting Committees (the "Redistricting Chairs") first convened the House and Senate Redistricting Committees in a joint session on the eve of the delayed Census data release, Thursday, 5 August 2021. Doc. Ex. 11613 ¶

[5] On 15 March 2021, the United States Census Bureau announced that it would release a "legacy" format summary redistricting data file to all states by mid-to-late August 2021, in addition to the "tabulated" P.L. 94-171 block-level data released before 30 September 2021, "[i]n recognition of the difficulties this timeline creates for states with redistricting and election deadlines prior to Sept. 30." Doc. Ex. 3033 (15 March 2021 Press Release from the U.S. Census Bureau); Doc. Ex. 11612 ¶ 20 (Joint Stip.).

23 (Joint Stip.). The purpose of this meeting was for the Redistricting Chairs to give a "roadmap to the committee members about the way that the chairs intend to at least initiate this process." Doc. Ex. 789:11–14 (PX74 5 August 2021 Joint Committee Tr.). However, the Redistricting Chairs did not propose or set forth a schedule for the redistricting process that established any firm timeline for the process. Doc. Ex. 3709:7-13 (PX146 Hise Dep. Tr.).

On Monday, 9 August 2021 the Redistricting Chairs proposed a set of criteria, which had been presented to the Republican leadership the day before, Doc. Ex. 3672:1–7 (PX146 Hise Dep. Tr.), that prohibited any use of racial data in redistricting by including the following criteria:

> "Racial Data. Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2021 Congressional, House and Senate plans."

Doc. Ex. 214 (PX33). The criteria also stated that "[p]artisan consideration and election data results *shall not* be used in the drawing of districts for the 2021 Congressional, House and Senate Plans." Doc. Ex. 214 (PX33).

The Redistricting Chairs permitted public comment on this criteria the next day. Doc. Ex. 6680 (PX1487). During this public comment period, Plaintiff Common Cause's counsel Allison Riggs alerted legislators that their failure to use racial data could subject them to liability and urged legislators to reform the criteria to ensure that minority voters had the opportunity to elect candidates of their choice. *Id.*

Two days later, on 12 August 2021, the U.S. Census Bureau released the 2020 Census Redistricting Data (Public Law 94-171) Summary File for all states, including North Carolina, in "legacy" format. Doc. Ex. 3037 (PX134). That same day, the Joint

Redistricting Committee debated amendments to their proposed criteria. Doc. Ex. 870:3-9 (PX77 12 August 2021 Joint Committee Tr.). Members of the Committee repeatedly warned the Committee Chairs that failure to use racial data would put the General Assembly in violation of North Carolina law. Senator Dan Blue reminded Committee Chairs that the North Carolina Supreme Court decision *Stephenson v. Bartlett* requires legislators, as the first step in the redistricting process, to determine whether Voting Rights Act ("VRA")-compliant districts are required, and expressed that "*Stephenson* makes it relatively clear that before you consider clustering or groupings, you have to make that VRA determination." Doc. Ex. 883:2-5 (PX77 12 August 2021 Joint Committee Tr.). While a proposed criteria setting forth that "[t]he Committee will draw districts that comply with the Voting Rights Act," was adopted into the final criteria, Doc. Ex. 216 (PX34), an amendment proposed by Senator Blue that would have prohibited packing Black voters into "any grouping or districting to give partisan advantage to any political party" was rejected along party lines. Doc. Ex. 787 (Am. to Proposed Criteria); Doc. Ex. 922:12-23, 931:10 (PX77 12 August 2021 Joint Committee Tr.). Redistricting Committee ultimately adopted the final redistricting criteria, which prohibited the use of any racial data in the 2021 redistricting process. Doc. Ex. 216 (PX34).

The Redistricting Chairs and leadership had considerable experience in prior redistricting cycles. This includes Defendant Hise, who worked on every North Carolina statewide map since 2011—in all of those instances, he reviewed analyses of racial data prepared by Thomas Hofeller and Dr. Thomas Brunell. Doc. Ex.

3570:23-24, 3689:16-3690:13, 3691:2-18 (PX146 Hise Dep. Tr.). Similarly, Representative Hall participated in past redistricting cycles, including the 2017 redistricting cycle, Doc. Ex. 3258:17-20 (PX145 Hall Dep. Tr.), and acknowledged that map drawers viewed racial data in those previous redistricting cycles. Doc. Ex. 3300:6-13 (PX145 Hall Dep. Tr.).

B. The Redistricting Chairs Designate County Cluster Options for State Legislative Maps That Must Be Used for Maps to Be Considered.

On Tuesday, 5 October 2021, the Redistricting Chairs announced at the House Committee on Redistricting and the Senate Committee on Redistricting and Elections that they would limit consideration of the Senate and House maps to those drawn using the county clusters described in the academic paper *N.C. General Assembly County Clusterings from the 2020 Census* (the "Duke Academic Paper"), published on the Duke University website "Quantifying Gerrymandering." Doc. Ex. 1019:2-10 (PX79 5 October 2021 House Redistricting Committee Tr.); Doc. Ex. 1130:12-23, 1134:3-11 (PX80 5 October 2021 Senate Redistricting Tr.); Doc. Ex. 744 (PX70 NC General Assembly Cnty. Clustering from the 2020 Census). The Duke Academic Paper states that "[t]he one part of *Stephenson v. Bartlett* which this analysis does not reflect is compliance with the Voting Rights Act," Doc. Ex. 744, a fact that was known to the Redistricting Chairs and announced publicly in both the House and Senate Redistricting Committee Meetings. Doc. Ex. 1116:6-9 (PX80 5 October 2021 Senate Redistricting Tr.); Doc. Ex. 1020:14-16 (PX79 5 October 2021 House Redistricting Committee Tr.).

As during the 12 August 2021 Joint Committee meeting, Committee members repeatedly questioned how the Committee could comply with state and federal law without evaluating the necessity of drawing VRA districts. In the Senate Redistricting Committee meeting, Senator Blue asked if legislative staff could provide data relevant to particular clusters in North Carolina to analyze whether there might be VRA concerns; Senator Hise rejected this request, stating "we can provide the information that's consistent with the guidance of this committee at this point, not including racial data as were coming in." Doc. Ex. 1122:16-24 (PX80 5 October 2021 Senate Redistricting Tr.); Doc. Ex. 3741:14-22 (PX146 Hise Dep. Tr.). Senator Marcus also stressed that the committee needed to conduct an RPV study to ensure legal compliance. Doc. Ex. 1125:10-17 (PX80 5 October 2021 Senate Redistricting Tr.). In the House Redistricting Meeting, Representatives Harrison and Reives similarly questioned how the committee would comply with the VRA. Doc. Ex. 1047:17-2, 1086:9-12 (PX79 5 October 2021 House Redistricting Committee Tr.). The Committee Chairs took no action in response to any of these concerns. *Id.* at 1048:21-25; 1086:16-19.

Before the Redistricting Chairs required the Duke Academic Clusters, Senator Hise and Representative Hall had both seen a public blog post endorsing the Duke Academic Clusters as advantageous to Republicans. Doc. Ex. 3723:22–3724:3; 3828:1-8 (PX146 Hise Dep. Tr.). Doc. Ex. 3468:18-24 (PX145 Hall Dep. Tr.); Doc. Ex. 6724 (PX1531). This blog post was on the website "Differentiators," which a website run by

former Chief of Staff for Senator Berger, Jim Blaine. Doc. Ex. 3723:22–3724:21 (PX146 Hise Dep. Tr.); T3 p 754:15-20 (Hise).

A. The Map-Drawing Process Orchestrated by Legislative Defendants Had Serious Lapses in Transparency.

On Tuesday, 5 October 2021, the Senate Committee on Redistricting and the House Committee on Redistricting and Elections announced in their respective committee meetings that they would make eight computer stations available to legislators to draw maps, beginning the morning of 6 October 2021. Doc. Ex. 6290 ¶ 6 (PX1468 Affidavit of Tyler Daye). The stations would be open during business hours, and both the rooms and the screens of the station computers would be live streamed while the stations were open. *Id.* The Redistricting Chairs did not provide lawmakers any set deadline by which they had to draw and propose maps. Doc. Ex. 1037:8-17 (PX79 5 October 2021 House Redistricting Committee Tr.).

The Redistricting Chairs stated publicly throughout the process that they intended to provide transparency in how the 2021 state Legislative and Congressional maps would be drawn. *See, e.g.*, Doc. Ex. 869 at 61:13-16 (PX77 12 August 2021 Joint Committee Tr.). Doc. Ex. 788 at 1 (PX74 5 August 2021 Joint Committee Tr.); Doc. Ex. 1016:3-18 (PX79 5 October 2021 House Redistricting Committee Tr.); Doc Ex. 6205, 4:5-11 (PX1463 3 November 2021 Senate Redistricting Committee Tr.). However, evidence adduced at trial indicates that the Redistricting Chairs deliberately failed to take measures that would provide meaningful transparency. They did not inform the public when any legislature would be physically present in any particular room drawing a map. Doc. Ex. 6291 ¶ 8 (PX1468

Affidavit of Tyler Daye). The live-streamed videos also made it difficult to view the process. *Id.* at 6292 ¶ 12. The room cameras were physically placed far from where the legislators were working, *id.*, and the station cameras had very poor audio quality, making it difficult for the public to understand what individuals in the room were saying. *Id.* at 6295 ¶ 20. The Redistricting Chairs also declined to put in place any measures that would ensure members were adhering to the adopted criteria by not bringing with them partisan or racial data when drawing maps. T3 p 869 (Hawkins); Doc. Ex. 3714:21–3715:11 (PX146 Hise Dep. Tr.); Doc. Ex. 1065:10–1066:11, 1077:3-23 (PX79 5 October 2021 House Redistricting Committee Tr.).

Additionally, Defendant Hise decided not to permit a vote on the transparency proposal set forth by Representative Pricey Harrison on 18 August 2021, which would have required (among other measures) that the Redistricting Committees disclose all consultants and counsel to members of the legislature who are paid by state funds and would be participating in the redistricting process. Doc. Ex. 728 (PX51 Rep. Harrison Proposal), Doc. Ex. 979:18-24 (PX78 Joint Committee Tr.). Legislative Defendants conducted and later admitted to numerous "strategy sessions" outside the public viewing terminals and behind closed with partisan assistants and others whose identities or role was not publicly disclosed. T3 p 743:21-24 (Hise); Doc. Ex. 3809:8-24 (PX146 Hise Dep. Tr.). The Redistricting Chairs also brought partisan assistants into the map-drawing rooms to participate in drawing maps, without publicly disclosing their identities or role in the process. Doc. Ex. 6292 ¶ 12 (PX1468 Affidavit of Tyler Daye). Mr. Dylan Reel, counsel to Rep. Hall, a 2020 law graduate,

and a primary aide during the redistricting process, often met with staff from Senator Moore's office. Doc. Ex. 3358:2-10, 3462:6-13 (PX145 Hall Dep. Tr.); T3 p 781:20–783:5 (Hall). Mr. Reel provided Representative Hall with "concept maps." T3 p 780:13-15 (Hall); Doc. Ex. 3362:19-22 (PX145 Hall Dep. Tr.). These concept maps were not drawn on public terminals, and Representative Hall has no idea where they came from, whose computer was used to draw them, or what data was used to draw them. T3 p 783:22–785:17 (Hall); Doc. Ex. 3358:11-13, 3362:19-22, 3383:18-19 (PX145 Hall Dep. Tr.).

Representative Hall testified that, unlike maps drawn on the public terminals, these "concept maps" were not publicly available. T3 p 784:18-25, 789:10-17 (Hall); Doc. Ex. 3385:9-20 (PX145 Hall Dep. Tr.). Video footage shows that Representative Hall and other legislators made use of the concept maps and other materials by bringing papers and communications devices, such as computers and cell phones, into the map-drawing rooms. Doc. Ex. 6293-6294 ¶¶ 16-17, 6306 ¶ 54 (PX1468 Affidavit of Tyler Daye); T2 p 342:18-22 (Daye). Representative Hall and Mr. Reel both brought their phones into the public map-drawing room and looked at them while drawing maps. T3 p 785:24–786:9 (Hall); Doc. Ex. 3471:22–3472:13 (PX145 Hall Dep. Tr.). On 7 October 2021, Senate Newton could be observed drawing the enacted Senate map while referencing papers that he had brought with him. Doc. Ex. 6294 ¶ 17 (PX1468 Affidavit of Tyler Daye). In the same video, Senate Hise can be observed working at one of the map-drawing stations with an unidentified individual. *Id.* ¶ 18. This individual looked at his phone and assisted Defendant Hise. *Id.*

Although the videos only showed activity in the designated rooms, legislators frequently requested detailed printouts of draft maps and took those printouts out of the map-drawing rooms. Doc. Ex. 6295 ¶ 21 (PX1468 Affidavit of Tyler Daye); T2 p 363:19–364:1 (Daye). For example, on 8 October 2021, an aide asked legislative staff member Erika Churchill for a printout of the Senate map that the Senate Co-Chairs had been working on, map SBR-3, with "county-level printouts so we can see the precinct numbers in a few counties" and the ability to see "precinct lines and names" for several areas. Doc. Ex. 6295 ¶ 22 (PX1468 Affidavit of Tyler Daye).

During the course of discovery practice, including a motion to compel, Legislative Defendants stated that Representative Hall called Mr. Reel to ask about the concept maps and Mr. Reel asserted that the concept maps "were not saved, are currently lost and no longer exist." R p 2238 (Plaintiffs' Joint Motion for Discovery Sanction). Legislative Defendants provided no further information about the missing files, not even basic facts about the devices on which these files were created or stored, or the nature of the files themselves. Nor did Legislative Defendants provide answers to important questions about the circumstances of the files' creation, retention, and destruction.

C. The Redistricting Chairs Fail to Consider Evidence of Potential VRA Issues Despite Repeated Assertions They Would Do So.

The Redistricting Chairs repeatedly stated they would be willing to examine evidence of racially polarized voting that was presented to the committees from either other legislators or from the public. On August 12, 2021, Senator Newton told the Committee members, "If you have new evidence or new studies of racially polarized

voting in North Carolina, we would be willing to examine that evidence, and nothing in this criteria prevents any member from bringing forward such evidence during this process." Doc. Ex. 879:11-16 (PX77 12 August 2021 Joint Committee Tr.).

Specifically, on 5 October 2021, Senator Hise said "this committee is still open to consider any information that exists on racially polarized voting." Doc. Ex. 1129:24–1130:2(PX80 5 October 2021 Senate Redistricting Tr.). He also said in that meeting that "if information does come forward regarding racially polarized voting, we will consider it." Doc. Ex. 1124:12-15 (PX80 5 October 2021 Senate Redistricting Tr.). And in a different meeting, Representative Hall said, "[M]embers of the committee and members of the public are welcome to gather whatever evidence and put forth evidence that might fall under Section 2 of the Voting Rights Act, that that may require some use of racial data." Doc. Ex. 954:10-23 (PX77 12 August 2021 Joint Committee Tr.).

On 8 October 2021, three days after the proposed County Cluster Maps were publicly released, Legislative Defendants received a letter from Allison Riggs, counsel for Plaintiff Common Cause, informing them of specific areas in the North Carolina Senate and House cluster maps that required examination for VRA compliance, including the Greene/Wayne/Wilson cluster "Q1" mandated by all 16 of the Senate Duke Cluster options, the Sampson/Wayne cluster "LL2" mandated in some of the House Duke Cluster options, and the Camden/Gates/Hertford/Pasquotank cluster "NN1" mandated in some of the House Duke Cluster options. Representative Hall chose not to read this letter, and Senator Hise took no action after receiving this

letter. T3 p 793:11-16 (Hall); Doc. Ex. 3756:23–3757:1 (PX146 Hise Dep. Tr.); Doc. Ex. 3484:11-16 (PX145 Hall Dep. Tr.). There is no evidence that any remedial action or RPV study was undertaken in response to this letter.

After draft Senate map, "SST-4", was made publicly available on the ncleg.gov website, Legislative Defendants received a second letter from Allison Riggs on 25 October 2021, in which she expressed concern that the cluster "Z1" chosen for this map from Duke Senate Clusters map "Duke_Senate 02" would obstruct the ability of Black voters to continue electing their candidate of choice. T3 p 752:24-753 (Hise); Doc. Ex. 5549 (PX1413 25 October 2021 Letter). Defendant Hise did not take any action to conduct a racially polarized voting study. Doc. Ex. 3762:17-20 (PX146 Hise Dep. Tr.), nor did he ask the Committee to vote on whether the Committee should undertake a racially polarized voting analysis, *id.* at 3767:2-6. There is no evidence that any remedial action or RPV study was undertaken in response to this letter. T3 p 753:9-13 (Hise).

On 26 October 2021, Plaintiff Common Cause sent a letter to Legislative Defendants with an RPV analysis for Senate Districts 1 and 9 in map SST-4 that showed legally significant racially polarized voting in these proposed districts. T3 p 753:4-7 (Hise); Doc. Ex. 6422 (PX1481 26 October 2021 Email). Legislative Defendants against took no action. T3 p 753:9-13 (Hise). Neither Representative Hall, nor any other Redistricting Chair, publicly announced what type of evidence, if not that already provided, would have prompted the Redistricting Committees to conduct

analysis to ascertain what the VRA might require. Doc. Ex. 3765:17–3768 (PX146 Hise Dep. Tr.).

II. The Enacted Maps

The Enacted Maps all passed along party lines. Doc. Ex. 11616 ¶ 41 (Joint Stip.). The Enacted House Map, HB976, passed the House on a strict party line vote, with 67 Republican Representatives in favor and 49 Democratic Representatives opposed. *Id.* ¶ 42. HB976 also passed the Senate on a strict party line vote, with 25 Republican Senators in favor and 21 Democratic Senators opposed. *Id.* The Enacted Senate Map, SB739, passed the Senate on a strict party line vote, with 26 Republican Senators in favor and 19 Democratic Senators opposed. *Id.* at 11617 ¶ 43 (Joint Stip.). SB739 also passed the House on a strict party line vote, with 65 Republican Representatives in favor and 49 Democratic Representatives opposed. *Id.* The Enacted Congressional Map, SB740, passed the Senate on a strict party line vote, with 27 Republican Senators in favor and 22 Democratic Senators opposed. *Id.* ¶ 44. SB740 also passed the House on a strict party line vote, with 65 Republican Representatives in favor and 49 Democratic Representatives opposed. *Id.*

SUMMARY OF TRIAL COURT'S ORDERS

The trial court issued two orders that adversely affect Plaintiff-Appellant Common Cause and erroneously delineate Legislative Defendants' obligations and duties in the redistricting process and the fundamental rights of North Carolinians under the state constitution. First, on 3 January 2022, in open court at the start of trial, the trial court denied Plaintiffs *Harper* and *Common Cause* Joint Motion for Discovery Sanctions, and on 4 January 2022 issued an order memorializing its

reasoning. R p 2702 (Jan. 4 Order on Joint Mot. Discovery Sanctions). Second, on 11 January 2022, the trial court issued its Judgment set forth in the Findings of Fact and Conclusions of Law regarding each of Plaintiffs' State Constitutional challenges to the Enacted Maps; to the individual districts within those plans; and to the redistricting process undertaken by Legislative Defendants. R p 3516 (11 January 2022 Trial Court Judgment) ("Judgment"). The trial court's ruling on these orders are summarized below.

A. *Common Cause* and *Harper* Plaintiffs' Joint Motion for Discovery Sanctions.

On 31 December 2021, *Common Cause* and *Harper* Plaintiffs filed a Joint Motion for Discovery Sanctions based on Legislative Defendants' admitted spoliation of key evidence–concept maps–used by Defendant Representative Hall during the map-drawing process and data regarding the creation, evaluation, and use of those maps. R p 2699–70 (4 January 2022 Order on Joint Mot. Discovery Sanctions). Prior to the filing of this motion by Plaintiffs, *Harper* Plaintiffs served limited discovery requests on Legislative Defendants seeking documents and information concerning the 2021 map-drawing process. *Id.* p. 2670–71. Legislative Defendants refused to respond formally to the requests and claimed that all responsive information and materials were in the public record online. The trial court granted *Harper* Plaintiffs motion to compel, ordered compliance, and found that the information and documents sought "goes to the heart of the dispute in this redistricting matter." R p 1675 (27 December 2021 Order on Mot. to Compel).

Harper Plaintiffs filed a second motion to compel after Representative Hall's deposition on 27 December 2021, in which he admitted to using "concept maps" that were not publicly available and were created by his then-General Counsel Dylan Reel. Representative Hall also admitted to viewing an image of a concept map on Mr. Reel's smartphone while he drew the district lines in the public map-drawing room. Doc. Ex. 3456:23–3457:9 (Hall Dep.). The trial court granted *Harper* Plaintiffs motion and required that Legislative Defendants identify the lost or destroyed material with specificity and certify to that loss or destruction. Specifically, the trial court referred to N.C.G.S. § 120-133(a), which creates an obligation for both present and former legislative employees to legislators to disclose any information concerning enacted redistricting plans. R p 2176–77 (29 December 2021 Order on Mot. to Compel). Legislative Defendants failed to produce any concept maps or any related data or information, and stated that the concept maps "were not saved, are currently lost and no longer exist." R p 2259 (Plaintiffs' Joint Mot. for Discovery Sanctions, Ex. A). Legislative Defendants also failed to provide any information on the missing files or the circumstances surrounding the creation, retention, and destruction.

Thereafter, *Common Cause* and *Harper* Plaintiffs filed a Joint Motion for Discovery Sanctions, and Legislative Defendants responded that same day. R p 2702 (4 January 2022 Order on Joint Mot. Discovery Sanctions). On 3 January 2022, the trial court denied Plaintiffs' motion for discovery sanctions. Given the short time allotted, the trial court found that the record did not demonstrate Legislative Defendants' actions, failing to preserve significant and relevant evidence of

legislative intent, amounted to spoliation necessitating an adverse inference. *Id.* Contradicting its prior order to compel, the trial court now reasoned that Mr. Reel, although a legislative employee at the time the House Plans were drawn, is no longer subject to "the demands or requests of a legislator employee (*i.e.,* Representative Hall) any different than any other non-legislative witness." *Id.*

B. The Trial Court's 11 January 2022 Judgment.

On 11 January 2022, the trial court issued its Judgment in favor of Legislative Defendants and dismissed with prejudice Plaintiffs claims that the Enacted Maps are extreme partisan gerrymanders in violation of the Enacted Maps were enacted with intent to discriminate against African American voters in violation of the Equal Protection Clause of the state constitution; and the 2021 redistricting process undertaken by Legislative Defendants violated state constitutional requirements as interpreted by this Court in *Stephenson v. Bartlett*, 355 N.C. 354 (2002) (*Stephenson I*) and *Stephenson v. Bartlett*, 357 N.C. 301 (2003) (*Stephenson II*).

1. Plaintiffs' Claims of Unconstitutional Partisan Gerrymandering.

The trial court addressed Plaintiffs' claims that Legislative Defendants engaged in unconstitutional partisan gerrymandering in violation of Article 1, Sections 10, 12, 14, and 19 of the North Carolina state constitution by first adopting Plaintiffs' experts' analyses and conclusions. The trial court affirmed that the Enacted Maps are the "product of intentional, pro-Republican partisan redistricting," each constitute "extreme outliers" compared to what would be expected from maps drawn using the adopted redistricting criteria, and that the maps were likely to be "highly non-responsive to the changing opinion of the electorate." R pp 3564-65 ¶¶

140, 142 (Judgment). The trial court specifically adopted Plaintiff Common Cause's Expert Dr. Daniel Magleby's findings that the "level of partisan bias in seats in the House maps went far beyond expected based on the neutral political geography of North Carolina." *Id.* p 3583, ¶ 206. The trial court also assessed Legislative Defendants' experts and concluded that Dr. Barber's findings reinforced Plaintiffs' experts' analysis on numerous occasions, such as the partisan redistricting and bias in specific county groupings. *Id.* p 3592 ¶ 233, 3617 ¶ 309. Finally, the trial court acknowledged that enforcement of the Enacted Maps could lead to "results incompatible with democratic principles." *Id.* p 3757 ¶ 148. While finding the Enacted Maps were drafted with pro-Republican partisan intent, the trial court did not substantively address the legislative process or evidence related to map-drawing (including the "concept maps" at issue in the motion for sanctions) in its findings of fact or conclusions of law.

Notwithstanding these findings of fact, the trial court ultimately determined in its Conclusions of Law that Plaintiffs' claims of partisan gerrymandering are non-justiciable under the North Carolina Constitution, after determining that the state constitutional provisions on which Plaintiffs' relied (the Free Elections, Equal Protections, and Free Speech and Freedom of Assembly Clauses) fail to provide a manageable standard for assessing unconstitutional partisan gerrymandering and were not intended to protect against extreme partisan gerrymandering. *Id.* p 3759¶ 156.

2. Plaintiff's Claims that Legislative Defendants Intentionally Discriminated on the Basis of Race While Redistricting.

The trial court determined that Plaintiffs presented no direct evidence or circumstantial evidence of intentional racial discrimination. Although examining the evidence in this light, the trial court did observe Plaintiff's expert Dr. Jonathan Mattingly findings that Legislative Defendants state Senate cluster choices in North Eastern North Carolina "favors the Republican Party and significantly fractures Black voters in that area." *Id.* p 3702 ¶ 589. Adopting Legislative Defendants' expert Dr. Lewis position, the trial court found "that no district, enacted or in 2020, does it appear that a majority of Black Voting Age People is needed for that district to regularly generate support for minority-preferred candidates in the reconstituted elections." *Id.* p 3703 ¶ 595. The trial court did not address evidence related to the legislative history, nor the historical context, of Legislative Defendants' purported race-neutral redistricting process. The trial court ultimately concluded that Plaintiffs failed to satisfy their burden of establishing that race was the predominant, overriding factor in drawing the districts within the state legislative and Congressional enacted plans. *Id.* p 3704 ¶ 597.

3. Plaintiff Common Cause's Claim for Relief under the Declaratory Judgment Act.

Although the trial court agreed with Plaintiffs that "the process in creating the Enacted Plans deviated from past procedure in not following *Stephenson* by drawing VRA districts first," it then determined "[t]here is nothing in *Stephenson* that requires any particular analysis prior to making a decision as to whether VRA districts are necessary." *Id.* p 3701 ¶ 583, 3768 ¶ 183. The trial court held that Legislative

Defendants' determination "based on their prior experience, that no VRA districts were required" satisfied the requirement set forth in *Stephenson I. Id.* p 3768 ¶ 183. As a matter of law, the trial court found that Plaintiff Common Cause was not entitled to a Declaratory Judgment or Injunctive Relief concluding that to grant such relief would "impermissibly intrude on the internal decision-making processes of the Legislature." *Id.*

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING PLAINTIFF-APPELLANTS' MOTION FOR SANCTIONS

A. Standard of Review.

The standard of review of an order addressing discovery sanctions under North Carolina Rule 37 is abuse of discretion. *Khaja v. Husna*, 243 N.C. App. 330, 347 (2015). Under this standard, this Court must defer to the trial court's discretion but should reverse its decision "upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 221 (2015) (citations and quotation marks omitted).

In *Mclain v. Taco Bell Corp.*, the Court of Appeals of North Carolina found that the trial court committed reversible error by failing to give plaintiff's jury instruction regarding adverse inference because the evidence demonstrated spoliation. 137 N.C. App. 179, 182 (2000). Admittedly, evidentiary standards are "somewhat more relaxed in a trial without a jury." *Denise v. Cornell*, 72 N.C. App. 358, 360 (1985).

Nevertheless, the trial court commits reversible error if it relies on incompetent evidence in making their findings. *Id*.

This issue was properly preserved for appellate review because Plaintiffs made a timely motion to the trial court. *See Khaja* , 243 N.C. App. at 349.

B. The Legislative Defendants' Admitted Spoliation Requires Sanctions.

The trial court abused its discretion by failing to impose discovery sanctions, including but not limited to an adverse inference, after Legislative Defendants admitted to spoliation of key evidence consisting of "concept maps" of county groupings drawn by staff outside of public view and relied upon in drawing some of the new legislative districts. Representative Hall testified in his deposition—and then again at trial—that he repeatedly met with his then-General Counsel, Dylan Reel, and others for "strategy sessions" about the map-drawing in a private room adjacent to the public map-drawing room, where he reviewed "concept maps" of several county groupings for the House map. Doc. Ex. 3381:23–3382:7 (PX145 Hall Dep. Tr.); T3 p 779:23–781:15 (Hall). Representative Hall admitted not only to relying on the "concept maps" in the private room, but also to looking at those maps on Mr. Reel's smartphone while he drew the district lines on the public terminal. Doc. Ex. 3456:23–3457:9 (PX145 Hall Dep. Tr.); T3 p 785:18–786:19 (Hall). Representative Hall testified that he never asked Mr. Reel how the maps were created, did not direct Mr. Reel to follow the Adopted Criteria in preparing the maps, and that he did not know what software was used or whether Mr. Reel had access to or used partisan or racial data in preparing the maps. T3 p 784:20–785:17 (Hall). He also testified that he did

not instruct Mr. Reel to save those concept maps, despite their statutory obligation to preserve those documents. *Id.* 789:7–24 (Hall).

Prior to addressing Plaintiffs' motion for sanctions, the trial court had already concluded that the evidence subject to spoliation was highly relevant to this matter. It did so in granting the *Harper* Plaintiffs' first motion to compel production of these types of "concept maps," with the court holding that such documentation "goes to the heart of the dispute in this redistricting litigation." R p 1675 (Dec. 27 Order on Mot. to Compel). In its second discovery order, the trial court found that the concept maps were in the possession or control of Legislative Defendants, citing to Legislative Defendants' statutory obligation to preserve these documents. R p 2175–76 (Dec. 29 Order on Mot. to Compel). The trial court thereafter ordered the Legislative Defendants to obtain the concept maps, or certify with specificity if they were lost or destroyed. *Id.* p 2176. Legislative Defendants did not produce the maps nor did they certify their loss or destruction with specificity, failing to comply with the court's order. R p 2259 (Plaintiffs' Joint Mot. for Discovery Sanctions, Ex. A).

Plaintiffs promptly filed the motion for sanctions. Plaintiffs' motion established that Legislative Defendants committed spoliation and should therefore be subject to an adverse inference. Where an individual "by his own tortious act withholds evidence by which the nature of his case would be manifested, every presumption to his disadvantage will be adopted." *McLain*, 137 N.C. App. at 183 (quoting Y*arborough v. Hughes*, 139 N.C. 199, 209 (1905)). But a party need not commit a tort to engage in spoliation: "Although destruction of evidence in bad faith 'or in anticipation of trial

may strengthen the spoliation inference, such a showing is not essential to permitting the [adverse] inference.'" *McLain*, 137 N.C. App. at 184 (quoting *R.I. Hosp. Trust Nat'l Bank v. E. Gen. Contractors, Inc.*, 674 A.2d 1227, 1234 (R.I. 1996)). Rather, to establish a prima facie case of spoliation, a party need only show that the spoliator (1) intentionally destroyed or failed to preserve (2) potentially relevant materials (3) while aware of the possibility of future litigation. *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 528 (2005); *Praxair, Inc. v. Airgas, Inc.*, 98–CVS-008571, 2000 NCBC LEXIS 5, at **57 (N.C. Super. Ct. Aug. 14, 2000). Here: (1) Legislative Defendants admitted to failing to preserve the concept maps, despite having a statutory obligation to do so; R p 2259 (Plaintiffs' Joint Mot. for Discovery Sanctions, Ex. A); (2) the concept maps were relevant and went to "the heart of the matter", R p 1675 (Dec. 27 Order on Mot. to Compel); and (3) Legislative Defendants destroyed the concept maps, or failed to preserve them, while they aware of the possibility of future litigation. R p 3556 ¶ 114 (Judgment) ("Representative Hall sought to draw districts . . . with potential litigation in mind.").

With spoliation established, the trial court had discretion to impose a wide range of sanctions, which at a minimum, should have included an adverse inference—*i.e.*, that the destroyed material would support that Legislative Defendants considered partisan and racial information when drafting the Enacted Maps. Plaintiffs also requested that Legislative Defendants be precluded from introducing testimony or evidence at trial that they did not consider partisan or racial data during the map-drawing process. *See, e.g.*, *GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 238

(2013) (affirming evidence preclusion when the "the record is rife with [defendant's] efforts to evade [plaintiff's] requests for evidence . . . , including contravention of three separate orders to compel"); *Deans v. Terry*, No. COA04-495, 2005 N.C. App. LEXIS 425, at *12 (N.C. Ct. App. Mar. 1, 2005); *Khaja*, 243 N.C. App. at 348.[6]

In denying Plaintiffs' motion for sanctions, the trial court did an about-face, contradicting the basis in its earlier orders granting *Harper* Plaintiffs' motions to compel. First, the court found that Mr. Reel was no longer a legislative employee, and therefore not subject to the demands or requests of a legislator employer. In doing so, the court stated that Plaintiffs should have subpoenaed Mr. Reel for the information. R p 2702 (Jan. 4 Order on Joint Mot. Discovery Sanctions). But Mr. Reel was Representative Hall's general counsel when he created the concept maps, and Legislative Defendants had a statutory duty to preserve the documents. R p 2175–76 (Dec. 29 Order on Mot. to Compel). That is why the trial court initially held, in response to the motion to compel, that the concept maps were in the Legislative Defendants' possession or control and should be produced. The fact that Mr. Reel was no longer an employee at the time of the discovery requests is irrelevant, and does

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[6] Plaintiffs requested that the court (1) draw an adverse inference that the destroyed materials would have shown that Legislative Defendants considered racial and partisan data during the map-drawing process; (2) preclude Legislative Defendants from introducing testimony or evidence that Legislative Defendants did not consider partisan or racial data during the map-drawing process; (3) find that certain "designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order" under North Carolina Rules of Civil Procedure 37; and (4) order any other sanctions that the Court deems appropriate in its discretion and inherent authority to manage this litigation.

not in any way relieve Legislative Defendants of their discovery obligations. Moreover, the burden to produce the documents was on Legislative Defendants—not on Plaintiffs as the trial court suggested.

The trial court also stated that the record at that time, before trial, did not demonstrate that Legislative Defendants' actions "definitively amount to spoliation." R p 2703 (Jan. 4 Order on Joint Mot. Discovery Sanctions). As set forth in Plaintiffs' motion, Legislative Defendants admitted to destroying or losing the concept maps, which the court had already determined go "to the heart of the dispute." R p 2242 (Plaintiffs' Joint Mot. for Discovery Sanctions). Given the Legislative Defendants' own admissions, and the trial court's earlier findings in its orders granting *Harper* Plaintiffs' motions to compel, the trial court's denial of the motion for adverse inference is "so arbitrary that it could not have been the result of a reasoned decision." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. at 221.

Representative Hall's testimony at trial confirmed that Legislative Defendants committed spoliation and that sanctions were proper. The trial court should therefore have found, at a minimum, an adverse inference that the concept maps included partisan and racial data. The court should also have discredited Representative Hall's testimony stating otherwise. But in its Judgment, the trial court did the opposite. It credited Representative Hall's testimony that "he personally drew nearly all of the House map enacted as House Bill 976, and that he did so over multiple days at an official computer terminal." R p 3537 ¶ 72 (Judgment). The court acknowledged that "between his sessions at the public terminal, [Representative Hall] met with his then-

General Counsel, Dylan Reel, and others about the map-drawing in a private room adjacent to the public map-drawing room." *Id*. p 3537 ¶73. The court did not, however, address the several admissions made by Representative Hall that he relied on the concept maps, which were drawn outside of the public terminal using unknown software that may have included racial and partisan data. That is in direct contradiction to the court's subsequent findings that Representative Hall "personally drew" the House map at an official computer terminal.

In denying the motion for sanctions, the trial court abused its discretion by failing to provide any explanation for its departure from the basis for its earlier orders in response to the motion to compel, discounting the spoliation of evidence highly relevant to the matters in dispute, and ignoring the substantial consequences of precluding Plaintiffs from being able to examine how the secret "concept maps" had been prepared.

II. THE TRIAL COURT ERRED IN FINDING THAT THE ENACTED PLANS DO NOT VIOLATE THE NORTH CAROLINA CONSTITUTION AS UNCONSTITUTIONAL PARTISAN GERRYMANDERS

> All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

N.C. Const. Art I, § 2. These words command that the state constitution necessarily protect North Carolinians from acts of the General Assembly that will subvert the will of the voters. As demonstrated below, the trial court failed to substantiate why such protections would not apply to acts reapportioning state Legislative and Congressional districts that, as here, systematically and without legitimate justification, discriminate against voters based on political viewpoint, and

which abridge the right of such voters from expressing these viewpoints and associating with candidates of a particular party to ensure the success of the competitors in power.

The undisputed expert evidence in this case supports the well understood principle that, at its most basic level, partisan gerrymandering operates to subvert the will of the people. Gerrymandering involves packing disfavored communities into a small number of districts in which they constitute a supermajority and cracking disfavored communities across a larger number of districts to minimize their influence elsewhere. *Gill v. Whitford*, 138 S. Ct. 1916, 1920 (2018). This subverts the will of the people both on an individual level and on an aggregate level. On the individual level, when an individual resides in a packed or cracked district, that individual's vote carries less weight than it would under a non-gerrymandered map. *Id.* at 1935–36 (Kagan, J., concurring). In a non-rigged district, an individual voter's choice, based on that voter's political conscience, carries a larger probability of swaying the outcome of an election than in a gerrymandered district, where there is essentially no chance of doing so. On the aggregate level, a gerrymandered map entrenches the power of the party in charge, regardless of the shifting will of the voters. The consequence is a system in which elected officials choose their voters rather than the other way around. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015).

That the Enacted Maps will inflict such harm is undisputed based upon the record adduced at trial and as reflected in the factual findings of the trial court. As

such, this Court need not revisit any of the factual findings of the trial court as to the nature of the Enacted Maps, including, *inter alia*:

- That the Congressional map is the "product of intentional, pro-Republican partisan redistricting" and represents an "extreme outlier that is highly non-responsive to the changing opinion of the electorate." R p 3564 ¶ 140 (Judgment) (quotations omitted).
- That the State Legislative maps are likewise "extreme outliers that systematically favor the Republican Party to an extent which is rarely, if ever, seen in the non-partisan collection of maps" and that this "intentional partisan redistricting in both chambers is especially effective in preserving Republican supermajorities." *Id.* p 3565 ¶ 142 (quotations omitted).
- Overall, that the Enacted Plans resiliently safeguard electoral advantage for Republican candidates," *Id.* p 3580 ¶ 192 (emphasis added), and do so in a manner that cannot be explained by political geography, *id.* p 3569 ¶ 159, 3577 ¶ 183, 3580 ¶ 192.

These findings were based upon analysis of thousands of ensemble maps generated by Plaintiffs' and Defendants' experts, generated using the same nonpartisan criteria that the General Assembly claimed to use in their redistricting criteria, and taking into account the natural political geography of the state. T1 p 141–42 (Mattingly); *id.* p 217 (Wesley); T2 p 374 (Magleby); *id.* p 391 (Magleby); T3 p 612 (Barber). As demonstrated by Plaintiffs' experts, Dr. John Mattingly and Dr. Dan Magleby and Defendants' expert Dr. Michael Barber, elections that under typical

nonpartisan state legislative maps would produce a Democratic majority in the North Carolina House give Republicans a majority under the Enacted House and Senate Maps. T1 p 141 (Mattingly); T2 p 385 (Magleby); T3 p 666 (Barber). Likewise, maps that would normally produce a Republican majority under nonpartisan maps produce a Republican supermajority under the Enacted House and Senate Maps. T1 p 141 (Mattingly). Dr. John Mattingly analyzed the performance of the nonpartisan maps and the Enacted House and Senate Maps under a variety of elections that have taken place in North Carolina. Among every possible election scenario that Dr. Mattingly analyzed, the partisan results were more extreme than what would see from nonpartisan maps. Doc. Ex. 6483 (PX1483 Mattingly Rep.).

An assessment of the median-mean difference illustrates just how durable the Republican gerrymanders are. The median-median difference takes the map-level median Democratic vote-share among the districts, and compares it to the mean Democratic vote-share over all districts. Doc. Ex. 6458 (PX1483 Magleby Rep.); T2 p 384 (Magleby). A negative number indicates that the median district Democratic vote-share is less than the overall average, thereby showing an overall bias against Democratic vote-share. Doc. Ex. 6444 at 15. Common Cause's expert Dr. Magleby measured the median-mean difference and found that the bias in the Enacted Maps is far more extreme than in any nonpartisan map he generated. *See id.* at 6458–59, 6463–64. Not a single randomly generated map had such an extreme median-mean share for the House and Senate—meaning that in his analysis, he saw no simulated map that was as extreme and durable a gerrymander. *Id.*; T2 p 385 (Magleby).

The expert analysis showed similar findings for the Enacted Congressional Map. According to experts' simulations, under the Enacted Congressional Map, Democrats consistently win four Congressional seats, regardless of the statewide Democratic vote-share. Doc. Ex. 6546 (PX1484 Mattingly Rep.). This makes the Enacted Congressional Map essentially impervious to changing voter preferences. In contrast, the nonpartisan, algorithmically-generated maps exhibited substantial responsiveness to voter preferences. *Id.* Depending on the statewide Democratic vote-share, in nonpartisan maps, Democrats can expect to win anywhere from four to eight seats. *Id.* In drawing the Congressional maps, the North Carolina Legislature found a way to defeat North Carolina's political geography and win elections, no matter what voters want. Furthermore, the Enacted Congressional Map had a more extreme median-mean difference than any nonpartisan, algorithmically-derived map. Doc. Ex. 6467 (PX1483 Magleby Rep.).

In light of this evidence, the trial court rightly determined that the extreme nature of the Enacted Maps is no mere coincidence. Instead, "a careful review of all of the evidence" supports that "the Enacted Maps are a result of intentional, pro-Republican partisan redistricting." R p 3698 ¶ 569 (Judgment).

It was not the blind squirrel that found the nut. While Legislative Defendants took great care in purporting to provide a partisan-blind redistricting process (proposing redistricting criteria that prohibited use of "partisan considerations and election results data," Doc. Ex. 216 (PX34 Redistricting Criteria), requiring that map-drawing stations be devoid of partisan data, and repeatedly promising the process

would be fair and transparent, *see* T3 p 794 (Hall); T3 pp 871–72 (Hawkins); T2 p 488 (Taylor); Doc. Ex. 3276:21–23 (PX145 Hall Dep. Tr.), the Enacted Maps reveal that what was promised was not delivered. Instead, Legislative Defendants executed a strategy to undermine the very process even they claimed to think voters of this State deserved, carefully crafted to preserve the plausible deniability of the select legislators who would choose to waive legislative privilege. As the evidence and testimony at trial confirmed, that the Redistricting Chairs engaged in strategy sessions behind closed doors, Doc. Ex. 3809:10–19 (PX146 Hise Dep. Tr.); T3 p 782:16–783:5 (Hall), sat side-by-side with undisclosed partisan assistants to guide the forming of district lines at public map-drawing stations, Doc. Ex. 6094, 6096, 6111 (PX1460 Map Drawing Sequences), requested detailed printouts of maps that were then taken out of the map-drawing room for analysis, Doc. Ex. 3817:14–318:8 (PX146 Hise Dep. Tr.); T3 p 783:6–15 (Hall), and, at least in the House, utilized template "concept maps" that the public will never see. T3 p 780:13–781:15 (Hall). Legislators admitted to never even instructing their partisan assistants to refrain from using partisan or racial data in advising them on map-drawing. Doc. Ex. 3805:17–21 (PX146 Hise Depo.); Doc. Ex. 3463:10–3464:10 (PX145 Hall Depo.). All of these steps worked to ensure that the partisan effects desired would be achieved under the cover of a purportedly partisan-data free process.[7]

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[7] Legislative Defendants also acknowledged that, as part of their role as legislators and given their experience in prior redistricting cycles, they have pre-existing knowledge of partisan data and information that they cannot simply "un-know." *See* Doc. Ex. 3609:, 3768:15–17 (PX146 Hise Dep. Tr.); Doc. Ex. 3258:17–20, 3300:6–13 (PX145 Hall Dep. Tr.).

Following these findings, and the logical consequences of the adjudicated facts, the trial court unreasonably and without a sound legal basis determined that voters of this state have no remedy under the North Carolina Constitution for partisan gerrymandering, regardless of how extreme the gerrymander or insidious the strategy devised to achieve it. For the reasons set forth below, this is a legal error that the Supreme Court can—and indeed must—correct.

A. Standard of Review

This is a question of law reviewed *de novo*. *State v. Biber*, 365 N.C. 162, 168 (2011) ("Conclusions of law are reviewed *de novo* and are subject to full review."). A *de novo* standard of review is also appropriate because this issue involves constitutional rights. *Libertarian Party v. State*, 365 N.C. 41, 46 (2011) ("[*D*]*e novo* review is ordinarily appropriate in cases where constitutional rights are implicated." (citations omitted)).

B. The Trial Court Misinterpreted and Misapplied *Stephenson* to Support its Erroneous Holding That the North Carolina Constitution Tolerates Extreme Partisan Gerrymandering; It Does Not.

Neither precedent nor the plain reading of the state constitution supports the notion that partisan gerrymandering that would entrench the power of one party is tolerated under the laws of this state. The trial court erred in taking this point of law for granted and, furthermore, in relying on it to find that the state constitution provides no remedy in this matter.

The trial court specifically erred by repeatedly misinterpreting and misapplying the following *obiter dictum*[8] from *Stephenson v. Bartlett*:

> The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions, *see Gaffney v. Cummings*, 412 U.S. 735 (1973), but it must do so in conformity with the State Constitution.

Stephenson v. Bartlett, 355 N.C. 354, 372 (2002). *See* R p 3697 ¶ 567 (Judgment) (citing this passage), 3734–35 ¶ 66 (same), 3737 ¶ 73 (same).

Putting aside that the issue of partisan gerrymandering was not before the Court in *Stephenson*, a cursory look at the *Gaffney* case cited reveals that the partisan considerations in that matter were of an entirely different species than those at issue here. The drafters in *Gaffney* sought "to create a districting plan [for the Connecticut General Assembly] that would achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties" in the spirit of "political fairness." 412 U.S. at 752. While the U.S. Supreme Court found these intentions were subject to judicial scrutiny under the Fourteenth Amendment, it ultimately determined that the plan did not run astray of the federal Constitution because its drafters did *not* seek to "minimize or eliminate the political strength of any group or party." *Id.* at 754. Thus, the dicta from *Stephenson* would actually suggest that partisan considerations are only permissible in an effort to achieve partisan fairness. Here, the trial court determined the opposite occurred here, where the General Assembly sought specifically to minimize the political strength of non-Republican

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[8] "[M]ere obiter dictum [is] not binding on this Court or any other." *Taylor v. J.P. Stevens & Co.*, 300 N.C. 94, 100–01 (1980).

voters. *Gaffney* does not provide the tacit permission for the legislators' actions that the trial court implies.

The Court's holding in *Gaffney* does, however, instruct as to the importance of judicial review under the facts of this case, by observing that "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so." *Id.* at 754. The inverse principle applies: judicial interest should be at its *greatest ebb* when legislators unfairly allocate political power as they have in the Enacted Maps.

The trial court's misreading of *Stephenson* is the keystone of its legal error because it frames the problem of justiciability as one of mere degree: how much is too much? *See, e.g.*, R p 3697 ¶ 567 (Judgment) ("[T]hese analyses do not inform the Court of how much of an outlier the Enacted Maps are from what is actually permissible."). But this is a false choice. North Carolina law has never endorsed extreme partisan gerrymandering of the nature proven here, which intentionally preserves the majority or even supermajority of the party in power durably and resiliently against shifting electoral preferences.

Instead, *Stephenson* clearly instructs the Court to do what the trial court adamantly refused to here: enforce provisions of the state constitution by developing a workable standard for ascertaining the fundamental constitutional violation at issue, regardless of how easy or difficult it may be to do so. After all, the Court in *Stephenson* squarely rejected the proposition that the Whole-County Provision be cast

aside despite its direct conflict with federal one-person, one-vote and VRA requirements, opting instead to harmonize it through modification. This required the Court in *Stephenson* to set forth a multi-faceted step-by-step mathematical algorithm for map-drawers to follow, maximizing the degree to which counties are kept whole, but that is nowhere found in statute or Constitutional provision. It is therefore ironic that the trial court relied so heavily on *Stephenson* to determine there is no "manageable criteria" that can be applied for partisan gerrymandering claims, R p 3756 ¶ 144 (Judgment), when the Court instructed so clearly in that very decision such a finding would be derogation of duty:

> [We] are not permitted to construe the WCP mandate as now being in some fashion unmanageable, or to limit its application to only a handful of counties. Any attempt to do so would be an abrogation of the Court's duty to follow a reasonable, workable, and effective interpretation that maintains the people's express wishes to contain legislative district boundaries within county lines whenever possible. . . . Progress demands that government should be further refined in order to best respond to changing conditions. Several provisions of our Constitution provide the elasticity which ensures the responsive operation of government.

Stephenson I, 355 N.C. at 382.

Here, the Constitution expressly requires a government "founded upon the[] will" of the people. The Free Elections, Equal Protection, and Free Speech and Assembly clauses protect all North Carolinians' "equal right to vote, a *fundamental* right under the state constitution" under "principles of substantially equal voting power and substantially equal legislative representation arising from the same Constitution." *Stephenson I*, 355 N.C. at 382. As described below, North Carolina's judiciary has consistently interpreted the state constitution in a manner *responsive* to unwarranted expansions of legislative power when—as here—a failure to do so

would abrogate the fundamental right to vote for the citizens of this State and undermine fundamental principles of free elections.

C. The State Constitution Requires That Elections in North Carolina Faithfully Ascertain the Will of the People.

From the earliest days of our Republic, the judiciary of this State has deemed necessary what the trial court here has refused to do: set forth boundaries to legislative power required by the state constitution, regardless of whether standards for doing so were easily ascertained, and where a failure to do so would risk fundamentally undemocratic results as is indisputably the case here.[9]

In one of the earliest decisions of this Court, *Bayard v. Singleton*, the Justices refused to enforce an act of the General Assembly that permitted dismissal of property disputes without trial by jury. 1 N.C. 5 (1787). Writing for the Court, Justice Ashe recounted the Justices' "great reluctance . . . against involving themselves in a dispute with the Legislature of the State" but nonetheless determined that "the obligation of their oaths, and the duty of their office required them in that situation, to give their opinion on that important and momentous subject." *Id.* at 6–7. The Court ultimately held the act of the General Assembly unconstitutional, in part because

9 *See* R p 3756 ¶ 145 ("We agree with the United States Supreme Court that excessive partisanship in districting leads to results that are incompatible with democratic principles. Furthermore, it has the potential to violate the core principle of republican government that the voters should choose their representatives, not the other way around. Also, it can represent an abuse of power that, at its core, evinces a fundamental distrust in voters, serving the self-interest of the political parties at the expense of the public good." (internal quotations and citations omitted)).

failing to do so would risk unravelling the bedrock of the then-nascent Republican form of government:

> [I]f the members of the General Assembly could do this, they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

Id. 7. As this decision illustrates, the judiciary from its earliest days has played a crucial role as a co-equal branch of government in addressing the longstanding concern that elected officials might entrench themselves in power through legislative action.

Nearly a century later, the Court again saw fit to provide a check on legislative power, this time as applied to reapportionment, in *People ex rel. Van Bokkelen v. Canady*, 73 N.C. 198, 220 (1875). In this matter, the Court struck down an act amending the charter of the City of Wilmington dividing the city into three wards from which nine members of the Board of Aldermen would be elected (three from each ward). *Id.* at 198. The wards were grossly malapportioned, with the first and second having approximately 400 voters each, and the third having 2,800. *Id.* at 225. The Court's opinion begins with the same principles at play here: "Our government is founded on the will of the people. Their will is expressed by ballot." *Id.* at 220. The Court struck down the reapportionment plan, finding it "a plain violation of fundamental principles, the apportionment of representation." *Id.* at 225.

Importantly, at the time of this decision there was no express provision in the state constitution requiring equal populations within districts for city representatives. This decision was also decades before any federal constitutional one-

person, one-vote requirements were established for municipal governments. But the Court saw fit to extend these principles to municipalities because of the impact that failing to do so would have had on the right to vote and free elections. There was no express provision in the Constitution that prohibited a reapportionment strategy providing disproportionate power to some voters within city government, but the Court still saw fit to strike it down on constitutional grounds because "the effect of the act is to violate the fundamental principles of the Constitution, and their own cherished and declared purpose to maintain free manhood suffrage. . . ." *Id.*

This Court again underscored in the 1915 decision, *Hill v. Skinner,* that adherence to state constitutional protections of the right to vote is not about mere formalistic compliance with time, place, and manner requirements. Rather:

> [T]he object of all elections is to ascertain, fairly and truthfully, the will of the people—the qualified voters. That registration, notice of elections, poll-holders, judges, etc., are all parts of the machinery provided by the law to aid in attaining the main object—the will of the voters, and should not be used to defeat the object which they were intended to aid.

169 N.C. 405, 415 (1915) (internal quotations omitted). In *Hill*, the Court reversed a lower court's decision to enjoin the results of an election due to alleged notice and registration issues after finding the election had still faithfully determined the will of the voters despite the election irregularities. *Id.* ("The object of the law has been fully attained. . . . and we see no valid reason why the popular will, so emphatically pronounced, should not be heeded."). Here, the trial court has once again done just the opposite: refusing to strike down the Enacted Maps despite unrebutted expert testimony these maps will be "highly *non-responsive* to the changing opinion of the electorate." R p 3564 ¶ 140 (Judgment) (quoting Doc. Ex. 4793–94 (PX1484 Mattingly

Rep.); *see also id.* p 3564 ¶ 142 (finding the Enacted House and Senate Maps are "especially effective in preserving Republican supermajorities in instances in which the majority or vast majority of plans in Dr. Mattingly's ensemble would have broken it").

Even as recently as in *Stephenson*, the Court reiterated that constitutional provisions must be interpreted to "uphold the principles of substantially equal voting power and substantially equal legislative representation." *Stephenson I*, 355 N.C. at 382.

The trial court failed to consider this precedent or the greater context of the Court's role in preserving the fundamental role of elections in ascertaining the will of the people. Instead, it interpreted the state constitutional provisions at issue so narrowly as to be wholly unresponsive to the challenges of the modern day, including the expansions in predictive modelling that allow such extreme partisan gerrymandering to be accomplished in the first place. This ignores the clear intent of our government's framers to establish a *resilient* form of democratic government guided by the will of those governed.

The trial court ultimately scapegoated the political process for failing to render a constitutional amendment or legislative act to remedy this latest tactic of undermining democracy. But such a specific amendment or statute is not necessary where state constitutional provisions have an inherent "elasticity which ensures the responsive operation of government." *Stephenson I*, 355 N.C. at 382 (internal citations

omitted). More to the point, Constitutional protections are not use it or lose it,[10] and the judiciary's core function is to ensure fundamental Constitutional protections withstand even novel methods of assault on core democratic principles.

The risk presented by the extreme partisan gerrymandering proved in this matter cannot be understated. Put simply:

> If unconstitutional partisan gerrymandering is not checked and balanced by judicial oversight, legislators elected under one partisan gerrymander will enact new gerrymanders after each decennial census, entrenching themselves in power anew decade after decade.

Common Cause v. Lewis, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at *383–84 (Wake Cnty. Sup. Ct. Sept. 3, 2019). For this reason, the trial court's allusions to voters' hypothetical ability to overcome the partisan gerrymanders in this matter[11]—which the trial court also found to be extreme outliers and durable to changing electoral will—is not a rational or reliable safety valve for the risk to democracy presented here. One cannot cure thirst with poisoned water.

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[10] If they were, it is doubtful one-person, one-vote principles would be enforceable given that the plans at issue in the cases establish the principle predicated on decades-old census data. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 217 (1962) (striking down Tennessee State districting plan that utilized 60-year-old census data); *Reynolds v. Sims*, 377 U.S. 533, 582–84 (1964) (holding state legislative districts violated the federal Equal Protection Clause due to malapportionment despite widespread and unaddressed issues of malapportionment for decades).

[11] *See, e.g.*, R at 3568 ¶ 155 (noting "a political gerrymander can still be broken in a wave election"). However, for example, in the Congressional map, such a wave election would be one that has not been seen at all in recent years—thus, that statement essentially presents an impossibility. *Compare* Doc. Ex. 6486–87 (PX1484 Mattingly Rep.) (showing that the highest Democratic statewide vote-share in recent elections has been 54%) with Doc. Ex. 6466 (PX1483 Magleby Rep.) (showing that Dems would need a 56% vote-share statewide to overcome the skew against them).

Furthermore, requiring a specific legislative act or Constitutional amendment to address this issue is not only unnecessary in light of the state constitutional protections already in place, but it is also unrealistic where an extreme partisan gerrymander like that or the Enacted Maps is almost certain to entrench power with the party in current legislative control notwithstanding shifting electoral preferences.[12] After all, legislation requires a majority of the General Assembly to pass and constitutional amendments require a 60 percent vote in each legislative chamber before being referred to citizens, who have no power to initiate statewide initiatives or referendums under North Carolina law. N.C. Const. art. XIII, §§ 1, 4. In sum, the trial court's hypothetical remedy to the issue of extreme partisan gerrymandering is itself undermined, and rendered unlikely, by its own reasoning.

As set forth below, the Free Elections, Equal Protections, and Free Speech and Freedom of Assembly Clauses each individually protect against the type of extreme partisan gerrymandering proven in this matter, especially when properly viewed through the lens of ensuring elections properly ascertain the will of the electorate.

D. The Enacted Maps Violate the North Carolina Constitution.

The North Carolina Constitution contains several provisions which, independently and together, protect elections in this state from acts that would

[12] The trial court devoted pages to describing unsuccessful bills proposing independent redistricting commissions that were predominantly sponsored by the party out of power, and which failed to pass due to lack of political will by the party in power. *See* R p 3543–45 ¶¶ 99-102. These paragraphs underscore how the political process, once polluted by maps ensuring political entrenchment, will not provide voters a genuine opportunity to specifically overcome measures that have fundamentally altered the democratic institutions that they would have to utilize to do so successfully.

subvert the will of the people, as the Enacted Maps would if enforced. These provisions—the Free Elections, Equal Protection, and Free Speech and Assembly Clauses—set forth several paths by which the Court can arrive at the same conclusion: that the Enacted Maps must be struck down as unconstitutional.

1. Free Elections Clause

Article I, Section 10 of the North Carolina Constitution provides that "[a]ll elections shall be free." The current language was revised in the 1971 Constitution from the prior iteration (that all elections "ought" to be free) to "make clear that the provisions of that article are *commands* and not mere admonitions." *N.C. State Bar v. Du Mont*, 304 N.C. 627, 639 (1982) (quoting John L. Sanders, *The Constitutional Development of North Carolina*, in *North Carolina Manual* 87, 94 (1979)).

But even under its prior iteration, the North Carolina Supreme Court almost a century ago confirmed that this provision protects government based on the "consent of the governed" including a "free ballot and a fair count." *Swaringen v. Poplin*, 211 N.C. 700, 702 (1937); *see also Clark v. Meyland*, 261 N.C. 140, 141 (1964) (striking down parts of an oath required to switch party affiliation that would have required voters to swear future support of the party's candidate, finding it violated the Free Elections Clause). Nowhere in either *Swaringen* or *Clark*, or any other identified precedent, did this Court impose limitations on the Free Elections Clause ascribed to it by the trial court in this matter. *See* R p 3764 ¶ 107 (Judgment) (concluding the "Free Elections Clause does not operate as a restraint on the General Assembly's ability to redistrict for partisan advantage."). And no amount of historical research into the oscillating balance of power between the King of Great Britain and

his parliament or the workings of colonial rule, *see id.* p 3738–46 ¶¶ 77–107 (Judgment), can distract from the indisputably broad language of the provision itself.

Indeed, the broad language chosen—that "[a]ll elections shall be free" —more persuasively supports broad application. The Pennsylvania Supreme Court's reasoning regarding an analogous provision in the Pennsylvania Constitution is particularly persuasive on this point. In *League of Women Voters v. Commonwealth*, 645 Pa. 1, 117 (2018), the Pennsylvania Supreme Court determined that the Free Elections Clause of the Pennsylvania state constitution rendered unconstitutional partisan gerrymandering of state legislative plans. This clause provides that "[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." *Id.* at 100. The Pennsylvania Supreme Court noted that, like in North Carolina, its free and fair election clause "has no federal counterpart" and thus provides greater protections than the federal constitution in preserving the integrity of individual votes. *Id.* at 98. The North Carolina Constitution should provide no less protection to its people than the Pennsylvania Constitution does under similarly broad language.

In light of the factual findings made by the trial court here, that the Enacted Maps are extreme outliers that will—and were intended to—preserve Republican majorities or supermajorities notwithstanding shifting electoral preferences, it is clear this is a case in which the act of the Legislature has violated the "core principle of republican government . . . that the voters should choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*,

567 U.S. 787, 824 (2015). Accordingly, the Enacted Maps violate the Free Elections clause and should be struck down.

2. Equal Protection Clause

Notwithstanding the invalidity of these plans under the Free Elections Clause, the Court may also determine that they violate the Equal Protection Clause and apply the more structured analysis of this provision.

The Equal Protection Clause of the North Carolina Constitution guarantees to all North Carolinians that "[n]o person shall be denied the equal protection of the laws." N.C. Const. art. I, § 19. This provision protects "the fundamental right of each North Carolinian to substantially equal voting power." *Stephenson I*, 355 N.C. at 379. "It is well settled in this State that the right to vote on equal terms is a fundamental right." *Id.* at 378 (internal quotations omitted). Accordingly, strict scrutiny applies. *Id.*

While the state constitution "provides greater protection for voting rights than the federal Equal Protection Clause," state courts apply the same test as federal courts to determine the constitutionality of challenged acts under the state constitution: "(1) intent, (2) effects, and (3) causation." *Common Cause*, 2019 N.C. Super. LEXIS 56, at *349 (citing *Duggins v. N.C. State Bd. of Certified Pub. Acct. Exam'rs*, 294 N.C. 120, 131 (1978); *Richardson v. N.C. Dep't of Corr.*, 345 N.C. 128, 134 (1996)). As described by the Superior Court in *Common Cause v. Lewis*:

> First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing district lines was to "entrench [their party] in power" by diluting the votes of citizens favoring their rival. *Ariz. State Legis.*, 135 S. Ct. at 2658. Second, the plaintiffs must establish that the lines drawn in fact have the intended

> effect by "substantially" diluting their votes. *Rucho*, 318 F. Supp. 3d at 861. Finally, if the plaintiffs make those showings, the State must provide a legitimate, non-partisan justification (i.e., that the impermissible intent did not cause the effect) to preserve its map. *Rucho*, 139 S. Ct. at 2516 (Kagan, J., dissenting).

2019 N.C. Super. LEXIS 56, at *349. Here, again, the Court need not disturb the factual findings of the trial court to easily determine Plaintiffs have met their burden with respect to the Enacted Maps.[13]

First, the evidence adduced at trial unequivocally supported that the predominant purpose of map-drawers was to entrench the Republican Party. *See, e.g.,* R p 3698 ¶ 569 (Judgment) ("[W]e conclude based upon a careful review of all of the evidence that the Enacted Maps are a result of intentional, pro-Republican partisan redistricting."). But even were this not the case, the record also provides ample evidence that the primary and predominant consideration applied by map-drawers was to amplify likelihood of Republican success. The testimony of Tyler Daye, who carefully observed the map-drawing process and reviewed the videos multiple times, *see* T2 p 339:10–18 (Daye), together with the summary exhibit documenting play-by-

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[13] Alternatively, this Court is not bound by the 2019 trial court's standard and may use a different standard for evaluating whether a partisan gerrymander violates the Equal Protection Clause that does not turn on Legislative Defendants' intent. As an example, first, the Court examines whether there is a likelihood that Legislative Defendants could have achieved a similar seat distribution without engaging in extreme partisan gerrymander, and whether the maps are responsive to the will of North Carolina voters. Second, should the distribution and responsiveness fall outside certain acceptable boundaries, akin to the 10% population deviation range in one-person, one-vote cases where if a plan falls outside that range, it is considered prima facie unconstitutional and the Court shifts the burden to Legislative Defendants to demonstrate whether there are partisan-neutral reasons that explain why such distribution and non-responsiveness occurred. For the reasons explained below, Plaintiffs similarly meet this alternative standard as well.

play, Doc. Ex. 6093 (PX1460 Map Drawing Sequences), substantiates that map-drawers in the House and Senate followed at least two strategies.

The first strategy apparent on the record is that map-drawers walked into the public map-drawing rooms with a "game plan" to first consolidate Republican advantage in districts, and then later address the adopted criteria. This was evident and explained at trial for two Senate Clusters, Mecklenburg/Iredell and Wake/Granville, where Mr. Daye observed map-drawers first drawing districts to maximize Republican advantage, and then coming in later to optimize maps along the traditional criteria. *See generally* T2 p 344:19–352:21 (Daye); Doc. Ex. 6098–6109 (PX1460 Map Drawing Sequences). As for the House, Representative Hall admitted to utilizing "concept maps" to form his "game plan" for drawing House districts. Doc. Ex. 3364:18–3365:4, 3368:18–19 (PX145 Hall Dep. Tr.).

The other strategy apparent on the record is that map-drawers used detailed printouts of draft maps for analysis, either by themselves or others, and then came back in to alter district lines in a way that augmented Republican advantage. Doc. Ex. 6093 (PX1460 Map Drawing Sequences). Such was the case in the Buncombe County House cluster, which Representative Hall remember using a concept map to draft. Doc. Ex. 3373:18–20 (PX145 Hall Dep. Tr.). Regardless of which particular strategy was used, this evidence supports (along with the expert analysis of the final maps) that the predominant purpose in drafting was to entrench Republican power.[14]

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[14] That Republican advantage was the primary consideration by map-drawers is also evidenced by the Legislative Defendants' abject refusal to conduct any RPV study before designating county clusters for the maps, after being notified of a blog post

Second, as stated above, the expert analysis definitively showed that the Enacted Maps will cause substantial vote dilution by systematically "cracking" and "packing" likely Democratic voters within districts to diminish their political power. *See Gill,* 138 S. Ct. at 1920; R p 3567 ¶ 151 (Judgment) ("The Court finds that cracking Democrats from the more competitive districts and packing them into the most heavily Republican and heavily Democratic districts is the key signature of intentional partisan redistricting and it is responsible for the enacted congressional plan's non-responsiveness when more voters favor Democratic candidates."); *id* at 3582–83 ¶¶ 198–99 (similar finding as to Enacted Senate and House Maps); *see generally id.* at 3592–658 District-by-District Analysis). These tactics were so effective that each of the maps constitutes an "extreme outlier" that is non-responsive to the changing opinion of the electorate by systematically favoring Republicans. R p 3564–66 ¶¶ 140–48 (Congressional); 142–47 (House and Senate) (Judgment).

The trial court's disclamation that the definitive expert findings in this matter still fail to inform "[h]ow much of an outlier the Enacted Maps are from what is actually permissible," *id.* p 3697 ¶ 567, is a red herring. As described above, the Constitution has never been interpreted by this Court to permit (and does not otherwise tolerate) the intentional, purposeful, and successful subversion of the will of North Carolina's electorate in redistricting that is present here. And the first criteria of this analysis—requiring plaintiffs to prove partisan considerations

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expressing that these cluster options would be favorable to republicans, and as described in detail below in Section III.

predominated in drafting—effectively prevents any intrusion on legislative discretion to decide districts within Constitutional bounds, even where the results show inadvertent partisan gain arising out of the State's political geography or the application of traditional redistricting criteria. As the thousands of simulated maps generated by the experts in this matter show, there remains a wide berth of potential maps that properly apply the criteria adopted by the General Assembly.[15] Put another way, with maps this discriminatory, this Court does not need to identify the line at which political considerations in redistricting become excessive because the North Carolina General Assembly's maps are miles beyond that line.

Nonetheless, should the Court choose to identify for future legislatures a metric or threshold at which the constitutionality of redistricting maps become suspect, as it has for the one-person, one-vote and Whole-County Provision requirements, a "reasonable, workable, and effective interpretation," *Stephenson*, 355 N.C. at 382, can easily be fashioned from the expert analyses conducted in this matter and Appellants' requested remedial directions to be issued from this Court. Done fairly, the legislature can assess the performance of a proposed redistricting plan using a composite partisan index[16] (which is to say, "done fairly" as long as the index

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[15] The Court also need not delineate a specific threshold here because of how extreme and apparent the partisan gerrymanders are in this case. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2521 (2019) (J. Kagan, dissenting) ("How about the following for a first-cut answer: This much is too much").

[16] In fact, Dr. Hofeller, mastermind of previous unconstitutional redistricting plans, created a highly predictive partisan composite index which he used to draw very effective partisan gerrymanders. *See Common Cause v. Lewis*, 2019 N.C. Super. LEXIS 56, at *15-16 (September 3, 2019).

is not only created by choosing elections for the composite that were particularly favorable to one party or another). It can compare the performance of the legislative plan to the most likely outcomes of simulations that do not use partisan data, as seen in the expert work of Dr. Mattingly (Doc. Ex. 4720 (PX629)), Dr. Chen (Doc. Ex. 4391 (PX482)), Dr. Magleby (Doc. Ex. 6444 (PX1483)), Dr. Duchin (Doc. Ex. 3901 (PX150)), and. Dr. Pegden (Doc. Ex. 4526 (PX523)). Just like with their obligations to ensure population equality, the legislature would have to provide compelling justification for redistricting plans that fell outside a certain range of departures from the seat shares most often seen in simulations. Plaintiff Common Cause's proposed remedial direction provides one such threshold—one identical to that used in one-person, one-vote cases (i.e., where the deviation from expected seats is more than +/-5%, the burden shifts to the legislature to provide non-discriminatory, neutral justifications for those deviations). The Harper Plaintiffs' remedial requests likewise provide another workable standard. But on the question of liability, it is plain that maps this skewed and this unresponsive to the will of North Carolina voters fail any constitutional test.

Finally, the purported legitimate, non-partisan justifications provided by the Legislative Defendants hold no water. As an initial matter, the expert testimony determined—and the trial court agreed—that North Carolina's political geography does not justify the effects of the Enacted Maps. R p 3557 ¶ 118, 3569 ¶ 159, 3577 ¶ 260, 3580 ¶ 192 (Judgment) ("The Enacted Plans resiliently safeguard electoral advantage for Republican candidates. [Doc. Ex. 3905 (PX150 Duchin Aff.)]. This

skewed result is not an inevitable feature of North Carolina's political geography."). Nor can the Legislative Defendants reasonably rely on the neutral criteria adopted, which were applied by each of the experts in generating the simulations that showed, definitively, that the Enacted Maps were extreme outliers. *Id.* at 3563 ¶ 138 (Mattingly), 3571 ¶ 166 (Pegden), 3585 ¶ 207 (Magleby). And as Dr. Mattingly's analysis showed, the map-drawers relied on municipalities as a predominating criteria only when and if it served the purposes of partisan advantage. *See* T1 p 156:13–18 (Mattingly) ("Q: And so – so put differently, found that the General Assembly focused on prioritizing municipalities in the Senate where doing that produced maps that were more Republican, but didn't in the House where it didn't matter as much, is that right? A: Yes, that's correct.").

The legislative record similarly provides no legitimate justification for the extreme nature of the Enacted Maps. Representative Hall and Senator Daniel cherry-picked specific public comments to justify specific districts, *see generally* Doc. Ex. 8343 (LDTX78 1 November 2021 Senate Tr.); Doc. Ex. 8489 (LDTX80 2 November Senate Tr.); Doc. Ex. 8229 (LDTX76 1 November 2021 House Tr.); but with over 4,000 public comments on the record, R p 3548 ¶ 107 (Judgment), it belies logic to think that, in each and every instance, they relied upon the public commentary resulting in extreme partisan outliers by coincidence alone.[17]

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[17] Furthermore, a close look at the record of public commentary in at least one instance reveals evidence that it was pretextual**.** Senator Daniel asserted that public input from Moore County resident Maurice Holland Jr. informed the formation of a "Sandhills" district in the Congressional map. Doc. Ex. 1158:14–22 (PX81 1 November 2021 Senate Tr.). However, Mr. Holland spoke specifically in

But more to the point, the transparency lapses and misrepresentations about the process supported on the record, and described above in Section I, undermine the nation that there was any legitimate purpose to justify the Enacted Maps. If there was, it could hardly have required such secrecy and back-room dealing as is substantiated on the record. And the adverse inference justified by Legislative Defendants' conduct undercuts any purported legitimate reasons they might provide. The Enacted Maps thus violate the Equal Protections Clause of the state constitution and may be struck down on this independent ground as well.

3. Freedom of Speech and Freedom of Assembly Clauses

The Freedom of Speech and Assembly Clauses provide yet another independent ground for the Court to strike down the Enacted Maps.

Article I, Section 14 of the North Carolina Constitution provides that "[f]reedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never restrained." Article I, Section 12 of the North Carolina

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favor of proposed Congressional map CBK-4 which grouped Moore, Hoke, Cumberland, Scotland, Robeson, and parts of Harnett and Richmond counties together, Doc. Ex. 6681 (PX1488), while SB740 trisects this county grouping through the middle between Congressional Districts 3, 4 and 8. Doc. Ex. 37 (PX1 Congressional Map). Mr. Holland also spoke against proposed Senate Map SST-4, *see* Doc. Ex. 742 (PX68 SST-4), calling districts 21 and 22 in Moore and Cumberland county "extreme," and against proposed House Map HBK-11 (dividing Moore County into 3 districts), *see* Doc. Ex. 743 (PX69 HBK-11). But the Enacted maps drawn and proposed by Legislative Defendants directly contradict Mr. Holland's expressed wishes; the Senate Map largely retains the "extreme" districts in SD 21 and SD19, and the House map still trisects Moore County between HD 51, HD 78, and HD 52. Doc. Ex. 38 (PX2 Senate Map); Doc. Ex. 39 (PX3 House Map). This misrepresentation of public testimony gives rise to an inference of bad faith by Legislative Defendants in purporting to rely on public comments.

Constitution provides that "[t]he people have a right to assembly together to consult for their common good, to instruct their representative, and to apply to the General Assembly for redress of grievances."

The North Carolina Supreme Court has held that North Carolina's Free Speech Clause provides broader rights than does federal law. *Evans v. Cowan*, 122 N.C. App. 181, 183–84 (1996). In North Carolina, the right of assembly encompasses the right of association. *Feltman v. City of Wilson*, 238 N.C. App. 246, 253 (2014). Together, North Carolina's Freedom of Speech and Freedom of Assembly Clauses protect the right of individuals to cast a ballot for the candidate of their choice and associate with their chosen political party. *Common Cause*, 2019 N.C. Super. LEXIS 56, at *365.

The Enacted Maps impermissibly burden individuals' political expression and association. By drawing maps for partisan advantage, Legislative Defendants identified Republican voters as preferred speakers and targeted Democratic voters as disfavored speakers for disfavored treatment because of disagreement with the views they express when they vote. In doing so, they have rendered disfavored speech less effective and intentionally engaged in viewpoint discrimination against Democratic voters.

The Enacted Maps also burden the ability of Plaintiffs to associate effectively, as guaranteed under Article I, Section 12, by precluding them from instructing their representatives, and applying to the General Assembly for redress of grievances. The maps impermissibly retaliate against Plaintiffs by taking adverse action against

them due to their voting history. Furthermore, Defendants would not have cracked and packed Democratic voters to dilute their votes but for that retaliatory intent. And for the same reasons as provided above, the Enacted Maps cannot meet strict scrutiny because Legislative Defendants cannot show they were narrowly tailored to achieve a compelling government interest.

E. Extreme Partisan Gerrymandering is a Justiciable Issue Under the North Carolina Constitution.

In light of the crucial role North Carolina's judiciary plays in securing free elections that ascertain the will of the voters, the trial court's determination that North Carolina's Constitution provides no remedy to voters for matters of extreme partisan gerrymandering represents an astounding dereliction of duty that this Court should reverse.

"The political question doctrine controls, essentially, when a question becomes not justiciable because of the separation of powers provided by the Constitution." *Cooper v. Berger*, 370 N.C. 392, 407–08 (2018) (internal quotations and alterations omitted). This doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches of government." *Id.* at 408 (internal quotations and alterations omitted). To determine whether an issue is a nonjusticiable political question, courts consider: (1) "the appropriateness under our system of government of attributing finality to the action of the political departments" and (2) the "lack of satisfactory criteria for a judicial determination." *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 210 (1962)).

Here, the question of whether state Legislative and Congressional maps comport with state constitutional requirements is well within the jurisdiction of the judiciary and determinable using the satisfactory criteria set forth above. As to the first issue, this Court in *Stephenson* made clear the judiciary has the "duty of redressing [] demonstrated constitutional violation[s]" in redistricting when and if they occur. *Stephenson I*, 355 N.C. at 376. While the General Assembly certainly has the power to make discretionary redistricting decisions, its actions in redistricting must be "in conformity with the State constitution" because "[t]o hold otherwise would abrogate the constitutional limitations or 'objective constraints' that the people of North Carolina have imposed on legislative redistricting and reapportionment in the state constitution." *Id.* at 371–72. In fact, the state constitution allows the judiciary broad powers in enforcing its requirements in redistricting, permitting courts to require valid reapportionment or to even formulate a valid redistricting plan when necessary. *Id.* at 362. Accordingly, the finality of reapportionment plans does not lie solely and finally with the Legislature, and courts cannot decline review on these grounds.[18]

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[18] The trial court's attempt to ground its reasoning in prior decisions of this Court, *see* R. p 3753 ¶ 135 (Judgment), is unpersuasive given that none of these decisions considered partisan gerrymandering of representational districts to further a political party, as proved here. *Howell v. Howell*, 151 N.C. 575, 572 (1909), concerned the establishment of a district to collect school taxes, not elect representatives; *Norfolk & S.R. Co. v. Washington Cnty.*, 154 N.C. 333, 335–36 (1911), decided an issue of where a county line existed for the purposes of taxation, not representation; and *Carolina-Va. Coastal Highway v. Coastal Tpk. Auth.*, 237 N.C. 52, 62 (1953), *State ex. Rel. Tillett v. Mustain*, 243 N.C. 564, 569 (1956), and *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 7 (1980), all considered the

As to the second ground for non-justiciability, the state constitution and guidance of this Court's precedent provide the satisfactory criteria set forth above in Section II.D to determine whether plans for reapportionment are unconstitutional. The trial court's reliance on the U.S. Supreme Court's decision in *Rucho v. Common Cause* to find otherwise is untenable in light of the unique nature of the North Carolina Constitution.

In *Rucho*, the U.S. Supreme Court held that partisan gerrymandering presented a political question "beyond the reach of the federal courts" because there was "no plausible grant of authority" in the federal Constitution, and thus no legal standards to limit and direct their decision. 139 S. Ct. at 2507. Importantly, the decision did not condone partisan gerrymandering or hold that no such standard for considering partisan gerrymandering could exist under law. Instead, the U.S. Supreme Court specifically guided that "state constitutions can provide standards and guidance for state courts to apply," as the North Carolina Constitution does here. *Id.*

North Carolina Courts have consistently interpreted our comparable constitutional provisions as more protective than those of the federal constitution. *See, e.g.*, *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 474 (1974); *State v. Barnes*, 264 N.C. 517, 520 (1965). Our Constitution is more detailed and specific than the federal Constitution in the protection of the rights of

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general assembly's constitutional powers in establishing municipal corporations, not drawing lines pertaining to state-wide or Congressional representation.

its citizens. *Corum v. Univ. of N.C.*, 330 N.C. 761, 783 (1992). Our Equal Protection Clause specifically provides greater protection for voting rights than federal equal protection provisions. *Stephenson I*, 355 N.C. at 377–81, 381 n.6 (200); *Blankenship v. Bartlett*, 363 N.C. 518, 522–28 (2009). And our Free Election Clause has no federal counterpart at all. *Cf. League of Women Voters v. Commonwealth*, 645 Pa. 1, 98 (2018) (observing that "the Free and Equal Elections Clause has no federal counterpart" and holding that the 2011 Plan for Congress violated this clause where it "subordinates the traditional redistricting criteria in service of achieving unfair partisan advantage.").

This Court's treatment of the divergence between interpreting the state Equal Protection Clause and how the U.S. Supreme Court interprets the Fourteenth Amendment's Equal Protection Clause only confirms the justiciability of these claims and the applicability of our state constitution to this problem. For example, in *Blankenship*, this Court recognized that the U.S. Supreme Court found the one-person, one-vote guarantee of the federal Equal Protection Clause inapplicable to judicial elections. 363 N.C. at 523–24. Despite that, the Court determined that Article I, Section 19 of the North Carolina Constitution was applicable to judicial elections in this state because the "right to vote on equal terms in representative elections" was a "fundamental right" in this state. *Id.* at 522. A similar result should follow here: the U.S. Supreme Court's decision in *Rucho* is not binding on how this Court views the justiciability or application of the federal Constitution on claims brought under our state Constitution.

The trial court erroneously ignored these differences when it "follow[ed] the extensive analysis of the nonjusticiability of partisan gerrymandering claims in *Rucho*." R p 3756 ¶ 144 (Judgment). In doing so, it abrogated the judiciary's "duty to follow a reasonable, workable, and effective interpretation that maintains the people's express wishes" instead of ignoring them entirely. *Stephenson I*, 355 N.C. at 382. The role of North Carolina's courts in redistricting is well established, and our unique Constitutional provisions afford broad protections to our State's voters which provide manageable standards for determining when legislative apportionment extends beyond what is permissible. Indeed, it is this Court's duty to uphold such protections afforded by the North Carolina Constitution.

III. THE TRIAL COURT ERRED IN FINDING THAT LEGISLATIVE DEFENDANTS DID NOT ACT WITH DISCRIMINATORY PURPOSE IN ADOPTING THE ENACTED PLANS

In denying Plaintiff Common Cause's claim of intentional racial discrimination, the trial court erred by misinterpreting relevant case law and ignoring overwhelming evidence of deception and bad faith by Legislative Defendants. Here, the contrast between the process that was promised and that which was delivered speaks volumes to Legislative Defendants' intent. By attempting to shield themselves in a shell of plausible deniability and purporting to follow a "race-blind" redistricting process, Legislative Defendants followed an old playbook. For decades, across the South, legislatures passed purportedly race-neutral measures that were intended to and had the effect of discriminating against Black voters. The results here speak for themselves: the Enacted Maps dismantle districts that perform

for Black voters in a foreseeable, preventable, and devastating manner. They should thus be struck down as violating the Equal Protection Clause of the state constitution.

A. Standard of Review

This is a question of law reviewed *de novo*. *State v. Biber*, 365 N.C. 162, 168 (2011) ("Conclusions of law are reviewed *de novo* and are subject to full review."). A *de novo* standard of review is also appropriate because this issue involves constitutional rights. *Libertarian Party v. State*, 365 N.C. 41, 46 (2011) ("[*D*]*e novo* review is ordinarily appropriate in cases where constitutional rights are implicated." (citations omitted)).

B. The Equal Protection Clause Is Violated When Race Was a Motivating Factor In the Drawing of Districts.

The North Carolina Constitution guarantees all persons equal protection of the laws, and further provides that no person shall be "subjected to discrimination by the State because of race, color, religion, or national origin." *See* N.C. Const. art I, § 19. Under the North Carolina Equal Protection Clause, North Carolina's citizens have "a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *White v. Pate*, 308 N.C. 759, 768 (1983). The North Carolina Equal Protection Clause is broader in the voting rights context than its federal equivalent. *See Stephenson I*, 355 N.C. at 376–80, 381 n.6; *Blankenship*, 363 N.C. at 523. This Court has held that "[i]t is well settled in [North Carolina] that the right to vote on equal terms is a fundamental right." *Stephenson I*, 355 N.C. at 378 (internal quotation marks omitted).

An act of the General Assembly can violate North Carolina's Equal Protection Clause if discriminatory purpose was "a motivating factor." *Holmes v. Moore*, 270 N.C. App. 7, 16 (2020). Plaintiffs "need not show that discriminatory purpose was the sole or even a 'primary' motive for the legislation, just that it was 'a motivating factor.'" *Id.* at 16–17 (internal quotation and citations omitted).

The legal standard for determining whether an official action was motivated by discriminatory purpose is set forth in *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), and was recently discussed by the Court of Appeals in *Holmes v. Moore*, 270 N.C. App. at 16 (stating that "proof of racially discriminatory intent or purpose" will show "a violation of the Equal Protection Clause"). Courts conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266; *State v. Jackson*, 322 N.C. 251, 261 (1988) (Frye, J., concurring). *Arlington Heights* laid out a non-exhaustive list of factors for courts to consider, including: (1) the law's historical background, (2) the specific procedural sequence leading to the law's enactment, including any departures from the normal procedural sequence, (3) the legislative history of the decision, and (4) the impact of the law and whether it bears more heavily on one race than another. 429 U.S. at 266–68.

Once this discriminatory purpose "is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 220 (4th Cir. 2016) (citing

Hunter v. Underwood, 471 U.S. 222, 228 (1985)). Judicial deference "is not warranted when the burden shifts to a law's defender after a challenger has shown the law to be the product of a racially discriminatory purpose or intent." *Holmes*, 270 N.C. App. at 19.

C. The Historical Context, the Sequence of Events and Legislative History, and the Effect of the Enacted Maps Show Undeniably That Race Was a Motivating Factor in Their Drafting.

Appellants presented the trial court with ample evidence to conclude that Legislative Defendants acted with discriminatory intent in adopting the Enacted Plans. In sum, the evidence supports a finding of intentional discrimination under each of the *Arlington Heights* criteria, as set forth below.

1. The Historical Background of the Enactment of the Enacted Plans Strongly Supports an Inference of Discriminatory Intent.

"The historical background of [a] decision is one evidentiary source [in proving intentional discrimination], particularly if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. "A historical pattern of laws producing discriminatory results provides important context for determining whether the same decision-making body has also enacted a law with discriminatory purpose." *McCrory*, 831 F.3d at 223–24; *see also Holmes*, 270 N.C. App. at 20 (citing *McCrory*).

Evidence that "highlight[s] the manner in which race and party are inexorably linked in North Carolina" frequently "constitutes a critical—perhaps the most critical—piece of historical evidence" in intentional discrimination claims in the voting context. *Holmes*, 270 N.C. App. 7, 23 (2020) (citing *McCrory*, 831 F.3d at 225);

see also Holmes v. Moore, No. 18-CVS-15292 (Wake Cnty. Sup. Ct. Sept. 17, 2021), at 5 ("It is enough to show that the legislature had a purpose to diminish the power of African American voters because of polarized voting in North Carolina."). In other words:

> Using race as a proxy for party may be an effective way to win an election. But intentionally targeting a particular race's access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose.

McCrory, 831 F.3d at 222.

On this factor, Appellants presented the expert testimony of Dr. James Leloudis, a historian with specialization in the history of race, politics, labor and reform in the 19th and 20th century American South. R p 3700 ¶¶ 578–80 (Judgment). Dr. Leloudis's testimony established that the history of voting and elections laws in North Carolina shows a recurring pattern in which the expansion of voting rights and ballot access to African Americans is followed by periods of backlash and retrenchment that roll back those gains for African American voters. The history of this backlash is characterized by facially neutral laws that did not always explicitly discriminate by race but were still enacted with the intent of restricting the voting rights of African Americans.

For example, in the decades after Reconstruction, a time during which Black North Carolinians had made rapid gains in their ability to win representation, Doc. Ex. 6587–92 (PX1486 Leloudis Rep.) conservative politicians used violence and racial appeals to gain a majority in the legislature. *Id.* at 6599–6601. They then instituted facially race-neutral literacy tests and the payment of a poll tax as prerequisites to

register to vote. *Id.* at 6601–02. These devices resulted in the wholesale disenfranchisement of Black North Carolinians and their removal from the political life of the state. *Id*.

In the mid-1950s, after Black North Carolinians made another push toward equality and won temporary political victories and increased representation, *id.* at 6611, the white political establishment altered methods of election to keep Black candidates from winning. *Id.* at 6614. The pattern–apparently race-neutral changes to election methodology–occurred again in the 1960s and 1970s upon the passage of the Voting Rights Act and the federal judiciary's move toward enforcing individual rights. *Id.* at 6611. As with redistricting today, the laws were neutral on their face and altered the seemingly "wonky" field of electoral mechanics. T2 p 308 (Leloudis). Yet, they successfully prevented Black voters from marshalling their resources to elect their candidates of choice. *Id.* p 309.

This history of restricting African American voting rights through facially race-neutral laws is also a 21st century phenomenon. H.B. 589, the first voter ID law successfully enacted by the General Assembly in 2013, was invalidated because it was designed to discriminate against African American voters. T2 p 309:8–21 (Leloudis). And a follow-up effort to pass another voter ID law was struck down just law year as racially discriminatory. *See Holmes v. Moore*, No. 18 CVS 15292, at *74.

It is well understood that Black voters vote for Democratic candidates at a much higher rate than white voters. T2 p 315 (Leloudis); Doc. Ex. 6638 (PX1486 Leloudis Rep.). Because of this, targeting Black voters in redistricting is not only an

effective tool to limit Black political participation, but is part and parcel of partisan gerrymandering in the South. Doc. Ex. 6639 (PX1486 Leloudis Rep.). Additionally, because this is the first redistricting cycle since the *Shelby County v. Holder* decision in 2013, the Legislature could act without fear of repercussions. *Id.* at 6643–44.

In total, the North Carolina General Assembly's actions in the current redistricting cycle, "fit the pattern of conservative backlash to minority gains." *Id.* at 6583. As in past years, seemingly race-neutral policies are actually an effective tool to limit Black political participation and ensure partisan control over state government. Thus, the historical context in which the Enacted Plans were passed by the General Assembly supports Plaintiffs' claim that the legislature intended to discriminate against African American voters.

2. The Sequence of Events and Legislative History Demonstrates That the Impact of the Enacted Maps on Black Voters Was Both Foreseeable and Intentional.

The sequences of events and legislative history of the Enacted Maps, largely ignored by the trial court, reveals how the discriminatory results impacting North Carolina's Black voters were not coincidental or a by-product of an otherwise lawful process. Throughout the process, Legislative Defendants took unprecedented steps to avoid any public consideration of race in this process that would have revealed the discriminatory effects of their plans and allowed other map-drawers to prevent the destruction of performing crossover districts.

After proposing criteria (ultimately adopted by the Committees) that prohibited the use of racial data in the consideration and analysis of proposed maps, Doc. Ex. 214 (PX33 2021 Joint Redistricting Committee Proposed Criteria); Doc. Ex.

216 (PX34 2021 Joint Redistricting Committee Adopted Criteria),[19] Legislative Defendants repeatedly rebutted any efforts to have the Redistricting Committees commission a racially polarized voting study that would assist members in protecting voters of color. They refused to do so despite:

1. Clear instruction from the North Carolina Supreme Court.

This Court has expressly stated that "legislative districts required by the VRA shall be formed prior to creation of non-VRA districts." *Stephenson I*, 355 N.C. at 383. As recently as 2014, this understanding of *Stephenson* was ratified by this Court's decision in *Dickson v. Rucho*, 368 N.C. 481, 532 (2015): "Thus, the process established by this Court in *Stephenson I* and its progeny requires that, in establishing legislative districts, the General Assembly must first create all necessary VRA districts, single-county districts, and single counties containing multiple districts."

2. Repeated requests by legislators that the redistricting committees were required to do so.

At the 12 August 2021 Joint Redistricting Committee hearing, multiple legislators, including Senator Dan Blue and Senator Ben Clark, pointed out this "no race data" criterion's incompatibility with *Stephenson* and compliance with the VRA. *See* Doc. Ex. 883:2–5 (PX77 12 August 2021 Joint Committee Tr.) (Senator Blue stating, "I think that *Stephenson* makes it relatively clear that before you consider clustering or groupings, you have to make that VRA determination.") *see also id.* at 56:12–15. When Legislative Defendants began the map-drawing process without

[19] *See also* Doc. Ex. 3717:6–7 (PX146 Hise Dep. Tr.) ("There is a prohibition of using racial data for the consideration [of maps].").

conducting a racially polarized voting analysis, they were again asked by fellow legislators how such a process could comply with their legal duties under *Stephenson*. In the Senate Redistricting Committee Meeting on 5 October 2021, Senator Marcus said "it is incumbent on this committee to make that determination, and to do so, you would need a racially polarized voting study. So are you saying, Mr. Chair, that you are not going to order that study?" Doc. Ex. 1125:13–19 (PX80 5 October 2021 Senate Redistricting Tr.). Chairman Hise's reply was clear: Legislative Defendants would "consider anything presented," *id.* at 1125:8-9, but that "[t]here is no plan or process right now for commissioning a particular study in any of the budget processes or in legislation." *Id.* at 1125:24–1126:2. Any racially polarized voting analysis, and thus any hope at complying with *Stephenson*, would depend on such information being "presented" to Legislative Defendants.

3. Ample notice that their process would result in discriminatory harm to voters of color.

Legislative Defendants repeatedly represented that RPV data would be considered by the Committees if so "presented." Doc. Ex. 879:11–16; 954:10–23 (PX77 12 August 2021 Joint Committee Tr.); Ex. 1124:12–15; 1129:24–1130:2 (PX80 5 October 2021 Senate Redistricting Tr.). But when such information was presented to Legislative Defendants, it was ignored. Counsel for Plaintiff Common Cause submitted multiple letters to Legislative Defendants, elucidating their legal duties under *Stephenson* in detail and identifying potentially problematic racial consequences of their failure to conduct a racially polarized voting study accordingly. R p 3533–34 ¶¶ 64–65 (Judgment). Plaintiff Common Cause even submitted a racially

polarized voting analysis for two proposed districts in the Senate plans, an analysis "indicative of racially polarized voting in these jurisdictions" and "urg[ing] the House and Senate Redistricting Committees to consider this information, and take care this redistricting cycle to ensure that House and Senate maps do not dilute the voting power of voters of color, particularly for voters in Northeast North Carolina." Doc. Ex. 6422–24 (PX1481 Bob Phillips Oct. 26 Email to Legislative Defendants), Doc. Ex. 6422 (PX1481 26 October 2021 Email). Again, despite being in precisely the form requested by Legislative Defendants, they took no action in response to this information.

4. Their own understanding that a "race-blind" process was "impossible."

Legislators (including the Redistricting Chairs themselves) have pre-existing knowledge of racial demographic and geographic information that they cannot unknow through the adoption of purportedly "race-blind" criteria. Doc. Ex. 3609, 3612 (PX146 Hise Dep. Tr.); *see also* T2 p 313:14–22 (Leloudis); Doc. Ex. 6657 (PX1486 Leloudis Rep.). Legislators must know the general demographic makeup of their districts in order to get elected and understand the role that demographics play in the election process. Doc. Ex. 3768:5–3769:9 (PX146 Hise Dep. Tr.). Hise, like other legislators, also admitted he is generally aware that there are higher proportions of minority populations in urban areas than in rural areas, with the exception of Eastern North Carolina where there are significant numbers of Black residents, and that upon learning information like this, he cannot "un-know" it when engaged in map-drawing. *Id.* at 3768:15–17; 3769:13–21. Similarly, Representative Hall

participated in past redistricting cycles, including the 2017 redistricting cycle, Doc. Ex. 3258:17–20 (PX145 Hall Dep. Tr.), and acknowledged that map drawers view racial data in those previous redistricting cycles. *Id.* at 3300:6–13.

In sum, the record shows undoubtedly that Legislative Defendants pursued extreme measures to give off the false impression that they would adhere to a "race-neutral" process, despite clear direction to the contrary from the highest Court in North Carolina, despite requests from fellow legislators, and despite public evidence that race must be considered in redistricting in order to comply with the state constitution. Persistent in their refusal, Legislative Defendants understood it would put Republican power at risk to maintain opportunities for Black voters who overwhelmingly support Democratic candidates.

The information that was publicly available to Legislative Defendants makes clear that the reason for refusing to comply with the state constitution and for harming Black voters was partisan advantage. Analysis on the Differentiators webpage, managed by a prominent Republican consultant with close ties to Senator Berger, demonstrated that the Duke Clusters would be beneficial to Republicans. Doc. Ex. 6726 (PX1531 Differentiators Blog). Legislative Defendants Hise and Hall both acknowledged their knowledge of the Differentiators website, specifically concerning the clusters, Doc. Ex. 3724:7–21; 3726:13–3728:14 (PX146 Hise Dep. Tr.); Doc. Ex. 3468:9–3469:13 (PX145 Hall Dep. Tr.), which stated explicitly the view that the Duke Academic clusters would create partisan advantage for Republicans. Doc. Ex. 6726 (PX1531 Differentiators Blog). They also knew that "[t]he one part of

Stephenson v. Bartlett which this analysis does not reflect is compliance with the Voting Rights Act." R p 3533 ¶ 59 (Judgment) (citing the Duke Academic Paper concerning the Clusters adopted by Legislative Defendants). Thus, by accepting the clusters "as is" and not performing a racially polarized voting study analysis (which would be needed to depart from the Duke clusters, according to them), Legislative Defendants effectively laid out a process where Republican-favoring clusters would be locked into any redistricting plan under consideration, and that would necessarily result in the destruction of functional crossover districts.

3. The Enacted Maps Systematically Lower BVAP Populations for Crossover Districts, Disproportionately Diminishing the Ability of North Carolina's Black Voters to Elect Candidates of Choice.

The evidence provided by Plaintiffs and Legislative Defendants show that the Enacted Maps each dismantle functioning crossover districts, reducing the number of state Legislators and Congressional representatives of color. This alone is compelling evidence of equal protection violations. *See Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) ("And if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments.").

The Enacted House Map

The Enacted House Map systematically reduces the Black Voting Age Population of at least two districts that, under the 2019 House Map, successfully allowed Black voters to elect their candidates of choice. First, House District 5 contains a 44.32% Black Voting Age Population under the 2019 House Map, which allows Black voters in the district to elect their candidates of choice, including

Representative Howard J. Hunter III, a Native American, who is the current representative of District 5. Doc. Ex. 6846 (PX1566 Ketchie Aff. Ex. 5). Under the Enacted Maps, Representative Hunter will be located in House District 5, and the BVAP percentage will decrease to 38.59%, which makes it less likely that Black voters will be able to continue to elect Representative Hunter. Doc. Ex. 6849 (PX1567 Ketchie Aff. Ex. 6). Similarly, House District 21 contains a 39.00% BVAP under the 2019 House Map, which allows Black voters in the district to elect their candidates of choice, including Representative Raymond E. Smith, who is Black and the current representative of District 21. Doc. Ex. 6846 (PX1566 Ketchie Aff. Ex. 5). Under the Enacted Maps, Representative Smith was redrawn into District 10 and double-bunked against Representative John R. Bell IV. Doc. Ex. 6849 (PX1567 Ketchie Aff. Ex. 6). The redrawn Senate District 10 contains a BVAP of 34.27%, which makes it less likely that Black voters will be able elect their candidates of choice. *Id.*

Further, the House maps unnecessarily double-bunk Black elected officials. Representatives Abe Jones and James Roberson represent House Districts 38 and 39, respectively, are both Black, and are both the candidates of choice for Black voters in their districts. Doc. Ex. 6846 (PX1566 Ketchie Aff. Ex. 5). Under the Enacted Maps, Representatives Jones and Roberson will be paired with each other, and Black voters will be forced to choose between two representatives who were both previously their candidates of choice. Doc. Ex. 6846 (PX1567 Ketchie Aff. Ex. 6).

House Districts 5, 21, and 38 were previously determined to be racial gerrymanders in *Covington v. North Carolina*, 316 F.R.D. 117, 143, 147, 151 (2017).

North Carolina Legislators therefore were aware of the demographic composition of these areas of North Carolina. And even the flawed and incomplete analysis of Legislative Defendants' expert, Dr. Lewis, supports the finding of discriminatory impact in the House map. By Dr. Lewis's own calculations, House District 21 (which had elected a Black incumbent for the entire decade after the 2011 redistricting cycle) would have a zero-percent chance of electing the Black-preferred candidate. Doc. Ex. 9606 (LDTX109 Lewis Rep., Ex. B, Table 1). A racially polarized voting analysis would have made this clear, and Legislative Defendants had an obligation to conduct such an analysis under *Stephenson*. But they did not, and instead destroyed a functioning crossover district. This was not an inevitable result of North Carolina's political geography. Plaintiffs' expert Dr. Jonathan Mattingly determined that it would have been possible for the legislature to draw districts in the Duplin-Wayne House Cluster with significantly higher BVAPs so as to give Black voters greater opportunity to elect their candidates of choice, once again demonstrating that the destruction of performing Black crossover districts was not necessary. Doc. Ex. 6579–80 (PX1485 Mattingly Addendum Rep.).

The Enacted Senate Map

The Enacted Senate Map will also result in a reduction of the number of Senators who are the candidates of choice of Black voters in North Carolina. For example, Senate District 21 contains a 42.15% BVAP under the 2019 Senate Map, which allows Black voters to elect their candidates of choice, including Senator Ben Clark, who is Black and currently represents District 21 Doc. Ex. 6842 (PX1564

Ketchie Aff. Ex. 3). Under the Enacted Maps, Senator Clark is drawn into Senate District 24, which as newly drawn contains a 29.63% BVAP population. Doc. Ex. 6844 (PX1565 Ketchie Aff. Ex. 4). Senator Clark is also double bunked with Senator Danny Earl Britt Jr., who is white. *Id.* This diminution in BVAP percentage will prevent Black voters in the district from continuing to elect their candidates of choice, and Senator Clark will therefore likely lose his Senate seat to a candidate who is not supported by Black voters in his district.

Importantly, Dr. Mattingly evaluated the possible clusters available to the North Carolina Legislature. Doc. Ex. 6579–80 (PX1485 Mattingly Addendum Rep.). His analysis shows that the North Carolina General Assembly had two options for clustering counties into Senate districts in Northeast North Carolina. The clusters the Legislature selected have BVAPs of 30.0% and 29.49%, splitting the Black vote and preventing Black voters in the area from electing their candidate of choice anywhere. The alternative Senate clusters would have had BVAPs of 17.47% and 42.33%, respectively, allowing Black voters to elect their candidate of choice in one of the clusters. *Id.*[20]

[20] The intentional destruction of crossover districts is plainly evidenced by Legislative Defendants' own comments. Legislative Defendants drew a Senate map both ways, wanting to "be prepared to file either one," according to Defendant Hise Doc. Ex. 6289, ¶ 9 (PX1468 Daye Aff). However, Legislative Defendants enacted the cluster that would reduce the BVAP and were told by the public would destroy a performing Black crossover district. Legislative Defendants had a choice to avoid the destruction of Senate District 1, but instead intentionally chose, even by the calculations of their own expert, to commit a clear violation of United States Supreme Court precedent.

In addition, Senate District 4 contains a 47.46% BVAP under the 2019 Senate Map, which allows Black voters to elect their candidates of choice, including Senator Milton F. "Toby" Fitch, who is Black and currently represents Senate District 4. Doc. Ex. 6842 (PX1564 Ketchie Aff. Ex. 3). Under the Enacted Maps, Senator Fitch will be located in the redrawn Senate District 4, which will contain a 35.02% BVAP and prevent Black voters in the district from electing their candidate of choice. Doc. Ex. 6844 (PX1565 Ketchie Aff. Ex. 4). As a result, Senator Fitch will likely lose his seat to a candidate who is not the candidate of choice of Black voters in the district.

As with the House Districts, Senate Districts 4 and 21 were previously determined to be a racial gerrymander in *Covington*, 316 F.R.D. at 142, 147. North Carolina Legislators therefore were well aware of the demographic composition of these areas of North Carolina. Most critically, in Senate Districts 1 and 4, the chance of the Black-preferred candidate winning went from 100% to 0%. Thus, the Legislature's Senate map destroyed two functioning, effective, crossover districts. Doc. Ex. 9608–10 (LDTX109 Lewis Rep., Ex. B, Table 1).

And like with the House Districts, Legislative Defendants' expert, Dr. Lewis, substantiated the discriminatory impact of the Enacted Senate Map, finding that Senate Districts 1 and 4 had BVAP figures high enough to enable Black voters to elect candidates of their choice in the 2019 Enacted Plans, but neither of these districts would maintain a BVAP high enough to enable Black voters to continue electing candidates of their choice in the Enacted Maps. Doc. Ex. 9608–10 (LDTX109 Lewis Rep., Ex. B, Table 1).

The Enacted Congressional Map

The Enacted Congressional Map will likely result in one of the two Black Congressmen from the State of North Carolina losing his seat due to Black voters' inability to elect their candidates of choice in the newly drawn Congressional district. Under the 2019 map, North Carolina's First Congressional District contained a 42.38% BVAP, allowing Black voters to elect their candidates of choice, including Representative G.K. Butterfield who is Black and currently serves as the representative to the United States House of Representatives from the First Congressional District. Doc. Ex. 6840 (PX1562 Ketchie Aff. Ex. 1). Under the Enacted Maps, Representative Butterfield was drawn into the Second Congressional District with a BVAP of 39.99%. Doc. Ex. 6841 (PX1563 Ketchie Aff. Ex. 2). The First Congressional District exhibits a high level of racially polarized voting, such that differences in BVAP have a consequential effect on the ability of Black voters to elect their candidates of choice. Under the Enacted Maps, Representative Butterfield will likely lose his seat to a candidate who is not supported by the Black voters in the district. *Id.* Congressional District 1 was previously determined to be a racial gerrymander in *Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016). North Carolina Legislators therefore were aware of the demographic composition of this area of North Carolina.

* * * * *

Overall, the evidence shows undeniably that Legislative Defendants' process—which they argue prevented any consideration of race—consistently targeted and

destroyed effective crossover districts that gave Black voters the ability to elect candidates of their choice. Such a showing strongly supports a finding of intentional discrimination.

4. There is No Compelling Non-Racial State Interest That Can Justify These Discriminatory Maps.

"Once racial discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor." *Hunter v. Underwood*, 471 U.S. 222, 228, 240 (1985). "Racial discrimination is not just another competing consideration," and any deference otherwise accorded to the acts of the North Carolina General Assembly disappears once the law has been shown to be the product of a racially discriminatory purpose. *Arlington Heights*, 429 U.S. at 265–66 ("When there is proof that a discriminatory purpose has been a motivating factor in the decision . . . judicial deference is no longer justified.")

The proper inquiry at this stage is into the actual purpose of the legislators who passed the Enacted Maps, not hypothetical or after-the-fact justifications. The Court must "scrutinize the legislature's actual non-racial motivations to determine whether they alone can justify the legislature's choices," and whether the Enacted Maps would have been enacted "irrespective of any alleged underlying discriminatory intent." *Holmes*, 270 N.C. App. at 33–34.

Legislative Defendants cannot advance any non-racial motivation for their intentional discrimination in the adoption of the Enacted Plans. The closest Legislative Defendants have come to articulating any justification for the

discriminatory actions they have taken is arguing that past precedent forecloses any racially polarized voting analysis. For reasons already shown above, the argument that such analysis is barred by case law is clearly mistaken, and the argument that such an analysis is a matter of mere prudence, rather than obligation, is foreclosed by the clear language of *Stephenson*. Additionally, as discussed above in Section II, the maps cannot be explained by race-neutral redistricting criteria.

The trial court erred by adopting a justification not offered by Legislative Defendants in defense of the Enacted Plans, explaining any discriminatory impact on North Carolina's voters of color to be the result of partisan, not racial, considerations. *See* R p 3764 ¶¶ 170–71 (Judgment) (holding that "[w]hat Plaintiffs have not shown . . . . is how the General Assembly targeted this group on the basis of race instead of partisanship."). Legislative Defendants have refrained from characterizing the Enacted Plans as the result of permissible partisan bias, and thus the trial court's reasoning is the first time such an argument has been made in this litigation. Likewise, the unconstitutional partisan discrimination employed by the legislature cannot be a "neutral" defense for unconstitutional racial discrimination.

Moreover, the trial court's assertion that "[t]here is nothing in the evidentiary record before this Court showing that race *and* partisan gain were *coincident* goals predominating over all other factors in the redistricting," R p 3764 ¶ 171 (Judgment), is directly contradicted by Legislative Defendants' own expert testimony and Defendant Hise's testimony. Dr. Andrew Taylor testified at trial that it is "impossible" for legislators to ignore what they know about race and partisanship of voters when

drawing maps. T2 p 519:2–7 (Taylor). Defendant Hise confirmed this in his deposition, stating "Once I know something I can't unknow it . . . . No person could." Doc. Ex. 3618:5–6, 3768:15–17 (PX 146 Hise Dep. Tr.). Legislative Defendants professed and insisted upon a race-blind process, all while inevitably retaining detailed knowledge of North Carolina's political and racial geography. Their intentions are as clear as the consequences demonstrated in the Enacted Maps. "Redistricting cannot be race-unconscious until the country ceases to be, and pretending that society or politics has become colorblind can only allow discrimination to go unchecked." Doc. Ex. 6657 (PX1486 Leloudis Rep.).

While the violation of *Stephenson* is no less obvious than the destruction of functioning crossover districts in each of the Enacted Plans, it is somewhat more abstract. It is easier to defend and argue over the requirements of case law than it is to explain the choice to destroy functioning Black crossover districts in each of the Enacted Plans. But both harms are just as clear, and importantly, these harms represent two sides of the same coin. Legislative Defendants' failure to comply with *Stephenson* directly and predictably resulted in the destruction of functioning crossover districts; they are the one and the same. Legislative Defendants' choice to violate *Stephenson* was an attempt to obscure the consequences of their decision to lock in the Duke Clusters at the outset of the process, not a failure to understand that one would result in the other. No matter which way Legislative Defendants' process is conceived, the results are intentionally discriminatory, and thus cannot pass

muster under the North Carolina Equal Protection Clause. The trial court erred in holding otherwise.

IV. THE COURT ERRED IN DENYING PLAINTIFF COMMON CAUSE'S REQUEST FOR RELIEF UNDER THE DECLARATORY JUDGMENT ACT.

A. Standard of Review

This is a question of law reviewed *de novo*. *State v. Biber*, 365 N.C. 162, 168 (2011) ("Conclusions of law are reviewed *de novo* and are subject to full review.") A *de novo* standard of review is also appropriate because this issue involves constitutional rights. *Libertarian Party v. State*, 365 N.C. 41, 46 (2011) ("[*D*]*e novo* review is ordinarily appropriate in cases where constitutional rights are implicated." (citations omitted)).

B. The Supremacy Clauses of the State Constitution Require Map-Drawers to Ascertain What is Required under the VRA when Drawing State Legislative Maps.

The judiciary's powers are unique in "the context of state redistricting and reapportionment disputes," where "it is *well within* the power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan." *Stephenson I*, 355 N.C. at 362 (emphasis added) (citation omitted). These powers extend to dictating the procedures required in lawful state legislative redistricting, because while "the respective state legislatures maintain primary responsibility for redistricting and reapportionment of legislative districts, such *procedures* must comport with federal law." *Stephenson I*, 355 N.C. at 363 (emphasis added).

This Court in *Stephenson* sought to harmonize the different North Carolina Constitutional requirements imposed on the redistricting process by setting forth a

process that would minimize the splitting of counties, in recognition of the Whole County Provision, while satisfying federal law requirements, including compliance with the VRA. *Stephenson II*, 357 N.C. at 309. In doing so, it directs that "legislative districts required by the VRA shall be formed prior to creation of non-VRA districts." *Stephenson I*, 355 N.C. at 383.

As the North Carolina Supreme Court later confirmed, the direction in *Stephenson I* is a process requirement commanded by the Supremacy Clauses:

> Thus, the *process* established by this Court in *Stephenson I* and its progeny requires that, in establishing legislative districts, the General Assembly *first* must create all necessary VRA districts, single-county districts, and single counties containing multiple districts.

Dickson v. Rucho, 368 N.C. 481, 532 (2015) (emphasis added), *vacated on other grounds*, 137 S. Ct. 2186 (2017). This is not a "preclearance requirement" as the trial court asserted, any more than the instructions on county clusters are. R p 3768 ¶ 184 (Judgment). It is a process requirement, and one that the Legislative Defendants failed to adhere to in the 2021 redistricting cycle.

C. It Is Undisputed That Legislative Defendants Failed to Ascertain Whether VRA Districts Were Required in the 2021 Redistricting Cycle.

Throughout the redistricting process, Legislative Defendants were repeatedly urged, and afforded ample opportunity, to ascertain what districts would be required by the VRA pursuant to the direction in *Stephenson I*. As described above, they failed to heed any of these pleadings, refusing to conduct any analysis this redistricting cycle. *See* R p 3535 ¶ 66 (Judgment) ("Overall, the redistricting Chairs unilaterally decided not to undertake or commission any racially polarized voting study for the 2021 redistricting cycle"); *see also* R pp 3528–30 ¶¶ 48–53 (Judgment). And in

addition to never allowing a vote in either Redistricting Committee on whether to conduct such an analysis, the Redistricting Chairs took the additional step of requiring all members to use designated county cluster options—the Duke County Clusters—which were explicitly devised without any consideration as to what the VRA might require. R p 3533 ¶ 59 (Judgment); *see also* Doc. Ex. 744 (PX70 Duke Clusters).

The trial court characterized these steps as a mere "decision that no VRA Districts are required" based on Legislative Defendants' "prior experience." R p 3768 ¶ 183 (Judgment). But the only decision established in the record was Redistricting Chairs' unilateral decision to prevent at all costs any formal analysis during the redistricting process as to whether VRA districts were required. *See* R p 3535 ¶ 66 (Judgment) ("Overall, the redistricting chairs unilaterally decided not to undertake or commission any racially polarized voting study for the 2021 redistricting cycle."). A natural consequence of this decision is that the "prior experience" that supposedly informed what the Legislative Defendants perceived the VRA to require was all based upon outdated Census and Election data. Accordingly, what the trial court characterized as a "decision" is much more accurately characterized as an erroneous legal assumption that no analysis need be conducted at all.

As described above in detail in Section III, this abject refusal to formally allow any consideration of race by Committee members or map-drawers was part of an intentional and concerted effort to facilitate the destruction of Black crossover districts in the Congressional and state Legislative Maps, and is antagonistic to the

Legislature's state Constitutional obligation to provide equal protection for all voters. N.C. Const. art. 1, §19. Furthermore, these actions also represent a flagrant disregard for the explicit instruction of this Court on what is required for a constitutional redistricting process.

Accordingly, in its first claim for relief, Plaintiff Common Cause has sought a declaratory ruling that it and its members and the voters it serves are entitled to, and Legislative Defendants have a duty to, undertake a redistricting process that adheres to the requirements of Article II, Sections 3 and 5 of the North Carolina Constitution as set forth in *Stephenson v. Bartlett*, including a requirement to undertake an analysis of racial data necessary to ascertain what districts are required by the VRA. R p 1330 ¶ 157 (Common Cause Complaint).

D. Declaratory Relief Is Thus Warranted and Proper.

The trial court denied Plaintiff Common Cause's request for declaratory relief and absolved Legislative Defendants of their failure to adhere to the explicit instruction of this Court, a holding that effectively—and impermissibly—treated the Court's direction in *Stephenson* as mere *dicta*. *See Dunn v. Pate*, 334 N.C. 115, 118 (1993) (Trial courts have "no authority to overrule decisions of the Supreme Court and ha[ve] the responsibility to follow those decisions until otherwise ordered by the Supreme Court."). The trial court's justification for doing so was that it "is not for the Court to decide and would impermissibly intrude on the internal decision-making processes of the Legislature." R p 3768 ¶ 183 (Judgment). This reasoning is unpersuasive given the judiciary's broad powers in redistricting to require valid

reapportionment or even go so far as to formulate a valid redistricting plan. *Stephenson I*, 355 N.C. at 362.

Instead, this matter presents the rare but important instance in which declaratory relief is not only warranted, but necessary to maintain the separation of powers upon which our democracy is founded. *See* N.C. Const. art I. § 6. "It has long been understood that it is the duty of the courts to determine the meaning of the requirements of our Constitution." *Leandro v. State*, 346 N.C. 336, 345 (1997). Accordingly, the judicial branch has the "responsibility [for] constru[ing] the limits on the powers of the branches of government created by our Constitution." *Comm. to Elect Forest v. Emps. PAC*, 376 N.C. 558, 564 (2021) (citing *Cooper v. Berger*, 370 N.C. 392 (2018)); *State ex rel. McCrory v. Berger*, 368 N.C. 633 (2016)). When constitutional disputes arise, "issues concerning the proper construction and application of . . . the Constitution of North Carolina can . . . be answered with finality [only] by this Court." *Stephenson I*, 355 N.C. at 362. The Court's vested authority includes declaring legislative process requirements dictated by the state constitution. *See, e.g.*, *Common Cause v. Forest*, 269 N.C. App. 387, 395 (2020) (holding that the Right to Instruct clause "requires that the [legislative] process, however quickly it moves, must be open to the public, and that the people must have ways to contact their representatives to convey their views during that process.").

By flagrantly disregarding this Court's direction in *Stephenson*, the Legislative Defendants effectively usurped the power of the judiciary to set forth state constitutional requirements in redistricting. To be clear, this is not a dispute of policy.

This is not a matter in which Legislative Defendants commissioned a study on what the VRA might require in redistricting and Plaintiffs take issue with those results. Legislative Defendants, by their own admission, refused to make any meaningful effort, following the 2020 decennial census, to ascertain what the VRA might require.

When the Legislature refuses to comply with a mandate of this Court in this manner, it is incumbent upon the courts of this state to uphold the rule of law. The declaratory relief sought by Plaintiff Common Cause requests just that, and Plaintiffs should not be required to seek relief in federal court (as the trial court asserted) when the Legislature fails to adhere to requirements under the state constitution as declared by the North Carolina Supreme Court.

This request for relief falls squarely within relief afforded by the Declaratory Judgment Act (the "Act"), N.C.G.S. § 1-253 *et seq.*, which provides courts of record the power to "declare rights, status, and other legal relations, whether or not further relief is or could be claimed" N.C.G.S. § 1-253. The Act is "remedial, its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered." N.C.G.S. § 1-264. Accordingly, "a declaratory judgment should issue (1) when it will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Conner v. N.C. Council of State*, 365 N.C. 242, 258 (2011) (internal citation omitted).

Here, a declaratory judgment is warranted because (1) there remains an ongoing controversy as to Legislative Respondents' duties to adhere to the process set forth in *Stephenson* when undertaking their constitutional mandate to redraw state legislative districts (an issue that will recur in any remedial redraw as well as in future redistricting cycles), and (2) a declaration from the court of record would therefore terminate and afford the parties relief from the uncertainty of this ongoing dispute.

This declaratory relief is similar to that afforded by the Court in *Leandro v. State*, 346 N.C. 336 (1997) and *Hoke County Board of Education v. State*, 358 N.C. 605 (2004), in which the Court held the Legislature had failed in its constitutional duty to provide a sound basic education to every child of this state. The Court had similar misgivings in these decisions, but nonetheless saw fit to "adopt and apply the broadened parameters of a declaratory judgment action that is premised on issues of great public interest." *Hoke*, 358 N.C. at 616. In other words, where "inordinate numbers" of citizens are "wrongfully being denied their constitutional right," then "our state courts cannot risk further and continued damage," even if "the perfect civil action has proved elusive." *Id.*; *see also Augur v. Augur*, 356 N.C. 582, 589 (2002) (courts have "no discretion to decline" a request for declaratory relief where "fundamental human rights are denied in violation of constitutional guarantees" and legislative action is specifically challenged by persons directly affected by it).

Put simply, if the Court fails to provide declaratory relief here as the trial court has done, this risks rendering past and future interpretations by the judiciary on the

state constitutional requirements in redistricting merely advisory and without the full force of law. Such a result risks injecting chaos into an area of law that is in dire need of stability. Plaintiff Common Cause's claim for relief under the Declaratory Judgment Act should thus be granted.

V. THE TRIAL COURT ERRED IN FINDING PLAINTIFF COMMON CAUSE LACKS STANDING

The trial court misinterpreted North Carolina standing doctrine, ignoring established standards and incorrectly employing irrelevant legal doctrines. To have standing, the party seeking relief must have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28 (1973). An association has standing to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *River Birch Ass'n v. Raleigh*, 326 N.C. 100, 130 (1990). An organization must only show that one of its members would have standing. *State Employees Ass'n of N.C., Inc. v. State*, 357 N.C. 239, 580 (2003). As discussed at length above, there is no question that Common Cause has standing to bring all claims pled in its Complaint.

A. Common Cause Has Standing to Allege Partisan Gerrymandering.

Common Cause requested injunctive relief based on the Legislature's violation of Article I, Sections 10, 12, 14, and 19 of the North Carolina Constitution through the enactment of Legislative and Congressional maps that are partisan gerrymanders. Under the North Carolina Supreme Court decision *Committee to Elect Dan Forest v. Employees Political Action Committee*, 376 N.C. 558, 594 (2021) (hereinafter "*EMPAC*"), a plaintiff challenging a legislative act as unconstitutional must show direct injury. This Court has explained that "direct injury" is synonymous with "adversely affected." *Id.*

It remains undisputed that Common Cause and its members have been adversely affected by the North Carolina Legislature's partisan gerrymandering. Legislative Defendants intentionally engaged in a confusing, opaque redistricting process in order to pass extreme partisan maps out of the public eye. Consequently, Common Cause was forced to divert staff time and resources to decoding the obscure process in order to fulfill its organizational mission. Common Cause has members in every electoral district across the state, and as multiple experts explained at trial, the gerrymandered districts were specifically engineered to be impervious to political change. T2 p 385 (Magleby). Those members are therefore impeded in their ability to organize, mobilize, and effect political change and to see their will translated into free and fair elections. Common Cause only needs one member to show that they have been adversely affected by the gerrymandered maps, and Common Cause can show far more than that. Therefore, Common Cause has standing on its own behalf and on behalf of its members. *See Common Cause*, 2019 N.C. Super LEXIS 56, at *329–30

(finding Plaintiff Common Cause had membership standing to assert Partisan Gerrymandering claims).

The trial court's analysis erred in two potential ways. First, if the trial court determined that Common Cause lacks standing based upon its finding that partisan gerrymandering does not violate the North Carolina Constitution, it wrongly tied the merits of Common Cause's case with a standing analysis. Whether partisan gerrymandering is a constitutional violation goes to the merits of the matter, and standing is independent from the merits of an action. On the contrary, "standing is jurisdictional in nature and consequently, standing is a threshold issue that must be addressed, and found to exist, *before the merits*, of [the] case are judicially resolved." *In re E.T.S.*, 175 N.C. App. 32, 41 (2005) (internal citations omitted) (emphasis added); *see also In re Miller*, 162 N.C. App. 355, 357 (2004) ("[S]tanding is a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved." (internal citations omitted)); *Byron v. Synco Properties, Inc.*, 258 N.C. App. 372, 375 (2018) (same); *Perdue v. Fuqua*, 195 N.C. App. 583, 585 (2009) (same). The more demanding federal standing doctrine also views standing as independent from the merits. *See Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) ("The [incorrect] 'legal interest' test goes to the merits. The question of standing is different."); *see also Doup v. Van Tuyl Grp., LLC*, 2021 U.S. Dist. LEXIS 75211, at *6–7 (N.D. Tex. Apr. 19, 2021) (affirming the distinction by refusing to find a lack of standing based on an argument that the defendant did not meet the definition of a "seller," as required under the statute). Consequently, both

the demanding federal standard and North Carolina's more generous standard affirm that the merits of a party's claim are distinct from standing, and the trial court erred in finding otherwise.

Second, and similarly, if the trial court concluded that Common Cause lacks standing because gerrymandering is a "political question," R p 3753–54 ¶ 135–37 (Judgment), it incorrectly conflated standing and justiciability, which are two very different concepts with distinct considerations under North Carolina law *and* federal law. The Court need look no further than *Hoke County Board of Education v. State*, where this Court first determined that the local school boards have standing in a case involving its children's basic education because a decision regarding the legality of defendant County School Board's action would "have an effect on" the local school boards' roles as educators. 358 N.C. 605, 617 (2004). Just as the local boards of education were affected by the opposing party's action, so too is Common Cause here affected by Legislative Defendants' action. Separately (and a full 22 pages later), in response to plaintiff's request that the Court determine the proper age at which children should start school, the Court found the issue was "nonjusticiable" and "squarely place[d] in the Hands of the General Assembly." *Id.* at 639. The Court did *not* retroactively determine that the justiciability of the controversy had some, or any, effect on standing. Therefore the trial court here erred in finding otherwise.

Even federal law is more stringent standing requirement confirms that justiciability and standing are distinct concepts. Although the trial court relied heavily on the U. S. Supreme Court case *Rucho v. Common Cause*, R p 3755–56 ¶

142–45 (Judgment), it failed to acknowledge how *Rucho* illustrates that justiciability and standing are distinct: "Two 'threshold questions' remained: standing, which we addressed in *Gill*, and 'whether [such] claims are justiciable.'" 139 S. Ct. 2484, 2498 (2019) (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018)). After the U.S. Supreme Court ruled partisan gerrymandering nonjusticiable under the federal constitution, it did *not* then turn around and look back at standing and make a determination based upon its justiciability holding.

In sum, whether the trial court wrongly tied its standing analysis to its findings related to the merits or its findings related to justiciability, it erred in holding that Common Cause has no standing. While Common Cause has clearly demonstrated how it has been adversely affected by the Legislature's partisan gerrymander, the trial court failed to provide any proper factual or legal reason otherwise or explain its departure from a recent holding affirming Common Cause's standing to bring partisan gerrymandering claims. *Common Cause*, 2019 N.C. Super LEXIS 56, at *329–30. Common Cause therefore clearly has standing to allege partisan gerrymandering.

B. Common Cause Has Standing to Allege Intentional Discrimination.

With regard to its intentional discrimination claims, where the same principles discussed in Section V.A. apply, Common Cause has similarly shown it is "adversely affected" by Legislative Defendants' action.

In erroneously concluding that Common Cause does not have standing to allege racial discrimination, the trial court stated that there is "no factual basis" underlying Common Cause's claim. R p 3715 ¶ 16 (Judgment). However, Common

Cause's members include Black voters throughout North Carolina who are directly harmed by the enactment of the Legislative and Congressional maps. The enacted maps will have a direct and deleterious effect on Black voters' ability to elect their candidates of choice. And the Legislature's extreme partisan gerrymander also prevents the election of legislators who can ally with Black elected officials in order to enact policies that are preferred by Black voters. The maps' destruction of performing Black districts and crossover districts directly impedes the ability of Common Cause's Black members to organize, engage like-minded voters, and advocate for their preferred policies. At the most basic level, Black Common Cause members are harmed by these maps, and therefore standing is established.

If the trial court was instead suggesting that Black Common Cause members suffered no "injury in fact," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), it ignored North Carolina Constitutional law. This Court expressly stated in *EMPAC* that an injury in fact requirement "is not the law of North Carolina." *EMPAC*, 376 N.C. at 609. Common Cause is able to show a direct injury based upon the effects that the Legislature's actions will have on Black North Carolinians. No more is required by the state constitution and the trial court erred by finding otherwise.

C. Common Cause Has Standing For Its Declaratory Judgment Claim.

Finally, Common Cause meets this Court's "adversely affected" standard for its Declaratory Judgment Claim based upon this state's precedent. *EMPAC*, 376 N.C. at 594.

Common Cause requests a judgment declaring that the North Carolina Legislature is obligated to abide by the requirements of *Stephenson* and determine

the necessity of drawing VRA districts prior to drawing non-VRA districts because Black members of Common Cause are adversely affected in multiple respects by the Legislature's failure do so. The maps that resulted from Legislative Defendants' refusal to follow explicit North Carolina law are severely deficient because they fail to provide an opportunity for Black Common Cause members to elect their candidates of choice, and cause dignitary harm to Black North Carolinians. As the trial court rightly notes, *Stephenson* was an effort to "harmonize the WCP [Whole County Provision] and VRA." R p 3767 ¶ 182 (Judgment). The result was that North Carolina law now requires attention to the VRA during redistricting to ensure Black North Carolinians have the full protections of the law. However, during the 2021 redistricting process, Legislative Defendants intentionally ignored these procedures. This deliberate denial of the protections of the VRA caused dignitary harm to Black members of Common Cause. Federal and state law establishes that dignitary harm to protected classes constitutes real and tangible harm. *See Tully v. City of Wilmington*, 370 N.C. 527, 534 (2018); *Powers v. Ohio*, 499 U.S. 400, 406 (1991); *Georgia v. McCollum*, 505 U.S. 42, 49 (1992). There is no doubt, therefore, that Black members of Common Cause are harmed by the Enacted Maps on numerous grounds.

Moreover, this Supreme Court has previously emphasized that prudential standing concerns are diminished in declaratory judgment actions of great public importance. In *Hoke County Board of Education*, this Court stated that,

> In declaratory actions involving issues of significant public interest . . . courts have often broadened both standing and evidentiary parameters to the extent that plaintiffs are permitted to proceed so long as the interest sought to be protected by the complainant is arguably within

> the 'zone of interest' to be protected by the constitutional guaranty in question.

358 N.C. at 615. Electing our legislative representatives is of preeminent public interest and importance. Black North Carolinians, who have repeatedly seen redistricting used as a tool of oppression and disenfranchisement against them, are unquestionably within the "zone of interest" pertinent to North Carolina's redistricting law. Common Cause therefore has standing for all claims it pled.

CONCLUSION

> Our government is founded on the consent of the governed. A free ballot and a fair count must be held inviolable to preserve our democracy. In some countries the bullet settles disputes, in our country the ballot.

Swaringen v. Poplin, 211 N.C. 700, 702 (1937). The record undeniably shows that the Enacted Maps violate the most fundamental democratic principles our Constitution guarantees the citizens of the State, and this Court should reverse the trial court's order dismissing Plaintiff Common Cause's claims for the reasons stated herein.

The Court should further grant relief by ordering a remedial redistricting process as follows:

- In the interest of time, and given the expedited nature of this litigation and fast-approaching election administration deadlines, this Court should retain jurisdiction over the remedial phase and appoint a Special Master to work immediately and concurrently with any legislative remedial redistricting committee the Court may permit[21] to provide alternative maps for

[21] Pursuant to the Court's inherent powers to "require valid reapportionment or to formulate a valid redistricting plan," *Stephenson I*, 355 N.C. at 376 (internal

consideration should the General Assembly fail to enact constitutional remedial plans.

- Order that Congressional remedial plans be drawn within districts that do not depart from within +/- 5% (allowing a range of 10%) of the most likely outcome of what the expected number of seats by any party would be using non-partisan simulations and a composite partisan index. *See Brown v. Thomson*, 462 U.S. 835, 842 (1983) (quoting *Gaffney v. Cummings*, 412 U.S. 735 (1973)); *Stephenson II*, 357 N.C. at 306.[22] The Legislature will justify the partisan index it uses to assess the adequacy of its remedial plan and why the elections selected for the index will provide a reliable indicator of partisan fairness,[23] or can rely on one of the Plaintiffs' expert's partisan index from this case. Should the Congressional plan fall outside the +/- 5% variance from the expected seats using the simulations, the legislature bears the burden of justifying such a departure.

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quotation and citation omitted), and in light of the extreme partisan gerrymanders proved in this case and the significant misrepresentations regarding the 2021 redistricting process by Legislative Defendants noted herein, it is well within the rights of this Court to find that Legislative Defendants have forfeited their right to engage in remedial map-drawing in this instance.

[22] This threshold is well-supported by precedent from both the U.S. Supreme Court and the North Carolina Supreme Court in measuring tolerable under- or over-weighting of votes in one-person, one vote cases. Of course, there is no mention of 10% or +/-5% in either the Federal or State Equal Protection Clauses, but both high courts have repeatedly asserted that this threshold is a reasonable one by which to create a shifting burden framework.

[23] The Court could also instruct the legislature on which and how many elections to use to construct a composite partisan index.

- Order the Legislature to remedy and restore the intentionally destroyed Black crossover districts identified by this Court as violations under our state's Equal Protection Clause, and further order the legislature to conduct a racially polarized voting study in the geographic areas identified by Plaintiff Common Cause in this litigation, accept the submission of racially polarized voting studies from the plaintiffs, and should it find legally significant racially polarized voting in these identified areas, draw districts compelled by the Voting Rights Act first, as this Court instructed in *Stephenson*.
- Likewise, this Court should clarify that none of its prior cases should be read to insist upon or endorse "race-blind" redistricting.
- County groupings should be established after any VRA districts are drawn, and the adequacy of the remedy should be measured on two fronts: (1) if a state Legislative plan produces expected seat shares outside the range of +/-5% (for a total of 10%) of what the expected seat vote is in statewide non-partisan simulated maps using a justified and reliable partisan index, the burden shifts to the legislature to justify on non-discriminatory grounds the statewide map, or if (2) a state Legislative plan produces any expected seat shares in any county or county grouping that shows up in fewer than 25% of non-partisan simulated maps for that county or county grouping, using a justified and reliable partisan index, the burden also shifts to the legislature to justify on non-discriminatory grounds the adopted district lines within that cluster.

These measures are required to ensure the voters of this State are not consigned to repeated remedial re-draws as they were last cycle, and to ensure adherence to our State's most fundamental democratic protections, as guaranteed by the North Carolina Constitution.

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

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