No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

Plaintiffs-Appellants,

REBECCA HARPER, et al.,

Plaintiffs-Appellants, and

COMMON CAUSE,

Plaintiff-Intervenor-Appellant,

v.

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

Defendants-Appellees.

From Wake County
21 CVS 015426
21 CVS 50085

REPLY BRIEF OF *HARPER* PLAINTIFFS-APPELLANTS

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INTRODUCTION

The remedial Senate plan is a blatant partisan gerrymander that entrenches Republican control over the General Assembly for the next decade. Legislative Defendants do not seriously argue otherwise and instead principally ask this Court to affirm the plan out of deference to the General Assembly. But rather than "passively deferring to the legislature," this Court's responsibility is to "determine whether [the] challenged legislative acts, although presumed constitutional, encumber the constitutional rights of the people of our state." *Harper v. Hall*, 380 N.C. 317, 323, 868 S.E. 2d 499, 510 (2022). And any deference owed the in the ordinary course is particularly unwarranted where, as here, this Court has already found that the General Assembly has repeatedly violated the constitutional rights of North Carolinians through partisan gerrymandering.

The remedial Senate plan is not a fair map—not even close—and it will deny Democrats a majority in the upper chamber even in elections where they win a substantial majority of the statewide vote. Legislative Defendants' contention that the plan is nevertheless constitutional because it purportedly satisfies two cherry-picked metrics distorts this Court's precedent and the record evidence in this case. This Court should reject the General Assembly's latest brazen gerrymander and adopt the *Harper* Plaintiffs' proposed remedial Senate plan, or another remedial Senate plan that "will give the voters of all political parties substantially equal opportunity to translate votes into seats across the plan."

ARGUMENT

I. The General Assembly's enacted remedial Senate plan does not remedy the constitutional defects in the invalidated 2021 plan.

Legislative Defendants ask this Court to presume the constitutionality of the remedial Senate plan because it purportedly satisfies a narrow set of cherry-picked metrics. But this Court held that a redistricting plan is presumed constitutional only if it provides voters with "substantially the same opportunity to electing a supermajority or majority of representatives as the voters of the opposing party would be afforded if they comprised [the same vote share] in that same election." *Harper*, 380 N.C. at 387, 868 S.E. 2d at 549. The remedial Senate plan fails this constitutional standard. Harper Pls.' Br. 17-28. In holding to the contrary, the trial court both misconstrued the legal standard and plainly erred in its factual assessment of the plan. *Id.* at 29-36.

A. This Court owes no deference to a redistricting plan that lacks partisan symmetry.

Legislative Defendants principally argue that the remedial Senate plan should be affirmed due to a "presumption of constitutionality." LDs' Br. 19. But this puts the cart before the horse. This Court has explained that a more searching standard of judicial review applies to redistricting plans given their potential to "restrict the democratic processes through which the 'political power' is channeled to the people's representatives, and which undermine the very democratic system created by our constitution." *See Harper*, 380 N.C. at 390, 868 S.E.2d at 551. For this reason, a redistricting plan is entitled to a presumption of constitutionality only if it demonstrates partisan symmetry: "If some combination of . . . metrics demonstrates there is a significant likelihood that the districting plan will give

the voters of all political parties substantially equal opportunity to translate votes into seats across the plan, *then* the plan is presumptively constitutional." *Id.*, 380 N.C. at 384-85, 868 S.E.2d at 547-48 (emphasis added). And even then, any presumption of constitutionality is rebuttable by evidence showing that the plan violates fundamental rights. *See id.*; Harper Pls.' Br. 32-33.

In addition, deference is unwarranted where, as here, the Court has held that the General Assembly already acted with unconstitutional intent. *See Harper*, 380 N.C. at 324, 868 S.E. 2d at 510 ("Legislative Defendants presented no evidence at trial to disprove, the extensive findings of fact of the trial court, to the effect that the enacted plans are egregious and intentional partisan gerrymanders."); *see also* Harper Pls.' Br. 34-35 (noting that state and federal courts have repeatedly invalidated the General Assembly's redistricting plans over the past decade). As other state high courts have held in indistinguishable circumstances, "the existence of unconstitutional intent" in the enacted Senate plan means that "no deference was due" to the General Assembly's remedy. *See League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363, 371 (Fla. 2015); Harper Pls.' Br. 35-36.[1]

[1] The Legislative Defendants cite the U.S. Supreme Court's *Abbott v. Perez*, 138 S. Ct. 2305 (2018), for the proposition that any presumption of constitutionality "applies in full force, even though the acts remedied prior laws the Court invalidated." LDs' Br. 19. But *Abbott* is inapposite because the standard of judicial review governing redistricting plans in federal court does not apply in North Carolina courts. *See Harper*, 380 N.C. at 361, 868 S.E. 2d at 533. And in contrast to the remedial Senate plan at issue here that was drafted by the Legislative Defendants, *see* LDs' Br. 7-13, *Abbott* applied a presumption of constitutionality where the Texas Legislature "enacted, with only very small changes, *plans that had been developed by [a] Texas court*" after the prior redistricting statute was struck down. 138 S. Ct. at 2325 (emphasis added).

There is accordingly no merit to Legislative Defendants' contention that the record contains "no evidence" of intentional partisan gerrymandering in the remedial Senate plan. LDs' Br. 20. It is blackletter law that the "historical background" of a legislative enactment—including prior instances of unlawful intent by the legislature at issue—is probative of discriminatory intent. *See Arlington Heights v. Metro. Hous. Devel. Corp.*, 429 U.S. 252, 267 (1977); *Abbott*, 138 S. Ct. at 232 (prior instances of discrimination by the legislature "are relevant to the extent that they naturally give rise to—or tend to refute—inferences regarding the intent of the [current] legislature"). And prior instances of discrimination aside, the degree of Republican entrenchment in the plan is itself evidence of intent. *See* Harper Pls.' Br. 17-27 (summarizing record evidence); *see, e.g.*, (R p 4759) (Drs. Mattingly and Herschlag finding that if Legislative Defendants had selected a single random plan from an ensemble of 80,000 computer-generated non-partisan plans, that plan would have had better partisan symmetry than the remedial Senate Plan with 99.6% probability); *Harper*, 380 N.C. at 385, 868 S.E. 2d at 548 (noting that "a plan which persistently resulted in the same level of partisan advantage to one party" does not occur "by accident"). If a map is extremely biased toward one party—and more biased than virtually all non-partisan comparators—that evidence supports that the mapmaker intended that result. *See, e.g., N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 231 (4th Cir. 2016) ("Showing disproportionate impact, even if not overwhelming impact, suffices to establish one of the circumstances evidencing discriminatory intent.").

Legislative Defendants further insist that the remedial Senate Plan is presumptively constitutional because it purportedly satisfies two metrics—a seven percent efficiency gap

and a one percent mean-median difference threshold. LDs' Br. 21-22.[2] But as *Harper* Plaintiffs explained in their opening brief, this Court's decision made clear that no single metric is dispositive of constitutionality. Harper Pls.' Br. 29-36; *see Harper*, 380 N.C. at 384, 868 S.E. 2d at 547 (declining to "identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander"). Rather, courts determining the constitutionality of a redistricting plan must conduct a holistic inquiry, focusing on whether "some combination" of metrics evinces partisan symmetry. *Id.* at 380 N.C. at 384, 868 S.E. 2d at 547-48. The efficiency gap metric, standing alone, does not give rise to a presumption of constitutionality, particularly where there is substantial record evidence of unconstitutional gerrymandering. *See id.* at 380 N.C. 386, 868 S.E. 2d at 548 ("It is entirely workable to consider the seven percent efficiency gap threshold as a presumption of constitutionality, *such that absent other evidence*, any plan falling within that limit is presumptively constitutional.") (emphasis added).

Indeed, Legislative Defendants have no response to the grave pitfalls of approving a plan based solely on compliance with any particular metric. *Harper* Pls.' Br. 31-36. There is unrebutted evidence that specific metrics can be gamed: The mean-median difference, for example, depends only on vote shares in a single district, and thus can be "manipulate[d]" in ways that disguise statewide gerrymanders. *Id.* at 31 (quoting R p

[2] Legislative Defendants falsely insist that the remedial Senate plan satisfied the "mean-median" metric, LDs' Br. 21, but the Special Masters' finding that "the majority of the advisors and experts found the mean-median difference of the proposed remedial senate plan to be less than 1%" was factually incorrect. *See* Harper Pls. Br. 13; *infra* pp. 8-9.

5030). And allowing the General Assembly to enact such a gerrymandered map inevitably signals to legislative leaders that extreme gerrymandering is fair game during the remedial phase of litigation—so long as they can engineer a map to satisfy one of the specific metrics identified in this Court's decision. *Id.* at 33.

B. The Remedial Senate Plan lacks partisan symmetry.

The record evidence overwhelmingly shows that the Remedial Senate Plan fails this Court's constitutional standard. Harper Pls.' Br. 17-28. To start, Legislative Defendants do not dispute multiple key findings of partisan bias made by the Special Masters' assistants, *Harper* Plaintiffs' experts, and even Legislative Defendants' own expert. Those undisputed findings alone establish that the trial court erred in adopting the Remedial Senate Plan. In particular, Legislative Defendants offer no response to the following:

- Dr. Grofman's finding that the Remedial Senate Plan "is very lopsidedly Republican," with an expected 24 Republican seats, 17 Democratic seats, and 9 competitive seats. Harper Pls.' Br. 18 (quoting R p 5042). Republicans at a given vote share will win over 4% more seats than Democrats at the same vote share; and Democrats must secure "considerably more than 50% of the statewide vote" to obtain "a majority of the seats." Harper Pls.' Br. 19 (quoting R p 5042). This map, Dr. Grofman found, is "a pro-Republican gerrymander." *Id.* (quoting R p 5043).
- Dr. Wang's finding that the Remedial Senate Plan "favor[s] Republicans in [all] six metrics evaluated," with an evenly split statewide vote expected to produce 27 Republican seats and 23 Democratic seats. Harper Pls.' Br. 20-21 (quoting R p 5097).

- Dr. Mattingly and Dr. Herschlag's findings that in any given election, across a range of vote shares between 50% and 55%, Republicans would be expected to elect four more Senators than Democrats would elect at the same vote share. This 4-seat deviation "is enough to potentially grant the Republicans a supermajority, whereas the Democrats either split the chamber or gain the smallest possible majority" when each party wins 52% of the statewide vote. Harper Pls.' Br. 23 (quoting R p 4759). This asymmetry protects Republican supermajorities, with Republicans expected to win a supermajority with only approximately 52% of the statewide vote. *Id.* at 24-26.
- Findings of Legislative Defendants' own expert, Dr. Barber, that Democrats need dramatic increases in statewide vote share to gain additional seats and have effectively no chance at winning a supermajority under the Remedial Senate Plan. For example, Dr. Barber found that Democrats must ascend from a 50% vote share to a nearly 55% vote share before gaining a 28th seat and are still two seats short of a supermajority. If Republicans experience that same 5-point increase from a 50% to a 55% vote share, their seat count jumps to 33 seats—well over a supermajority. Harper Pls.' Br. 27 (citing R p 4413).

These unrebutted findings establish that the enacted Remedial Senate Plan allows Republicans to lock in a supermajority at vote shares where Democrats would not even win a majority. Such a plan cannot reasonably be described as giving Democrats "substantially the same opportunity to elect[] a supermajority or majority of representatives," as the North Carolina Constitution requires. *Harper*, 380 N.C. at 387, 868 S.E. 2d at 549.

Legislative Defendants' limited defenses of the Remedial Senate Plan are unpersuasive.

First, Legislative Defendants double down on the trial court's approach by focusing exclusively on two metrics—the efficiency gap and the mean-median difference. Legislative Defendants assert that because their expert and two of the Special Masters' assistants found a mean-median difference of less than 1%, and the plan has an efficiency gap of less than 7%, the plan necessarily is "within the Court's thresholds for presumptive constitutionality." LDs' Br. 23. But again, this Court's decision does not permit this narrow approach to evaluating partisan symmetry; the trial court was required to consider all relevant evidence and to decide whether "voters of all political parties" have "substantially equal opportunity to translate votes into seats across the plan." *Harper*, 380 N.C. at 385, 868 S.E.2d at 548; *see supra* section I.A. This is especially critical because mapmakers can generate maps that satisfy certain metrics while still providing one party with an enormous advantage in translating votes into seats. Harper Pls.' Br. 31-32; *see* R p 5030 (mapmakers can "manipulate" the mean-median difference by "assuring that in the particular district which is the median," the vote share is relatively close to the mean, even if "the map as a whole remains a clear partisan gerrymander").

Regardless, Legislative Defendants' myopic approach also fails on its own terms, because the trial court's finding regarding this impermissibly narrow set of metrics was not supported by substantial evidence. The Special Masters stated that a "majority of the advisors and experts found the mean-median difference of the proposed remedial Senate plan to be less than 1%." (R p 4892). That is incorrect. Two of the special masters' advisors

(Drs. McGhee and Jarvis), along with both sets of Plaintiffs' experts who submitted reports (Drs. Mattingly and Herschlag for *Harper* Plaintiffs and Common Cause; Dr. Duchin for *NCLCV* Plaintiffs), concluded that the mean-median difference *exceeded* 1%. (R pp 4563, 5072, 5124). And while Drs. Grofman and Wang found a mean-median difference of less than 1%, Legislative Defendants have no response to the fact that these two assistants—unlike the others—used only a single election composite rather than a range of elections with varied results. Harper Pls.' Br. 29 (citing R pp 5039, 5042–43, 5078). The trial court's and Legislative Defendants' reliance on the mean-median difference is therefore misplaced because half of the Special Masters' assistants, including the only ones who used a range of elections, found that the Remedial Senate Plan fails this metric too.

Second, though Legislative Defendants ignore much of the evidence of partisan bias, *supra* pp. 6-7, they criticize *additional* evidence of partisan bias—namely, the findings of the Special Masters' assistants Dr. McGhee and Dr. Jarvis regarding the parties' unequal opportunity to translate votes to seats. LDs' Br. 25-26. For starters, neither the Special Masters nor the trial court adopted—or even *mentioned*—any of Legislative Defendants' critiques. Rather, the Special Masters and trial court *categorically* ignored all evidence of partisan bias besides the mean-median difference and efficiency gap. Harper Pls.' Br. 28-33; *see* R p 4878. This was a legal error, and Legislative Defendants offer no reason to think that the trial court would have discounted these findings absent that legal error.

In any event, Legislative Defendants' post hoc critiques fall flat. Legislative Defendants take issue with the methodology of Dr. McGhee, who found that the Remedial Senate Plan gave Republicans an advantage of 4.8% to 5.1% in terms of the number of

seats they would be expected to win in a perfectly tied statewide vote. (R p 5072). Dr. McGhee found that Democrats would need to win at least 53% of the statewide vote to win a majority, essentially foreclosing the possibility that Democratic voters can elect a majority under any plausible election scenario. Harper Pls.' Br. 19-20 (citing R pp 5072, 5074).

Rather than contesting these findings or identifying competing evidence, Legislative Defendants attempt to portray Dr. McGhee's methodology—which used a well-known nonpartisan website called PlanScore that evaluates redistricting plans "on measures of partisan advantage" (R p 5051)—as a "novel" method that was not "endorsed by this Court." LDs' Br. 27. They likewise criticize Dr. McGhee for failing to "explain [PlanScore's] assumptions." *Id.* at 26.

These critiques are simply incorrect. Dr. McGhee's report not only describes "PlanScore's Approach" in detail (R pp 5051-52), but also provides hyperlinks to an extensive description of PlanScore's "statistical model" (R p 5051) and to its actual analysis of the Remedial Senate Plan (R p 5053). Through those links, users can download the precinct-level voting data used by PlanScore's model,[3] and can view descriptions of each of the metrics it uses to evaluate plans' partisanship, including the efficiency gap, sensitivity testing, declination, mean-median difference, and partisan bias.[4] The partisan

[3] PlanScore, *Unified District Model* (Dec. 2021), https://planscore.campaignlegal.org/models/data/2021D; *see Voting and Election Science Team (University of Florida, Wichita State University)*, Harvard Dataverse, https://dataverse.harvard.edu/dataverse/electionscience (last visited Aug. 15, 2022).

[4] Planscore, *SL 2022-3 - Shapefile.zip*, (Feb. 19, 2022) https://planscore.campaignlegal.org/plan.html?20220219T062826.185412573Z.

bias metric relied on by Dr. McGhee, PlanScore clearly explains, is "the difference between each party's seat share and 50% in a hypothetical, perfectly tied election."[5] Contrary to Legislative Defendants' suggestion, this measure of bias—akin to the other partisan symmetry metrics employed by the other experts—is *exactly* the sort of "partisan symmetry analysis" that this Court's decision endorsed. *Harper*, 380 N.C. at 384, 868 S.E.2d at 547. In particular, it is evidence that under the Remedial Senate Plan, Democratic voters do not "have substantially the same opportunity to electing a supermajority or majority of representatives as the voters of the opposing party would be if they comprised [the same] percent of the statewide vote share in that same election." *Harper*, 380 N.C. at 387, 868 S.E.2d at 549. Legislative Defendants' feigned ignorance about PlanScore is not a legitimate basis for throwing out Dr. McGhee's extensive findings of extreme partisan asymmetry.

Legislative Defendants also nitpick the methodology of Dr. Jarvis, who found that the Remedial Senate Plan "is often a significant outlier in favor of the Republicans" in terms of seats won when compared to the non-partisan ensemble. R p 5116; *see* Harper Pls.' Br. 21. Dr. Jarvis found that, across 11 historical elections, the plan's consistent pro-Republican disparity in "seat margins" gave "strong evidence of partisan gerrymandering." (R p 5119). Legislative Defendants suggest that Dr. Jarvis's analysis was skewed by the fact that his choice of elections differed from Dr. Mattingly's. LDs' Br. 25. It is hard to take Legislative Defendants' selective critique seriously when they endorse the findings of

[5] PlanScore, *Partisan Bias*, https://planscore.campaignlegal.org/metrics/partisanbias.

Dr. Wang (*see* LDs' Br. 25), who also did not use any of the three elections Legislative Defendants now claim crucial. (R p 5078.) Moreover, Legislative Defendants' intimation that Dr. Jarvis declined to include only elections "won by Republicans" is misleading; he also did not include an election won by a Democrat (2020 Auditor). More broadly, it is remarkable that, despite applying different methodologies, all four of the Special Masters' assistants as well as Plaintiffs and Legislative Defendants' experts *uniformly* concluded that the Remedial Senate Plan systematically and significantly favors Republicans. That Dr. Jarvis reached the same conclusion using a slightly different set of statewide elections only confirms the constitutional violation.

Finally, citing generic evidence that Democratic voters are "concentrated in dense, urban areas," Legislative Defendants argue that the Remedial Senate Plan's pro-Republican bias "is the natural and probable consequence of North Carolina's political geography." LDs' Br. 29. But unrebutted record evidence conclusively shows that "political geography" cannot possibly explain the Remedial Senate Plan's profound lack of partisan symmetry and pro-Republican tilt. Drs. Mattingly and Herschlag analyzed this precise issue in their remedial-phase report—which Legislative Defendants nowhere attempt to refute—by comparing the partisan symmetry of the Remedial Senate Plan to the partisan symmetry of other possible Senate plans. *See* Harper Pls.' Br. 24. They found that if Legislative Defendants had selected *a single random plan* from the ensemble of 80,000 computer-generated maps—which were not drawn to prioritize partisan symmetry in any way—that plan would have had better partisan symmetry than S.B. 744 with 99.6% probability. (R p 4759). And confirming that North Carolina's political geography does not

require a massive 4-seat advantage to Republicans, the remedial plan proposed below by *Harper* Plaintiffs produced an average deviation in seats won at a given party vote share of only 1.04375 seats. (R p 4759). Political geography cannot explain a map that is an extreme outlier even among other possible maps with the exact same political geography. Rather, overwhelming unrebutted evidence establishes that the Remedial Senate Plan is an intentional partisan gerrymander, and the trial court's decision should be reversed on that basis.

II. This Court has the authority to implement the *Harper* Plaintiffs-Appellants' proposed remedial plan.

Legislative Defendants contend that this Court lacks authority to adopt *any* remedial plan. LDs' Br. 54-55. On the contrary, North Carolina law expressly states that a court may "impose its own substitute plan" provided "the court first gives the General Assembly a period of time to remedy any defects identified by the court in its findings of fact and conclusions of law." N.C. Gen. Stat. § 120-2.4(a). This Court has already given the General Assembly an opportunity to remedy the defects identified in its February opinion and may now "impose its own substitute plan" in light of the General Assembly's manifest failures to correct them.

Legislative Defendants insist that they be given the opportunity to correct any defects in the *remedial plan*, too. LDs' Br. 55. But this reading of the statute is nonsensical. If the General Assembly has the right to redraw remedial plans under Section 120-2.4(a), then it could deprive the Court of the ability to adopt "its own substitute plan" by simply resubmitting unconstitutional remedial plans *ad infinitum*. This Court should not adopt an

interpretation of Section 120-2.4(a) that renders key language superfluous. *See Matter of B.L.H.*, 376 N.C. 118, 123, 852 S.E. 2d 91, 122 (2020) ("[A] statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant, because it is presumed that the legislature did not intend any provision to be mere surplusage.").[6]

CONCLUSION

The Court should reverse the trial court's order and order the trial court to adopt the *Harper* Plaintiffs' remedial Senate map, or alternatively remand for additional remedial proceedings.

[6] Legislative Defendants' suggestion that *Harper* Plaintiffs waived any argument as to Section 120-2.4(a) by failing to cite the statute in their opening brief is meritless. *See* LDs' Br. 55. *Harper* Plaintiffs devoted an entire section of their opening merits brief to the argument that this Court should adopt the *Harper* Plaintiffs' remedial plan, *see* Harper Pls.' Br. 36-38, and may properly respond to Legislative Defendants' reliance on Section 120-2.4(a) in this reply. *See, e.g.*, *WLW Realty Partners, LLC v. Continental Partners VIII, LLC*, 360 P.3d 1112, 1116 (Mt. 2015) ("The purpose of a reply brief is to respond to arguments raised in a response brief; we will not fault a party for waiting until the reply brief to respond to an argument or evidence that was first raised in a response brief.").

Respectfully submitted, this 15th day of August, 2022.

PATTERSON HARKAVY LLP

Electronically submitted
Narendra K. Ghosh, NC Bar No. 37649
100 Europa Dr., Suite 420
Chapel Hill, NC 27517
(919) 942-5200
nghosh@pathlaw.com

N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed have authorized me to list their names on this document as if they had personally signed it.

Burton Craige, NC Bar No. 9180
Paul E. Smith, NC Bar No. 45014
PATTERSON HARKAVY LLP
100 Europa Dr., Suite 420
Chapel Hill, NC 27517
(919) 942-5200
bcraige@pathlaw.com
psmith@pathlaw.com

ELIAS LAW GROUP LLP

Abha Khanna*
1700 Seventh Avenue, Suite 2100
Seattle, Washington 98101
Phone: (206) 656-0177
Facsimile: (206) 656-0180
AKhanna@elias.law

Lalitha D. Madduri*
Jacob D. Shelly*
Graham W. White*
10 G Street NE, Suite 600
Washington, D.C. 20002
Phone: (202) 968-4490
Facsimile: (202) 968-4498
LMadduri@elias.law
JShelly@elias.law
GWhite@elias.law

ARNOLD AND PORTER KAYE SCHOLER LLP

Elisabeth S. Theodore*
R. Stanton Jones*
Samuel F. Callahan*
601 Massachusetts Avenue NW
Washington, DC 20001-3743
(202) 954-5000
elisabeth.theodore@arnoldporter.com

**Admitted pro hac vice*

Counsel for Harper Plaintiffs

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate procedure, counsel for Plaintiff certifies that the foregoing brief, which was prepared using a 13-point proportionally spaced font with serifs.

Electronically submitted
Narendra K. Ghosh

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of August, 2022, a copy of the foregoing Plaintiff-Appellants' Brief was electronically filed and served by electronic mail on counsel of record for Defendants-Appellees as follows:

Amar Majmundar
Stephanie A. Brennan
Terence Steed
NC Department of Justice
P.O. Box 629
Raleigh, NC 27602
amajmundar@ncdoj.gov
sbrennan@ncdoj.gov
tsteed@ncdoj.gov

Counsel for the State Defendants

Allison J. Riggs
Hilary H. Klein
Mitchell Brown
Katelin Kaiser
Jeffrey Loperfido
Southern Coalition for Social Justice
1415 W. Highway 54, Suite 101
Durham, NC 27707
allison@southerncoalition.org
hilaryhklein@scsj.org
mitchellbrown@scsj.org
katelin@scsj.org
jeffloperfido@scsj.org

J. Tom Boer
Olivia T. Molodanof
Hogan Lovells US LLP
3 Embarcadero Center, Suite 1500
San Francisco, CA 94111
tom.boer@hoganlovells.com
oliviamolodanof@hoganlovells.com

Counsel for Plaintiff Common Cause

Phillip J. Strach
Alyssa Riggins
John E. Branch, III
Thomas A. Farr
Nelson Mullins Riley & Scarborough LLP
4140 Parklake Ave., Suite 200
Raleigh, NC 27612
phil.strach@nelsonmullins.com
alyssa.riggins@nelsonmullins.com
john.branch@nelsonmullins.com
tom.farr@nelsonmullins.com

Mark E. Braden
Katherine McKnight
Baker Hostetler LLP
1050 Connecticut Avenue NW,
Suite 1100
Washington, DC 20036
mbraden@bakerlaw.com
kmcknight@bakerlaw.com

Counsel for the Legislative Defendants

Stephen D. Feldman
Adam K. Doerr
Erik R. Zimmerman
Robinson, Bradshaw & Hinson PA
434 Fayetteville Street, Suite 1600
Raleigh, NC 27601
sfeldman@robinsonbradshaw.com
adoerr@robinsonbradshaw.com
ezimmerman@robinsonbradshaw.com

Sam Hirsch
Jessica Ring Amunson
Zachary C. Schuaf
Karthik P. Reddy
Urja Mittal
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, D.C. 20001
shirsch@jenner.com
jamunson@jenner.com
zschauf@jenner.com
kreddy@jenner.com
umittal@jenner.com

Counsel for NCLCV Plaintiffs

Electronically submitted
Narendra K. Ghosh