No. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR., et al., Plaintiffs, REBECCA HARPER, et al., Plaintiffs, COMMON CAUSE, Plaintiff-Intervenor, v. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al., Defendants.	From Wake County

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REPLY BRIEF OF PLAINTIFFS-APPELLANTS
NORTH CAROLINA LEAGUE
OF CONSERVATION VOTERS, INC., ET AL.

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INTRODUCTION

The Enacted Plans are unconstitutional partisan gerrymanders. They also unlawfully dilute the voting strength of Black citizens while violating the Whole County Provisions and the *Stephenson*/*Dickson* framework. The Legislative Defendants are incorrect on the law and fail to show error in the panel's fact-findings under the deferential standard of review.

ARGUMENT

I. The Legislative Defendants' Partisan-Gerrymandering Arguments Lack Merit.

The Legislative Defendants' core submission is this: The General Assembly can enact the most extreme gerrymander imaginable—one that entrenches the incumbent political party in power, no matter what—and there is nothing anyone can do about it. That claim clashes with our Constitution's solemn proclamation that "[a]ll political power is vested in and derived from the people" and "founded upon their will only." N.C. CONST. art I, § 2. Indeed, the Enacted Plans violate multiple provisions of our State's Constitution. Nor does the political-question doctrine prevent courts from stopping "members of the General Assembly" from "render[ing] themselves the Legislators … for life." *Bayard v. Singleton*, 1 N.C. 5, 7 (1787).

A. The Political-Question Doctrine Is No Barrier to Relief.

The political-question doctrine invoked by the Legislative Defendants, *see* LD Br. 30, is a narrow exception to this Court's duty to ensure that the

Constitution "stand[s] in full force as the fundamental law of the land, notwithstanding [any] act" of the General Assembly. *Bayard*, 1 N.C. at 7. The Legislative Defendants invoke that exception based on the truism that redistricting implicates politics. *E.g.*, LD Br. 41. But they acknowledge that state courts adjudicate claims like those here. *Id.* at 35, 56–57. So the only question is whether something in this State's Constitution overcomes the presumption favoring judicial review, empowers the political party controlling the General Assembly to entrench itself without limit, and requires this Court to part company from *League of Women Voters of Pennsylvania v. Commonwealth*, 645 Pa. 1, 178 A.3d 737 (2018).

The answer is no. The NCLCV Plaintiffs respectfully submit that this Court can and should take up Chief Justice Roberts's invitation to apply "state constitutions" to remedy "excessive partisan gerrymandering" that is "incompatible with democratic principles." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019).

1. The Constitution Does Not Give the General Assembly Unreviewable Discretion to Entrench Itself in Power.

The Legislative Defendants argue that the Constitution's text forecloses the Court's review of its extreme partisan gerrymanders. LD Br. 31. This case, however, does not implicate "a textually demonstrable constitutional commitment" to the General Assembly. *Bacon v. Lee*, 353 N.C. 696, 717, 549

S.E.2d 840, 854 (2001). The Legislative Defendants point to the authority to district in Article II. LD Br. 31. But this Court considered the same text in *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), and did not view a vote-dilution challenge under the Equal Protection Clause as implicating an area the Constitution commits to the General Assembly's unreviewable discretion. *See id.* at 379, 562 S.E.2d at 394.

The Legislative Defendants note that the political-question inquiry proceeds claim-by-claim and that the claims here differ from those in *Stephenson I*. LD Br. 45–46. That, however, misses the point: *Stephenson I* shows that the General Assembly's Article II districting authority does not yield a textually demonstrable commitment of discretion to draw districts unbounded by other constitutional provisions. *Stephenson I* is thus a full answer to the Legislative Defendants' argument based on constitutional text.

The Legislative Defendants also invoke the Constitution's Separation-of-Powers Clause. N.C. CONST. art. I, § 6; *see* LD Br. 45. But that argument is circular: Judicial review here would usurp the General Assembly's functions only if the Constitution vested in the General Assembly unreviewable discretion—which it does not.

This Court's decision in *Cooper v. Berger*, 370 N.C. 392, 809 S.E.2d 98 (2018), underscores that this case does not implicate the political-question doctrine. *Cooper* asked whether legislation enacted pursuant to the General

Assembly's authority to "prescribe the functions, powers, and duties of … administrative departments and agencies," N.C. CONST. art. III, § 5(10), unconstitutionally interfered with the Governor's authority to "take care that the laws be faithfully executed," *id.* art. III, § 5(4). *Cooper* explained that because the dispute "involve[d] a conflict between two competing constitutional provisions," it "involved an issue of constitutional interpretation, which this Court has a duty to decide." 370 N.C. at 412, 809 S.E.2d at 110.

This case likewise raises an interpretive question, not a "policy dispute." *Id.* It involves reconciling the General Assembly's Article II districting authority with the Free Elections, Equal Protection, Free Speech, and Free Assembly Clauses. Indeed, under the separation-of-powers analysis *Cooper* contemplates, few issues would be less appropriate to reserve to the General Assembly's exclusive discretion—or would yield greater danger to the separation of powers—than the question whether the General Assembly may entrench one party in power even "when voters clearly prefer the other." FOF 191.[1] Indeed, as the Governor and Attorney General explain, partisan gerrymandering erodes many specific separation-of-powers safeguards. Gov.

[1] References to the panel's judgment of 11 January 2022, reproduced at R pp 3512–3771, are given by paragraph number in the court's findings of fact ("FOF") and conclusions of law ("COL"). Other references are made to documents in the printed record ("R") and Rule 9(d) exhibits ("Ex."), the Appendix to the NCLCV Plaintiffs' Opening Brief ("NCLCV Br., App."), and the transcripts (for example, "T1" for Volume 1 of the transcripts).

Br. 6; Gov Br. in Support of Pet. for Discr. Rev. 7–15. Adjudicating the claims here thus would preserve rather than harm the separation of powers.

Repeatedly, the Legislative Defendants argue that they must have unreviewable discretion because it "would make no sense" if the "Constitution … delegate[d] to the General Assembly … redistricting authority but … deni[ed] it the power to exercise political discretion." LD Br. 32. Given that districting "necessarily encompasses … political considerations," they say that the Framers could not have intended to require "political actors [to] erase political thoughts." *Id.* at 32, 42, 45.

As an initial matter, if the Legislative Defendants really think nonpartisan districting is impossible, one might ask how they could in good faith have adopted redistricting criteria stating that "[p]artisan considerations … ***shall not*** be used." *Id.* at 98 (quoting R p 824). One might also ask how they could have "testified, at trial and under oath," that they complied with a criterion that they now say requires something that is not possible. *Id.* at 98. And one might ask how they can now tell this Court that it cannot "require a redistricting without partisan … considerations" because "the General Assembly's position [is] that this already occurred," *id.* at 194, even as they tell this Court that such a process is impossible.

The key point, however, is this: No Plaintiff argues that the General Assembly must banish political considerations from districting. The Plaintiffs'

standards leave substantial room for considering partisanship. Indeed, the NCLCV Plaintiffs maintain that the General Assembly ***should*** consider election data in just the way the U.S. Supreme Court approved in *Gaffney v. Cummings*, 412 U.S. 735 (1973): To "allocate political power to the parties in accordance with their voting strength." *Id.* at 754; *see Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306 (2016) (unanimously endorsing redistricters' legitimate "state interest in maintaining … the competitive balance among political parties" (citing *Gaffney*, 412 U.S. at 752)).

For this same reason, the Legislative Defendants misconstrue *Stephenson I* when they suggest that this Court has approved some consideration of "partisan advantage" and thus partisan-gerrymandering claims must be nonjusticiable. LD Br. 34. Again, a chasm separates (1) what *Stephenson I* approved from (2) partisan gerrymanders entrenching one party regardless of the people's will. Indeed, the Legislative Defendants disregard that when *Stephenson I* approved using partisan considerations, it cited *Gaffney*, which specifically ***rejected*** using election data to "minimize or eliminate the political strength of any group or party." 412 U.S. at 754.

The Legislative Defendants' other political-question arguments also fail. They say *Stephenson I* permits courts to enforce only the express restrictions on redistricting authority in Article II, Sections 3 and 5. LD Br. 34. This argument, however, conflicts with *Stephenson I*'s holding that a redistricting

plan violated the Equal Protection Clause. *See Stephenson I*, 355 N.C. at 378–81, 562 S.E.2d at 394–95.

The Legislative Defendants say that because the Governor cannot veto redistricting plans, courts cannot review them. LD Br. 36. But at the Founding, the Governor had no veto ***at all***. The Legislative Defendants' logic would thus require abrogating *Bayard*. It also conflicts with *Stephenson I*.

Finally, the Legislative Defendants argue that recognizing a partisan-gerrymandering claim would "amount to a constitutional amendment, not interpretation." LD Br. 43. That rhetoric does not accord with how courts decide cases. When this Court in *State ex rel. McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016), held that the General Assembly violated the separation of powers by appointing majorities to executive boards—despite the long history of legislation doing so—the Court was engaged in interpretation, not amendment. The same was true when the U.S. Supreme Court recognized the one-person, one-vote principle in 1962 (despite decades of malapportioned maps), and an individual right to bear arms in 2008 (despite decades in which that right had been regarded as a collective right). *Baker v. Carr*, 369 U.S. 186 (1962); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

2. The Claims Here Do Not Implicate a Lack of "Manageable Criteria or Standards."

The Legislative Defendants fare no better arguing that the claims here are impervious to "judicially manageable standards." LD Br. 49. Those strained assertions overlook that courts in this State and elsewhere have ***actually adjudicated*** partisan-gerrymandering claims like these.[2] And they are even more implausible given that, as the Legislative Defendants admit, these courts have accepted some claims and rejected others (which refutes the assertion that recognizing such claims will yield unlimited interference with legislative powers). *Id.* at 49. In fact, the claims raised here are no more difficult to adjudicate than other constitutional claims that this Court regularly decides. The Legislative Defendants' contrary arguments lack merit.

First, the Legislative Defendants insist that no standard in this area can "separate the proverbial wheat from the chaff." *Id.* at 51. But to begin, given this case's extreme facts—plans that lock one political party in power, regardless of the will of the people, and that are more extreme than 99.9% or 99.9999% of all possible plans, FOF 175, 181–82—it is far from clear that this Court needs to establish a be-all-and-end-all standard now, any more than the U.S. Supreme Court did when it announced the one-person, one-vote principle.

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[2] *E.g.*, *League of Women Voters*, 645 Pa. 1, 178 A.3d 737; *Harper v. Lewis*, No. 19 CVS 012667, 2019 N.C. Super. LEXIS 122 (Oct. 29, 2019); *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Ct. Sept. 3, 2019).

Reynolds v. Sims, 377 U.S. 533, 578 (1964) (leaving it to "[l]ower courts [to] work out more concrete and specific standards"); *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983) (after two decades of rigorous debate among the lower courts, establishing "10% rule" for non-congressional redistricting plans).

Indeed, this point is underscored by Pennsylvania's experience after the *League of Women Voters* decision holding that Pennsylvania's free-elections clause prohibits extreme partisan gerrymandering. *See* 645 Pa. at 97–116, 178 A.3d at 802–14. In short, the Pennsylvania General Assembly altered its approach to redistricting in response. The legislature's 2011 plan had produced a severe Republican skew in a state where Democrats routinely win the statewide vote. *See id.* at 124–28, 178 A.3d at 818–21. But rather than repeat that approach after *League of Women Voters*, the Republican General Assembly in January 2022 adopted a plan that it claims will result in a congressional delegation of nine Democrats and eight Republicans.[3] A holding from this Court may have the same effect and limit future litigation. *Accord Rucho*, 139 S. Ct. at 2523 (Kagan, J., dissenting) (noting that a decision invalidating partisan gerrymanders "would of course have curbed much of that

[3] *See* Rebuttal Br. of House Republican Intervenors at 7, *Carter v. Chapman*, (Pa. Commw. Ct. Jan. 27, 2022) (No. 464 MD 2021), *available at* https://www.pacourts.us/Storage/media/pdfs/20220127/175125-jan.26,2022-intervenor'sreplybrief(houserepublicans).pdf.

behavior" because "[i]n districting cases no less than others, officials respond to what this Court determines the law to sanction").

More fundamentally, however, the NCLCV Plaintiffs ***identified*** a standard in their opening brief, focusing on (1) whether maps systematically prevent a political party whose candidates receive a majority of votes statewide from having a realistic opportunity to win at least half the seats statewide; and (2) if so, whether political geography or traditional districting principles compelled the skew. NCLCV Br. 79–80. Tellingly, the Legislative Defendants do not claim this standard is unadministrable. Nor could they, as it entails a straightforward analysis that every quantitative expert in this case undertook.

In fact, the standards here are far more straightforward than those this Court regularly applies, as detailed by the Governor and Attorney General. Gov. Br. 36–38. Particularly notable is the speedy-trial guarantee. This doctrine requires a "difficult and sensitive balancing" of four factors and is so indeterminate that it is "impossible to determine precisely when the right [to a speedy trial] has been denied." *State v. Farmer*, 376 N.C. 407, 414, 852 S.E.2d 334, 340 (2020). Yet this Court adjudicates those cases because duty demands it. The Court did the same in *Stephenson I*, where it recognized that reconciling the Whole County Provisions with one-person, one-vote principles would be difficult but declined to declare the task "unmanageable"—because that "would be an abrogation of the Court's duty." 355 N.C. at 382, 562 S.E.2d

at 396. The Court should do no less here: The standards are manageable, and democracy is at stake.

The Legislative Defendants' contrary arguments lack merit. One, they say that, to prove that a standard is administrable, Plaintiffs had to analyze "every redistricting conducted by the General Assembly"—since the Founding—and "identify which" were unconstitutional. LD Br. 51–52. Plaintiffs, however, need not litigate hundreds of different maps to prevail here. The Legislative Defendants cite no case imposing such a requirement.

Two, the Legislative Defendant say that the Plaintiffs "acknowledge that no redistricting in State history satisfied their standard." *Id.* at 52. But no Plaintiff has said any such thing. The Legislative Defendants had a chance below to prove that the standards the Plaintiffs advanced would have invalidated other maps. They did not try to do so.

Three, the Legislative Defendants insist that the Plaintiffs' standards fail to "detect … differences" in different cases. *Id.* at 53. But the Legislative Defendants' only evidence is that the panels detected extreme partisan gerrymanders in both *Common Cause* and below. *Id.* And that is because, in both cases, the General Assembly enacted plans that were "designed specifically to ensure that Democrats would not win a majority" of seats even when they won a majority of statewide votes and that were more extreme than 99.9% or more "of all possible plans … meeting the same nonpartisan criteria"

as those purportedly applied by the General Assembly. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *22, *74, *115 (N.C. Super. Ct. Sept. 3, 2019); FOF 175, 181, 195–201.

Four, the Legislative Defendants complain that "[t]here is nothing the General Assembly could do to avoid" liability and that it was "not enough even for the General Assembly to hire an expert to show that the plans are not outliers." LD Br. 54. But notably, the Legislative Defendants did not even hire an expert to defend the Enacted Congressional Plan. And as to the Enacted Senate and House Plans, the Legislative Defendants' expert ***admitted*** that those plans are "partisan outlier[s] as [he] use[d] that term," (T4 pp 670:7–671:5, 672:12–15), and his own ensembles betrayed just how egregious their skew is. *See* NCLCV Br. 30–31.

Second, the Legislative Defendants argue that even if the standards here are "manageable," they are not "judicial" and "ha[ve] no foundation" in the Constitution. LD Br. 50. The NCLCV Plaintiffs' standard cited above, however, derives directly from the constitutional principles we invoke: It implements the popular-sovereignty principle that the "will of the people,—the majority,—legally expressed … govern[s]." *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 428, 26 S.E. 638, 638 (1897). It guards against manipulation that undermines the principle that "[a]ll elections shall be free," N.C. CONST. art I, § 9; *see Clark v. Meyland*, 261 N.C. 140, 143, 134 S.E.2d 168, 170 (1964).

And it ensures that citizens have "substantially equal" "voting power," "legislative representation," and "representational influence," *Stephenson I*, 355 N.C. at 377, 379, 562 S.E.2d at 393–94; *infra* pp 16, 20, 33. When a plan gives the party that wins a majority of statewide votes a realistic chance to obtain a majority of statewide seats, it satisfies those principles—and if not, not. The NCLCV Plaintiffs showed that the Enacted Plans fail that standard, contrary to the Legislative Defendants' argument that the claims here fail "any arguably manageable standard." LD Br. 93.

The Legislative Defendants cannot gain by noting that the Harper Plaintiffs and the NCLCV Plaintiffs presented different types of evidence to assess the Enacted Plans. ***Both*** approaches revealed the Enacted Plans as extreme partisan gerrymanders. That is not a "conflict," *id.* at 57, but concord. Nor would it help the Legislative Defendants if, someday, a court had to "choose one or the other" approach. *Id.* In the one-person, one-vote realm, for example, a choice must be made between different population measures—such as "total population" versus "[v]oter-eligible population." *Evenwel v. Abbott*, 578 U.S. 54, 57 (2016). Such debates raise interpretive questions that courts must resolve. *See id.* at 76–80. But when such questions arose, the U.S. Supreme Court did not respond by overturning *Baker v. Carr*. *Id.*

The Legislative Defendants' other arguments have no more merit. They express confusion about whether partisan-gerrymandering claims "exist[] at

the statewide level or at the district or grouping level." LD Br. 58. The answer is ***both***, consistent with the broad scope of the constitutional provisions the Plaintiffs invoke. *Infra* pp 15–26.

Two, the Legislative Defendants demand an answer to "what elections [are] use[d] to evaluate whether a gerrymander is durable or even exists." LD Br. 58. But that question is one of evidence, not of constitutional principle. Below, some experts used 52 elections; others, 10. (R pp 2358, 2720–21) None of that bears on justiciability.

Finally, the Legislative Defendants insist that any remedy will "work[] a … constitutional violation on other[]" voters whose votes may no longer be as effective. LD Br. 59. Every discrimination remedy, however, could likewise be said to "harm" individuals who benefitted from discrimination. Integrating buses may mean that Whites might have to stand. Remedying equal-pay violations may result in men no longer earning more than women co-workers. Those "harms" do not make it unconstitutional for courts to provide remedies for unconstitutional discrimination.

* * *

The Legislative Defendants deny that "partisan redistricting is even a problem" and suggest that any limits on gerrymandering would be a "war on democracy." LD Br. 84–85. Notably, the U.S. Supreme Court did not agree with the Legislative Defendants when every Justice declared excessive

partisan gerrymandering "incompatible with democratic principles." *Rucho*, 139 S. Ct. at 2506; *see id.* at 2512 (Kagan, J., dissenting). Nor did the panel below agree when it refused to "condone the enacted maps" and expressed its "disdain for having to deal with issues that potentially lead to results incompatible with democratic principles." COL 148. The reality is that few results could be more anti-democratic than districting plans that entrench one party even "when voters clearly prefer the other." FOF 191.

Nor should the Court give weight to the Legislative Defendants' expressed concern for "the judiciary's reputation." LD Br. 88. The U.S. Supreme Court heard similar warnings in *Baker v. Carr*, 369 U.S. at 324–25 (Frankfurter, J., dissenting); *id.* at 347 (Harlan, J., dissenting). One wonders, too, what warnings the *Bayard* Court received before it invalidated an act of the General Assembly for the first time. This State is better off for *Baker* and *Bayard*. And it will be better off from a decision here that protects similar constitutional principles.

B. Extreme Partisan Gerrymanders Violate the North Carolina Constitution.

The Legislative Defendants' merits arguments fare no better. The panel found that the Enacted Plans are "intentional, pro-Republican" gerrymanders that "resiliently safeguard electoral advantage" and embed one political party in power, even "when voters clearly prefer the other," FOF 189, 191, 569, and

are more "carefully crafted for Republican advantage" than 99.9% or 99.9999% of possible maps. FOF 175, 181–82. The Legislative Defendants fail to show that such maps comport with our Constitution.

Instead, when skewed plans predetermine results, "elections [are not] free," N.C. CONST. art. I, § 10; North Carolina's voters do not have "substantially equal" "voting power," "legislative representation," or "representational influence," *Stephenson I*, 355 N.C. at 377, 379, 562 S.E.2d at 393–94; and disfavored voters cannot freely exercise their speech and assembly rights, N.C. CONST. art. I, §§ 12, 14. Moreover, under such plans, the Declaration of Rights' core promise no longer holds: No more is "[a]ll political power … vested in and derived from the people." N.C. CONST. art. I, § 2. Instead, the "carefully crafted will of the map drawer" controls. *Common Cause*, 2019 WL 4569584, at *3.

1. The Free Elections Clause Does Not Condone Extreme Partisan Gerrymanders.

The Legislative Defendants try to rewrite (and narrow) the Free Elections Clause with arguments at war with text, purpose, and history.

First, they contend that the Free Elections Clause prohibits only "[v]oting [r]estriction[s]," and that so long as voters can freely select among candidates "in [a] given district," it is irrelevant that the district lines preordain results. LD Br. 69, 71. These artificial limits, however, have no

basis in the Free Elections Clause, which broadly declares that "[a]ll elections shall be free." N.C. CONST. art. I, § 10. As the NCLCV Plaintiffs explained, the word "free" at the Founding meant "[u]ncompelled," "[n]ot bound by fate," and "not necessitated." *Free*, SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (1755); *see* NCLCV Br. 50–51. The Framers did not limit the Clause to any particular ***means*** of predetermining election results. When constitutional text is clear and broad, this Court will not impose ad hoc limits. *E.g.*, *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 2021-NCSC-6, ¶ 58 (declining to impose limits on the "judicial power" that the "framers … did not, by their plain words, incorporate").

The Legislative Defendants' rewriting is especially inappropriate given that the Free Elections Clause is an "application of the principle of popular sovereignty, first stated in Section 2." JOHN V. ORTH & PAUL M. NEWBY, THE NORTH CAROLINA STATE CONSTITUTION 55 (2d ed. 2013). It makes little sense to say that this Clause prohibits oath requirements that might influence one voter, *Clark*, 261 N.C. at 141, 134 S.E.2d at 169, and bars "[m]anipulation of … [o]utcomes … in [a] given district," LD Br. 70–71, but permits extreme partisan gerrymanders that dictate election results across ***all*** the districts.

The Legislative Defendants' arguments, moreover, clash with *Hill v. Skinner*, 169 N.C. 405, 86 S.E. 351 (1915), and *State ex rel. Quinn v. Lattimore*, 120 N.C. 426, 26 S.E. 638 (1897). Those cases considered attempts to

invalidate election results based on violations of oath requirements, registration regulations, and like formalities. This Court explained that the critical question is whether elections "ascertain, fairly and truthfully, the will of the people." *Hill*, 169 N.C. at 415, 86 S.E. at 356; *accord Quinn*, 120 N.C. at 428–29, 26 S.E. at 638. When the answer is yes (as it was in those cases), that is that. But when the answer is no—as it is here—then it is irrelevant that "there is no barrier between any voter and a ballot," that "every voter receives a district," and that other formalities are upheld. LD Br. 62, 69. Going to the polls means little if elections will yield but one result.

Second, the Legislative Defendants point to "[c]onstitutional history." *Id.* at 71. The key history, however, is against them: As the panel found, the Free Elections Clause derives from "the English Bill of Rights," which was "crafted in response to abuses and interference by the Crown in elections for members of parliament which included changing the electorate in different areas to achieve electoral advantage." COL 77. Rarely does this Court encounter such on-point history.

The Legislative Defendants argue that because the English Bill of Rights protected Parliament from the Crown, the Free Elections Clause cannot limit the General Assembly. LD Br. 71–72. This Court's decision in *Clark*, however, refutes that argument. *Clark* invalidated an oath requirement enacted by "the General Assembly … as a condition of the party transfer." 261 N.C. at 141,

134 S.E.2d at 169. As *Clark* reflects, the Declaration of Rights' "very purpose" is "to ensure that the violation of these rights is never permitted by anyone … invested … with the powers of the State." *Corum v. Univ. of N.C. ex rel. Bd. of Governors*, 330 N.C. 761, 782–83, 413 S.E.2d 276, 289–90 (1992).

The Legislative Defendants also urge that the Free Elections Clause cannot impose any relevant limit because gerrymandering occurred at the Founding. LD Br. 72–75. The NCLCV Plaintiffs, however, already refuted this argument. NCLCV Br. 61–63. In short: Partisan-gerrymandering claims did not arise in early North Carolina (because party politics was limited); where gerrymandering occurred, it was condemned ***as unconstitutional***; and the same argument, if accepted, would have foreclosed the U.S. Supreme Court from recognizing the one-person, one-vote principle (given the persistence of "Rotten Boroughs" in England and malapportioned districts in America).

The Legislative Defendants try to distinguish the one-person, one-vote cases on the theory that Founding-era Americans opposed malapportioned districts. LD Br. 77. But those same Americans opposed gerrymandering, too: They identified it as "a grievous wound on the Constitution" that "subverts and changes our Form of Government." NCLCV Br. 61–62 (citing sources). While Founding-era courts did not ***remedy*** that injury, that is no different from the one-person, one-vote cases and accords with the "dearth of constitutional litigation" "nationwide." ORTH & NEWBY, *supra*, at 11.

2. The Equal Protection Clause Does Not Condone Extreme Partisan Gerrymanders.

The Legislative Defendants' arguments concerning the Equal Protection Clause, LD Br. 61–69, are similarly at war with its text and this Court's cases.

First, the Legislative Defendants say that extreme gerrymanders that predetermine election results entail no "cognizable distinction" among citizens because "[e]very voter receives a district, and all districts are of roughly equal population." LD Br. 62. The same, however, could have been said in *Stephenson I*, where every voter had a district that complied with one-person, one-vote requirements. This Court nonetheless invalidated the inclusion of both single- and multi-member districts in the same plan as denying citizens "substantially equal" "voting power," "legislative representation," and "representational influence." *Stephenson I*, 355 N.C. at 377, 379, 562 S.E.2d at 393–94.

The Legislative Defendants observe that the violations here are not ***exactly the same*** as those in *Stephenson I* or *Blankenship*. But they have no answer to the equal-protection principles those cases apply, which compel the same result here. NCLCV Br. 64–66. Nor do they address Justice Kagan's persuasive description of the equal-protection harms that extreme gerrymanders inflict: "[D]istricters have set out to reduce the weight of certain citizens' votes, and thereby deprive them of their capacity to 'full[y] and

effective[ly] participat[e] in the political process[].'" *Rucho*, 139 S. Ct. at 2514 (Kagan, J., dissenting) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565 (1964)).

Second, the Legislative Defendants disparage the principle of "equal voting power" as "rhetorical hyperbole masked as constitutional argument." LD Br. 63. *Stephenson I*, however, did not agree: It affirmed that "***[e]qual voting power for all citizens is the goal***" and invalidated multi-member districts that were inconsistent with that principle. 355 N.C. at 380, 562 S.E.2d at 395 (emphasis added).

The Legislative Defendants rely heavily on the observation that, in any plan, "[s]ome partisans will find themselves in the majority" and "others in the minority"; hence, they say, the Equal Protection Clause cannot confer "a right to be grouped with likeminded persons." LD Br. 64. That, however, is no defense for a districting plan that ***systematically*** dilutes the voting power of one political party's supporters who, but for that dilution, could elect their preferred candidates. *See Rucho*, 139 S. Ct. at 2524 (Kagan, J., dissenting).

Next, the Legislative Defendants target an argument no Plaintiff makes. They insist that "Constitutional law does not privilege the 'major' parties," and that if "Democrats and Republicans are entitled to proportional representation," then "so are numerous minor parties," such as "monarchists" and "Green Party members." LD Br. 65–66. No Plaintiff, however, urges proportional representation or any rule that would privilege major parties.

North Carolina's "monarchists" cannot win elections in any district, much less majorities. The equal-protection harm here comes from how the Enacted Plans entrench one party in power when, but for extreme partisan gerrymandering, the party could lose that power as voter preferences shift.

Third, the Legislative Defendants argue that they acted with "[n]o invidious intent." LD Br. 66. But to begin, they neglect *Stephenson I* and ignore *People ex rel. Van Bokkelen v. Canaday*, 73 N.C. 198 (1875), which held ***in vote-dilution cases*** like this one that "it is the ***effect*** of the act, and not the ***intention of the Legislature***, which renders it void." *Id.* at 220, 225–26. Moreover, the Legislative Defendants have no answer to the panel's finding that, to the extent intent is required, it is present here. FOF 569.

Fourth, the Legislative Defendants insist rational-basis review applies. But again, *Stephenson I* held that the "right to vote on equal terms is a fundamental right" and that when laws burden this right—as gerrymandered plans do—"strict scrutiny is … applicable." 355 N.C. at 378, 562 S.E.2d at 393. Hence, the Legislative Defendants' claim that "[m]embership in a political party is not a suspect classification," LD Br. 67, is irrelevant. Regardless, redistricting plans that entrench one political party in power even "when voters clearly prefer the other," FOF 191, further no "legitimate government purpose." *Standley v. Town of Woodfin*, 362 N.C. 328, 332, 661 S.E.2d 728, 731 (2008).

3. The Free Speech and Free Assembly Clauses Do Not Condone Extreme Partisan Gerrymanders.

Extreme partisan gerrymanders also impermissibly burden free speech and association rights by targeting, and penalizing, exercise of these rights based on the party that voters support. NCLCV Br. 70–74. The Legislative Defendants raise two counterarguments, LD Br. 78–82, both infirm.

First, they say that the U.S. Supreme Court has declined to hold that the First Amendment limits partisan gerrymandering. *Id.* at 82. But to begin, *Rucho* was about justiciability. More important, ***this*** Court has reserved the right to interpret North Carolina's guarantees of free speech and free assembly more broadly than their federal counterparts, *e.g.*, *Libertarian Party of N.C. v. State,* 365 N.C. 41, 47, 707 S.E.2d 199, 203 (2011), and Justice Kagan and Justice Kennedy persuasively identified the speech and assembly harms that partisan gerrymanders inflict. They "subject certain voters to 'disfavored treatment'— … counting their votes for less—precisely because of 'their voting history [and] their expression of political views.'" *Rucho*, 139 S. Ct. at 2514 (Kagan, J., dissenting) (second alteration in original) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment)).

Second, the Legislative Defendants argue that speech and association rights protect only against "restrictions" and that finding a violation here would amount to a right to "government assistance in speech." LD Br. 79–80.

On this theory, North Carolina could enact a public-funding law giving Republican candidates $2 for every $1 given to Democratic candidates. Indeed, that hypothetical is much like these gerrymanders, which stack the deck so that the expression of one party's supporters is effective and the other's is not.

Courts have wisely rejected that untenable view. The "distinction between laws burdening and laws banning speech is but a matter of degree." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565–66 (2011) (quoting *United States v. Playboy Ent. Grp., Inc.,* 529 U.S. 803, 812 (2000)). And it is "no answer to say that petitioners can still be 'seen and heard'" when burdens on their speech "effectively stifle[] [their] message." *McCullen v. Coakley*, 573 U.S. 464, 489–90 (2014). So it is with extreme partisan gerrymanders.

C. The Federal Elections Clause Is No Barrier to Relief.

The Legislative Defendants briefly argue that the federal Elections Clause bars a remedy for congressional redistricting.[4] They claim this Clause vests plenary power in state ***legislatures*** and forbids state ***courts*** from reviewing congressional plans for compliance with state law. LD Br. 183–84.

The U.S. Supreme Court has rejected this argument. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787

[4] That Clause provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations …." U.S. CONST. art. I, § 4, cl. 1.

(2015), it held that "[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Id.* at 817–18. Redistricting must be "performed in accordance with the State's prescriptions for lawmaking." *Id.* at 808.

Arizona accords with myriad U.S. Supreme Court decisions, including *Growe v. Emison*, 507 U.S. 25 (1993). There, after the Minnesota legislature had enacted an unlawful congressional plan, a state court had issued an injunction adopting a remedial congressional plan. A federal district court blocked that injunction from taking effect, and the U.S. Supreme Court held that the federal court had erred "in not deferring to the state court's efforts to redraw Minnesota's … federal congressional districts." *Id.* at 42. For a unanimous Court, Justice Scalia emphasized that "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Id.* at 33 (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965) (*per curiam*)). Indeed, the Legislative Defendants' position would render *Rucho* incoherent. *Rucho* approved the Florida Supreme Court's decision striking "down that State's congressional districting plan as a violation of the" Florida Constitution. 139 S. Ct. at 2507.

Although the Legislative Defendants cite *Smiley v. Holm*, 285 U.S. 355 (1932), that decision only undermines their argument. *Smiley* rejected a lower court's holding that the word "Legislature" in the Elections Clause referred solely to the "legislative body" of the State and explained that the word refers instead to the "method which the state has prescribed for legislative enactments," including the "check[s] in the legislative process" imposed by the state constitution. *Id.* at 367–68. The Legislative Defendants also cite *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020). But *Carson* disapproved a Secretary of State's attempt to modify election procedures when "nothing in [any state] statute authorize[d]" him to do so. *Id.* at 1060. It specifically did not address a "court order … declar[ing] [a] statute invalid." *Id.*

D. The Legislative Defendants Cannot Overcome the Panel's Findings that the Enacted Plans Are "Intentional, Pro-Republican" Gerrymanders.

The Legislative Defendants attempt to relitigate the facts and argue that certain evidence "deserve[d] … more weight." LD Br. 101; *see id.* at 101–61. They cannot, however, satisfy this Court's standard, under which factual findings "are conclusive … if supported by competent evidence." *Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010). Indeed, the "Legislative Defendants offered no defense of the 2021 Congressional Plan," FOF 424, and cannot credibly claim the panel lacked

evidence to reject their defenses of the Enacted Senate and House Plans. The NCLCV Plaintiffs will limit their response to six dispositive points.

First, the Legislative Defendants raise a barrage of specific complaints about the minutiae of different experts' methodologies. LD Br. 95–113. These complaints are uniformly meritless but, more important, miss the forest for the trees. The panel credited the testimony of ***five different*** Plaintiff-side experts, using three different methodologies, all finding that the Enacted Plans are extreme gerrymanders designed to "safeguard[] Republican majorities in any plausible" scenario and to "systematically prevent Democrats from gaining a tie or a majority." FOF 193, 196, 199; *see* FOF 142, 423, 462–63, 466, 482, 569; NCLCV Br. 20–27. Even the Legislative Defendants' own expert, Dr. Barber, admitted that the Enacted Senate and House Plans were "partisan outlier[s] as [he] use[d] that term." (T4 pp 670:7–671:5, 672:12–15)

Second, the Legislative Defendants contend that the Plaintiffs' experts did "not honor the General Assembly's criteria." *E.g.*, LD Br. 95, 97, 102–04, 107–11. Mostly, however, these complaints do not refer to the written Adopted Criteria but to various ad hoc, and often post hoc, explanations lurking in the legislative record. For example, if legislators stated that they tried "to keep the City of Charlotte together" as much as possible, *id.* at 157 (quoting FOF 104(i))—which is just another way of saying "pack Democratic voters in Charlotte"—then the Legislative Defendants fault alternative maps that do

not pack Charlotte to the same degree. *See, e.g.*, *id.* at 102. That, however, has nothing to do with whether experts followed legitimate redistricting criteria. As Dr. Mattingly explained, "if we followed every single step that the legislature did, we would necessarily end up with their map." (T2 p 203:23–25) Tellingly, the Legislative Defendants could not produce any simulations analysis that (by their lights) followed the Adopted Criteria more closely but produced different results. Dr. Barber's ensembles, as explained, confirmed that the Enacted Plans are extreme outliers. NCLCV Br. 30–31.

The Legislative Defendants' manipulations are nowhere more obvious than as to municipalities. The Adopted Criteria include a permissive statement that the "Committee may consider municipal boundaries." FOF 54. But as Dr. Mattingly (and the panel) found, the "the mapmakers focused on [preserving] municipalities … only when doing so advantaged Republicans." FOF 158. In fact, the General Assembly failed even to follow its own mandatory criteria—in ways the Legislative Defendants fail to address.[5]

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[5] A few examples suffice. First, the Adopted Criteria provide that "[d]ivision of counties in the 2021 Congressional Plan shall ***only*** be made for reasons of equalizing population and consideration of double bunking." (Ex. 216 (emphasis added)) But as Dr. Chen established, the Enacted Congressional Plan has more county divisions than necessary, even when avoiding double-bunking. (R pp 2345, 2349–50) Second, the Adopted Criteria direct the legislature to "make reasonable efforts" to draw plans that are compact. (R p 216) The record evidence shows that the legislature drew plans that are far less compact than reasonably necessary. R pp 2354–55, 2728; FOF 299.

Third, the Legislative Defendants rehash their argument that "Democratic voters tend to be more geographically concentrated than Republican voters" and "tend to live in urban areas at a much greater rate." LD Br. 117. The panel, however, rejected the Legislative Defendants' argument that "political geography" explained the Enacted Plans' extreme bias. FOF 188, 482. Its findings rest on competent evidence. The ***whole point*** of simulations analysis is to control for political geography, which is why Drs. Chen, Mattingly, Pegden, and Magleby all testified that North Carolina's political geography did not drive the Enacted Plans' skew. (R pp 2378, 2381, 2400, 2565–66, 2718–19, 2779, 2802)

Fourth, the Legislative Defendants mischaracterize the panel's findings as contradictory. They claim "the Panel credited the … legislative record" stating that districts were "drawn to … achieve … legitimate, non-partisan goals," which they argue is inconsistent with findings that these districts were partisan gerrymanders.[6] The panel, however, did not "credit" these self-serving justifications. What it ***actually*** said was that the "legislative record shows that [certain] ***stated goals*** [were] achieved by the … Plan[s]." FOF 108 (emphasis added); *see* FOF 104, 111. Achieving some facially nonpartisan

[6] LD Br. 118 (citing FOF 108(l)); *see, e.g.*, *id.* at 27, 95, 99, 101, 118, 120, 125, 129, 131, 133–41, 145, 147, 149, 150–53, 155, 158–59, 169.

"stated goals" is perfectly consistent with the panel's finding that the General Assembly ***also*** acted with partisan intent.

Fifth, the Legislative Defendants relitigate the panel's detailed findings in specific clusters and districts. LD Br. 117–61. Nothing in their laundry list refutes the reality that competent evidence supported the panel's factual findings. None of these complaints, moreover, addresses the more important point: The General Assembly's individual districting choices ***add up*** to grossly skewed plans, as illustrated by the histograms constructed using Dr. Barber's ensembles and methods reproduced at pages 30 and 31 of the NCLCV Plaintiffs' opening brief. A few examples illustrate the flaws in the Legislative Defendants' objections:

- They claim that House Districts 114, 115, and 116 were created to preserve municipal integrity and increase district compactness. LD Br. 138; T5 p 765:4–14. But in fact, the Enacted Plan splits Asheville into three districts; does nothing to reduce the number of people "ousted" from their municipalities; and creates the two least compact districts in the ***entire House Plan*** in Districts 116 and 114. (R pp 2512–13, 2601–02; Ex. 366, 726)

- They defend the Guilford House cluster's partisan skew by citing the need to keep Greensboro together, consistent with the adopted "criteria to respect municipal lines and to keep cities wholly within the fewest number of districts as possible." LD Br. 136. But in fact, "[t]he enacted map splits Greensboro across ***all six districts***" while also bisecting High Point and trisecting Summerfield. (R pp 2509 (emphasis added)) And in the Enacted Congressional Plan, the legislature again ignored its criteria and carved Greensboro up into ***three separate congressional districts***. (Ex. 37, 230)

Sixth, the Legislative Defendants complain that "Drs. Mattingly, Pegden or Magleby failed to produce a visual copy of a map or maps that they claimed included legal districts for the entire state." LD Br. 114. But to begin, no such map is necessary to show that the Enacted Plans are extreme gerrymanders. Moreover, the Legislative Defendants acknowledge that the "NCLCV … plan[s]" were "offered … as a legal alternative." *Id.* at 115.

The Legislative Defendants have little to say about the NCLCV Maps, which improve on the Enacted Plans' compliance with traditional districting principles while treating both political parties (and minority voters) evenhandedly. NCLCV Br. 21–27; *see* (R p 2718 (reproduced at NCLCV Br., Apps. 1–3)). The Legislative Defendants incorrectly state that the algorithm that yielded this map "was specifically programmed to create Democratic districts where possible." LD Br. 115. In fact, as the NCLCV Maps' architect, Sam Hirsch, testified, these maps did exactly what the U.S. Supreme Court approved in *Gaffney* by attempting (among other things) to "fairly … allocate political power to the parties in accordance with their voting strength," not "to minimize or eliminate the political strength of any group." 412 U.S. at 754; T4 pp 835:12–836:21. Indeed, Dr. Barber's analysis identified the NCLCV Maps as ***pro-Republican*** outliers in several clusters, and Dr. Barber testified that, if he were "given the job" of "optimizing for Democratic advantage," he "wouldn't do that" and would "try to do the opposite." (T4 pp 699:22–701:8)

The Legislative Defendants also emphasize examples in which the NCLCV Maps agree with the Enacted Plans in particular districts. *E.g.*, LD Br. 140, 145, 146. But again, they lose the forest for the trees. Dr. Barber's ensembles and methods—again, reproduced in the NCLCV Plaintiffs' opening brief—spotlight (1) how much the Enacted Plans and the NCLCV Maps differ; (2) how the Enacted Plans are outliers and the NCLCV Maps are not; and (3) how much more closely the NCLCV Maps align results with the voters' will. NCLCV Br. 30–31; R pp 2746–51. Indeed, this comparison shows how wrong the Legislative Defendants are when they say the "impact of gerrymandering in this case is muted." LD Br. 86. Even ignoring the increase in competitive districts in the NCLCV Maps (R pp 2735), Dr. Barber's analysis and methods identify the Enacted Plans and NCLCV Maps as differing by an average of three congressional seats (21% of the total), four Senate seats (8%), and seven House seats (6%). NCLCV Br. 30–31; R pp 2750–51, 2904, 3054.

II. The Enacted Plans Dilute Minority Voting Strength in Violation of the North Carolina Constitution.

The Legislative Defendants assert that North Carolina law does not prohibit racial vote dilution and insist that the Enacted Plans do not dilute Black voting strength. These arguments, too, lack merit.

A. The Legislative Defendants Have No Adequate Answer to the NCLCV Plaintiffs' Showing that the Free Elections Clause and Equal Protection Clause Prohibit the Dilution of Minority Voting Strength.

As the NCLCV Plaintiffs have explained, the Free Elections and Equal Protection Clauses protect "substantially equal voting power" and "substantially equal legislative representation" for ***all*** voters. NCLCV Br. 88–92. Together, these clauses provide robust protection against minority vote dilution similar to that provided by Section 2 of the federal Voting Rights Act ("VRA"), 52 U.S.C. § 10301, as interpreted by Justice Souter in *Bartlett v. Strickland*, 556 U.S. 1, 26–44 (2009) (dissenting op.). The Legislative Defendants incorrectly assert that this theory was "rejected" in *Dickson v. Rucho*, 368 N.C. 481, 531, 781 S.E.2d 404, 440 (2015). LD Br. 173. But *Dickson*, a VRA case, said nothing about the protections against racial vote dilution under the North Carolina Constitution. This Court's cases are thus no barrier to the approach the NCLCV Plaintiffs urge.

Alternatively, the Legislative Defendants suggest that drawing effective minority opportunity districts with less than majority-minority population could violate the federal Equal Protection Clause. *Id.* at 174–75. The U.S. Supreme Court, however, has explained that "States that wish to draw crossover districts are free to do so where no other prohibition exists." *Bartlett*, 556 U.S. at 24. While holding that effective Black opportunity districts with

less-than-majority Black voting-age population, or BVAP, are not "required" under VRA Section 2, the Court explained that "in the exercise of lawful discretion" States could draw them to prevent minority vote dilution. *Id.*

B. The Legislative Defendants' Intent Arguments Lack Merit.

In arguing that the NCLCV Plaintiffs failed to prove racially discriminatory intent, LD Br. 165–70, the Legislative Defendants confuse the intent standard. Notably, they do not mention *Van Bokkelen*. That case, as explained, was a racial vote-dilution case, where the legislature drew lines such that "one [White] vote" in one district "count[ed] as much as seven [Black] votes" in another. 73 N.C. at 225–26. And in this context, this Court held that "it is the effect of the act, and not the intention of the Legislature, which renders it void." *Id.*

After ignoring *Van Bokkelen*, the Legislative Defendants conflate this case with a "racial gerrymandering claim[]," which requires showing that race "was the predominant factor" in drawing districts. LD Br. 163, 165, 174–75. But as the Legislative Defendants acknowledge, racial gerrymandering and racial vote-dilution claims are "analytically distinct." *Id.* at 163 n.27. In particular, to the extent the claims here required intent, the Plaintiffs would need to show only that race was "a motivating factor." *Holmes v. Moore*, 270 N.C. App. 7, 16, 840 S.E.2d 244, 254–55 (2020). The NCLCV Plaintiffs easily satisfy that standard. NCLCV Br. 114–16.

C. The Legislative Defendants' Effects Arguments Lack Merit.

Despite the Legislative Defendants' efforts to muddle the evidence, LD Br. 173, the record shows that the Enacted Plans ***do*** dilute Black voting strength. Dr. Duchin analyzed those plans district by district and found that racially polarized voting deprives Black voters a fair opportunity to nominate and elect their preferred candidates. (R pp 2726–27)

First, Dr. Duchin used industry-leading ecological-inference techniques to study whether there is racially polarized voting in North Carolina. (R p 2726) She found a "consistent pattern of polarization." (R p 2726)

Second, to test whether racially polarized voting was significant enough to overcome Black voters' preferences at a ***district*** level, Dr. Duchin identified a set of eight recent electoral contests—four Democratic primaries and four general elections—that are "particularly informative in determining whether Black voters have an opportunity to elect their candidates of choice." (R p 2726) She then assessed districts by examining whether the Black-preferred candidate won at least six of the eight contests. (R p 2726)

Third, Dr. Duchin conducted a "check of demographics" and tested whether the resulting districts had a Black voting-age population of at least 25%, to ensure that there are actually "Black voters there to benefit from that opportunity." (T3 pp 442:24–443:10; R p 2726)

The results were clear: In the Enacted Plans, only 2 of 14 congressional districts (14%), only 8 of 50 Senate districts (16%), and only 24 of 120 House districts (20%) provide Black voters a realistic opportunity to nominate and then elect their preferred candidates. (R p 2727) This falls short in a State where members of protected minority groups constitute more than 30% of the adult citizen population.[7]

The Legislative Defendants try to rebut this evidence—which the panel did not discredit—by claiming that the "trial court found" that "North Carolina does not have legally significant racially polarized voting." LD Br. 170 (citing FOF 595). The panel made no such finding. Indeed, the Legislative Defendants presented no evidence to counter Dr. Duchin's conclusion that racially polarized voting exists. Instead, the panel found that "in no district" is "a majority of BVAP … needed for that district to regularly generate majority support for minority-preferred candidates." FOF 595. But the NCLCV Plaintiffs' claim is not brought under the VRA, and it does not require districts with "a majority of BVAP."

The Legislative Defendants also misquote Dr. Duchin as stating that "if 'at least 25% of the voting age population is Black' that the district is effective

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[7] Census Bureau, Citizen Voting Age Population by Race & Ethnicity (Feb. 19, 2021), https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.2019.html; NCLCV Br. 94.

for Black voters." LD Br. 173. In fact, Dr. Duchin testified the opposite: She "emphasize[d] that this [25% threshold] is in ***no way an estimate of what level of Black population is needed***" to create an effective Black opportunity district. (T3 p 443:2–4 (emphasis added)) That is because, as Dr. Duchin explained, it is important to "look[] at the electoral alignment" at the district level. (T3 p 443:4–5) Indeed, in some parts of the State even "House-sized districts with 35–39% BVAP" are not effective. (R p 2726)

Finally, the Legislative Defendants say Dr. Lewis's testimony proves that the Enacted Plans adequately preserve Black electoral opportunity. But what they call "Dr. Lewis's … reliable dataset," LD Br. 174, was proven at trial to be anything but. Dr. Lewis used an unmoored definition of "effective" that identified districts as effective so long as the Black-preferred candidate won 50% or 75% of a wide range of elections, even if ***100%*** of those wins were in Democratic primaries. (R pp 3306–07; T5 pp 605:5–11, 606:12–20) That meant, as Dr. Lewis conceded, that he identified districts as "Black effective" even though Black-preferred candidates lost every single general election in those districts. (NCLCV Br. 40, 108–09; T5 pp 605:5–11, 606:12–20) That untenable methodology does not cast doubt on Dr. Duchin's analysis.

III. The Legislative Defendants Fail to Refute the Violations of the Whole County Provisions.

The Legislative Defendants incorrectly claim that "there is no evidence that any district line traversing any county line within any of the county groupings was unnecessary for the equal-population rule." LD Br. 182. But as the NCLCV Plaintiffs explained, in the Cleveland-Lincoln-Gaston Senate cluster, the legislature drew Senate District 44 to traverse three county lines instead of two, creating one unnecessary traversal. NCLCV Br. 118–19; *see* Ex. 38. There are also an additional four extra traversals created by the configuration of Senate Districts 45, 47, and 50 in western North Carolina. (*Compare* Ex. 38, *with* R p 2718 (reproduced at NCLCV Br., App. 2))

Moreover, although this Court has not addressed whether the General Assembly must minimize county-line traversals in making clustering choices, the fact that the General Assembly repeatedly chose clusters with more traversals when doing so advantaged Republicans—in Senate Districts 1 and 2,[8] Senate Districts 31, 32, and 36, and Senate Districts 43, 44, 46, 48, and 49—

[8] The NCLCV Plaintiffs incorrectly stated in their opening brief that the Enacted Senate Plan's configuration of Senate Districts 1 and 2 created 28 traversals, NCLCV Br. 121; the correct figure is 24. (Ex. 38) The key point, however, remains: The NCLCV Senate Map creates only 23 traversals in these districts while better respecting municipalities, improving compactness, and avoiding cracking Democratic voters. (R p 2718 (reproduced at NCLCV Br., App. 2); *see id.* pp 2722, 2728, 2730, 2732)

underscores its eagerness to privilege partisan advantage over compliance with the Whole County Provisions.

IV. The Legislative Defendants' Standing Arguments Fail.

The Legislative Defendants' standing arguments also lack merit. ***First***, they assert that the Plaintiffs lack standing because the political-question doctrine applies. LD Br. 161. They are incorrect about the political-question doctrine, *supra* pp 1–8, and in any event, that issue concerns the merits. NCLCV Br. 123.

Second, the Legislative Defendants say that the Plaintiffs have not shown "residency in a challenged district," which they say standing requires. LD Br. 161. Even were such a showing necessary, *but see* NCLCV Br. 125–28, NCLCV has members who are registered Democrats in each district in each Enacted Plan, and a Democratic and Black member in each area in each district and cluster in which an alternative NCLCV map would improve their opportunity to elect preferred candidates. NCLCV Br. 125–26.

Third, Legislative Defendants claim that NCLCV "cannot assert voting rights on behalf" of its members. LD Br. 162. North Carolina law, however, makes clear that in suits for declaratory and injunctive relief, individual participation is not needed. *Willowmere Cmty. Ass'n v. City of Charlotte*, 370

N.C. 553, 557, 809 S.E.2d 558, 561 (2018); *see also* FOF 623.[9] Nor is there a "voting rights" exception to this rule. It is well-settled that organizations can invoke their members' voting rights in challenges like this one.[10]

Fourth, NCLCV's status as a nonpartisan organization, LD Br. 162, does not deprive it of standing. NCLCV need not assert that its "members uniformly … prefer Democratic candidates." *Id.* The point is that—as the panel found—free and fair elections untainted by partisan skew are germane to NCLCV's mission of protecting the environment through legislative advocacy. COL 13; FOF 618, 620–22.[11]

Fifth, the claim that Republicans are "the proper parties to challenge" districts that pack Democrats, LD Br. 162, disregards *Gill v. Whitford*'s holding

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[9] *See River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990); *Shearon Farms Townhome Owners Ass'n II, Inc. v. Shearon Farms Dev., LLC*, 272 N.C. App. 643, 649–50, 847 S.E.2d 229, 234–35 (2020), *review denied*, 377 N.C. 566, 858 S.E.2d 284 (2021).

[10] *E.g.*, *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 817–18 (M.D.N.C. 2018) (three-judge court), *vacated and remanded on other grounds*, 139 S. Ct. 2484 (2019); *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978, 1062 (S.D. Ohio) (three-judge court), *vacated and remanded on other grounds*, 140 S. Ct. 101 (2019); *League of Women Voters of Mich. v. Johnson*, 352 F. Supp. 3d 777, 797–99 (E.D. Mich. 2018) (three-judge court), *rev'd and remanded on other grounds*, No. 18-2383, 2018 WL 10096237 (6th Cir. Dec. 20, 2018).

[11] *E.g.*, *Common Cause*, 318 F. Supp. 3d at 829; *Ohio A. Philip Randolph Inst.*, 373 F. Supp. 3d at 1076; *League of Women Voters of Mich.*, 352 F. Supp. 3d at 802.

that voters have standing to challenge their placement in a "packed" district as a "burden on [that] plaintiff['s] own votes." 138 S. Ct. 1916, 1931 (2018).

V. The Legislative Defendants' Remedial Arguments Lack Merit.

The Legislative Defendants' remedial arguments, LD Br. 192–95, largely aim at delay that will make it harder to hold the 2022 elections with minimum disruption. First, they suggest that the panel failed to provide "fact-finding … sufficient [for] liability." *Id.* at 193. The panel, however, identified exactly the facts that it found rendered the Enacted Plans "intentional, pro-Republican partisan" gerrymanders—statewide and in specific districts—that "resiliently safeguard advantage for Republican[s]."[12] This Court has what it needs to make the findings contemplated by N.C. Gen. Stat. § 120-2.3.

Alternatively, the Legislative Defendants contend that this Court cannot "lawful[ly] … direct [the] remedial process itself." LD Br. 192. They neglect, however, this Court's "inherent power … to do all things that are reasonably necessary for the proper administration of justice." *Beard v. N.C. State Bar,* 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987). Indeed, the Legislative Defendants concede that N.C. Gen. Stat. § 120-2.4(a)(1) contemplates that this

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[12] FOF 140, 144, 192–201, 238, 243, 246, 251, 254, 256, 260, 264, 267, 273, 277, 280, 286, 290, 292, 300, 308, 314, 318, 321, 326, 330, 333, 338, 342, 344, 349, 352, 354, 359, 362, 364, 369, 373, 375, 381, 384, 386, 394, 397, 399, 405, 408, 410, 569; *see* NCLCV Br. 41–44. The NCLCV Plaintiffs have identified three additional House clusters they believe should be part of a remedy, NCLCV Br. 86–87, which—again—requires no further fact-finding.

Court "may fashion a remedial plan." LD Br. 193; *see* NCLCV Br. 132–33. The remand they propose, LD Br. 193, would only create further delay.

It may be helpful to the Court to recount how matters proceeded in Pennsylvania after its Supreme Court found that the congressional plan enacted by its General Assembly violated the Pennsylvania Constitution. The Pennsylvania Supreme Court issued an order providing the General Assembly with the opportunity to adopt a new, constitutional plan but recognized that it might "fall to th[e] Court expeditiously to adopt a plan." *League of Women Voters of Pa. v. Commonwealth*, 654 Pa. 576, 181 A.3d 1083, 1085 (2018). Hence, the court retained jurisdiction and ordered that any remedial plan from the General Assembly, as well as any proposed remedial plans from any of the parties, be submitted directly to the court. *See id.* It also retained Dr. Nathaniel Persily to act "as an advisor to assist the Court in adopting, if necessary, a remedial … plan." *Id.*, 181 A.3d at 1085–86. And 12 days after declaring the existing plan unconstitutional, the court—with the assistance of Dr. Persily—adopted a remedial plan that "dr[ew] heavily upon the submissions provided by the parties, intervenors, and *amici*." *Id.* at 583, 181 A.3d at 1087.

The NCLCV Plaintiffs agree with the Legislative Defendants on one thing: The Court need not "require a redistricting without partisan data or considerations." LD Br. 194. Instead, the NCLCV Plaintiffs respectfully

submit that the Court should review remedial maps to ensure that they reflect a good-faith effort to implement the Constitution's core guarantees of popular sovereignty, free elections, and substantially equal voting power, so that a political party whose candidates receive a majority of votes statewide has a realistic opportunity to win at least half the seats statewide. NCLCV Br. 130–31.[13] Such a plan would vindicate North Carolina's bedrock command that the "will of the people,—the majority,—legally expressed … govern[s]," *Quinn*, 120 N.C. at 428, 26 S.E. at 638, and would do so far better than a plan based on median outcomes from simulated plans. As the U.S. Supreme Court has explained, the "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with … voting strength," whereas a "politically mindless approach" ignoring electoral data "may produce, whether intended or not, the most grossly gerrymandered results." *Gaffney*, 412 U.S. at 753–54.

CONCLUSION

The NCLCV Plaintiffs request that the Court reverse the judgment below and grant the relief requested in the NCLCV Plaintiffs' opening brief.

[13] The Court should also ensure that the maps treat minority voters fairly and remedy the Whole County Provision violations. NCLCV Br. 130–31.

Respectfully submitted this 31st day of January, 2022.

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CERTIFICATE OF SERVICE

Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I hereby certify that the foregoing document has been filed with the Clerk of the North Carolina Supreme Court by electronic submission. I further certify that a copy of this document has been duly served upon the following counsel of record by email:

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