No. 413PA21 TENTH DISTRICT

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

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REPLY BRIEF OF PLAINTIFF-APPELLANT COMMON CAUSE

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INDEX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Other Authorities

INTRODUCTION

In their Response Brief, the Legislative Defendants ask the Court to accept that the North Carolina General Assembly has essentially unfettered authority to pursue partisan advantage when redistricting while simultaneously ignoring its duty to conduct even the most rudimentary assessment of whether new districts are unacceptably harmful to Black voters. They further argue there is no harm in the General Assembly publicly representing that it is pursuing a transparent redistricting process, guided by so-called "neutral" criteria, while secretly relying upon maps drawn up by legislative staff, using unknown systems and relying upon black-box criteria, that are conveniently unavailable for review when challenges are filed to adopted maps. The arguments made by Legislative Defendants in their Response underscore the need for this Court to act in this case and affirm the constitutional bounds on redistricting imposed by the North Carolina Constitution.

Legislative Defendants' contention that the Court has no role in guaranteeing the constitutional rights of voters throughout the redistricting process asks the Court to ignore the well-established principle that courts have the inherent power to "require valid reapportionment or to formulate a valid redistricting plan," when necessary to ensure Constitutional protections are enforced. *Stephenson v. Bartlett,* 355 N.C. 354, 375-76, 562 S.E.2d 377, 392 (2002) (*Stephenson I*). More broadly, it contravenes longstanding precedent from this Court thwarting unconstitutional attempts by the legislature to subvert the will of voters or otherwise politically entrench itself. *Bayard v. Singleton*, 1 N.C. 5, 7, 1 Mart. (NC) 48, 3 (1787); *People ex*

rel. Van Bokkelen v. Canady, 73 N.C. 198, 220, 21 Am.Rep. 465, 41 (1875); *Hill v. Skinner*, 169 N.C. 405, 415, 86 S.E.2d 351, 356 (1915). Absent this Court's intervention now, fundamental damage will be done to the constitutional guarantees afforded to North Carolina citizens by giving a green light to the Legislative Defendants, and future General Assemblies, to use all available modern tools to maximize partisan advantage during the redistricting process in contravention of the will of voters and without the consent of the governed.

Legislative Defendants' Response is otherwise riddled with contradictions and misrepresentations of the record, ignoring explicit fact-finding made by the trial court when those facts fail to align with their preferred narrative. For example, they brazenly contend that all "Plaintiffs-Appellants are avowed supporters of the Democratic Party", Leg. Defs. Br. 74, and that Plaintiffs are "not the North Carolina citizenry[]", *id.* at 83, ignoring the fact that Common Cause is a nonpartisan organization that has worked with both Democratic and Republican legislators and whose members live in diverse counties across the State of North Carolina. R pp 3709-10 ¶¶ 624-29; Doc. Ex. 6413-15 (PX1480 Phillips Aff.). And, after arguing partisan intent is perfectly acceptable, they contend Legislative Defendants "did not act with partisan intent" at all, Leg. Defs. Br. 98, directly contradicting the specific factual findings made by the trial court that each of the Enacted Maps was the result of intentional, Pro-Republican drafting. R p 3564 ¶ 140 (Congressional); R p 3565 ¶ 142 (House and Senate).

The issues in this case are of the utmost importance. However, portions of the Legislative Defendants' Response read like a disgruntled uncle after Thanksgiving dinner, trading a serious examination of the constitutional principles at issue here for a raging case of "whataboutism". Legislative Defendants' complaints range from irrelevant points about how now-Governor Roy Cooper's Senate district was drawn nearly three decades ago, to centuries of prior political behavior under wildly different social and technological circumstances, to outrageous asserted suggestions that those who disagree with health agencies warnings against using Ivermectin, a dewormer, as a treatment for COVID-19 are being censored. Leg. Defs. Br. 80. Amidst this melodramatic rhetoric, Legislative Defendants try to distract from the fact that the rights of North Carolina voters are being undermined, especially Black voters. But these efforts at misdirection only reinforce what was proven at trial: that Legislative Defendants drew maps with the predominant goal of entrenching themselves in power by partisan means, racial means, or both. In doing so, they abrogated their sworn duty to serve the people of this State, provide constitutionally required procedural protections to prevent undue harm to Black voters, and to guarantee free elections that will ascertain the will of the voters.

ARGUMENT

I. PARTISAN GERRYMANDERING VIOLATES THE NORTH CAROLINA CONSTITUTION AND IS JUSTICIABLE.

Legislative Defendants' Response makes clear that Legislative Defendants view redistricting as a political game with only political ends, "as political actors make *deals* resulting in political choices with political effects[]", Leg. Defs. Br. 1

(emphasis added), that can never be reviewed for compliance with the State Constitution. Legislative Defendants want this Court to ratify their extreme position that "nothing in the Constitution restricts the General Assembly's political discretion in redistricting," Leg. Defs. Br. 35, thereby freeing the Legislative Defendants—and all future General Assemblies—to act with impunity in the use of partisan data to cement their power during the decennial redistricting process.

To accept Legislative Defendants' theory of unchecked "political redistricting" would contravene and severely diminish other constitutional protections, such as the Free Elections, Equal Protection, and Free Speech and Assembly clauses, that protect all North Carolinians' right to equal voting power. *Stephenson I*, 355 N.C. at 382, 562 S.E.2d at 396 (describing this Court's obligation to ensure that the Whole County Provision not only complies with federal law, but "must also be reconciled with other legal requirements of the State Constitution"). Neither the Constitution, nor any holding of this Court, has condoned partisan gerrymandering that subverts the will of the voters as the Enacted Maps would here. In fact, to the extent these issues have been adjudicated, courts have consistently found that a legislature violates the fundamental rights of voters where it pursues a goal of extreme partisan gerrymandering in North Carolina or otherwise implements criteria that deprives voters of constitutional protections. *See Common Cause v. Lewis*, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 56 at *13 (Wake Cnty. Super. Ct. Sep. 3, 2019) (finding certain House and Senate districts to be extreme partisan gerrymanders, resulting in vote dilution and violating the state Constitution); *Harper v. Lewis*, 19 CVS

012667, 2019 N.C. Super. LEXIS 122, at *18 (Wake Cnty. Super. Ct. Oct. 28, 2019) (finding that the 2016 North Carolina Congressional plan was an extreme partisan gerrymander in violation of the Free Elections Clause, Equal Protection Clause, Freedom of Speech Clause, and Freedom of Assembly Clause of the North Carolina Constitution). And, in fact, even the Legislative Defendants acknowledge that the General Assembly is only "free to implement legislation as long as that *legislation does not offend some specific constitutional provision*." Leg. Defs. Br. 35 (emphasis added).[1]

In staking out their position that they are authorized to pursue extreme partisan outcomes, the Legislative Defendants ignore how North Carolina's judiciary has consistently interpreted the state Constitution in a manner responsive to unwarranted expansions of legislative power that would abrogate the fundamental right to vote. Common Cause Br. 38–41 (documenting North Carolina's jurisprudence starting in 1787 to show that courts have played a crucial role as a co-equal branch

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[1] Legislative Defendants also wrongly contend that Plaintiffs in this case believe that any partisan consideration at all is unconstitutional. Leg. Defs. Br. 44 ("Plaintiffs-Appellants argue that politics in redistricting has always been forbidden. This would treat every redistricting conducted by the General Assembly in history as unconstitutional"). This grossly misrepresents Common Cause's position. Common Cause reasonably argues, as these cases support, that partisan considerations cannot exceed constitutional restrictions and preempt the fundamental rights of North Carolinians.

This position is further supported by Common Cause's expert Dr. Magleby's comparative analysis of Iowa and North Carolina post-2011 redistricting. In "Considering the Prospects for Establishing a Packing Gerrymandering Standard," Dr. Magleby determined that Iowa's legislature *did not* engage in partisan gerrymandering. Accordingly, Legislative Defendants' histrionics that nothing will ever not be a gerrymander according to Plaintiffs is plainly wrong. *Election Law* (2018), https://www.liebertpub.com/doi/10.1089/elj.2016.0392.

of government to address acts of the General Assembly that result in unconstitutional political entrenchment or undermine the will of the people); *Stephenson I*, 355 N.C. at 382, 562 S.E.2d at 396 (internal citations omitted) ("Several provisions of our Constitution provide the elasticity which ensures the responsive operation of government"). Discretionary choices, political or otherwise, made by legislators in redistricting cannot usurp constitutional protections or the power of this state's courts to uphold voters' fundamental rights. *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 390 ("The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions… but it must do so in conformity with the State Constitution").

Furthermore, Legislative Defendants twist the holding in *Stephenson* to restrict the General Assembly's authority only narrowly with regards to four constitutional requirements explicit to the redistricting process, while completely ignoring other critically relevant provisions within the North Carolina Constitution, including the Equal Protection Clause. Leg. Defs. Br. 34 (listing the constitutional restrictions to include "that legislative districts be of 'an equal number of inhabitants' ('as nearly as may be'), 'consist of contiguous territory,' not unnecessarily divide counties, and 'remain unaltered until the return of another decennial census'"). This Court in *Stephenson* did not empower Legislative Defendants to exercise their political discretion in disregard of other constitutional provisions not explicitly listed. In fact, the Court in *Stephenson* was well aware of other constitutional limitations. *Stephenson I*, 355 N.C. at 378-79, 562 S.E.2d at 394. And the *Stephenson* Court

recognized that the Equal Protection Clause of the North Carolina Constitution protects "the fundamental right of each North Carolinian to substantially equal voting power." *Id.* at 378.[2] Thus, Legislative Defendants have fundamentally mischaracterized this Court's redistricting jurisprudence and the limitations imposed on the Legislature's ability to redistrict by the North Carolina Constitution.[3]

Legislative Defendants also repeatedly misread and contradict the trial court's Findings of Fact where it conflicts with their theory of the case.

First, Legislative Defendants argue that the trial court did not find the Enacted Maps are "extreme partisan gerrymanders." Leg. Defs. Br. 51, 113. The Legislative Defendants' conclusory statement, however, leaves out that the trial court only rejected the *Common Cause v. Lewis* legal standard of "extreme," R p 3542 ¶ 95 ("To the extent the 2021 redistricting committees sought to retain the district lines of the 2019 maps, partisan bias, although not 'extreme' by the Common Cause standard, is present in the Enacted Maps[]"), and as a result, never made a specific factual finding applying the "extreme partisan gerrymandering" test used by the *Common Cause* court. Instead, multiple Findings of Fact by the trial court affirm the partisan

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[2] In *Stephenson*, this Court also instructed that "legislative districts required by the VRA shall be formed prior to the creation of non-VRA districts" *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 396-97. This restrictive criterion, ignored by the Legislative Defendants, is an example of an explicit limitation on the procedure by which, and the extent that, political considerations can be pursued during redistricting.

[3] This Court also previously made clear that the judiciary has the "duty of redressing [] demonstrated constitutional violation[s]" in redistricting when and if they occur. *Stephenson I*, 355 N.C. at 376, 562 S.E.2d at 392. As explained in Common Cause's opening brief, the state Constitution allows the judiciary broad powers in enforcing constitutional requirements in redistricting. Common Cause Br. at 56.

intent behind, and the dramatic electoral consequences of, the Enacted Maps.[4] As such, Legislative Defendants' actions clearly satisfy any "extreme partisan gerrymandering" standard.

Second, in their misguided effort to present a defense to charges of overt partisan intent in designing the Enacted Maps, the Legislative Defendants point to their adopted redistricting criteria as evidence that they did not seek partisan advantage and state that their adherence to the criteria "remains unimpeached." Leg Def. Br. 98. Legislative Defendants further claim that "the trial court issued no finding that the General Assembly considered political data in drawing the Enacted Plans." *Id.* at 99. Again, these claims are directly contradicted by the extensive fact-finding made by the trial court.

For example, the trial court repeatedly concluded that the Enacted Maps were a result of intentional partisan intent and would provide Republicans with a durable partisan advantage. *See, e.g.*, R p 3698 ¶ 569 ("[W]e conclude based upon a careful review of all of the evidence that the Enacted Maps are a result of intentional, pro-Republican partisan redistricting"); R p 3575 ¶ 176 (the "Court also finds" that expert analysis "provides mathematically precise calculations of how carefully crafted the plan is—that is, how precisely the district boundaries align with partisan voting patterns so as to advantage Republicans . . ."). The partisan advantage achieved via

[4] As previously stated, this Court does not need to disturb the trial court's factual findings to easily determine the Enacted Maps are extreme partisan gerrymanders under the *Common Cause v. Lewis* standard. Common Cause Br. 47.

the Enacted Maps was found by the trial court to be incredibly high. Indeed, the Court found that "the enacted congressional map is more carefully crafted to favor Republicans than at least 99.9999% of all possible maps of North Carolina satisfying the nonpartisan constraints imposed in [Dr. Pegden's] algorithm." R p 3575 ¶ 175. One would have to ignore all common sense to say that number was not extreme. As a result of the evidence presented at trial, the Court held that "the 2021 Congressional Plan is a partisan outlier *intentionally and carefully designed* to maximize Republican advantage in North Carolina's Congressional delegation." R p 3658 ¶ 423 (emphasis added). In fact, the Court explicitly held that the "enacted congressional plan fails to follow, and subordinates, the Adopted Criteria's requirement to draw compact districts." R p 3661 ¶ 434. And, while the Legislative Defendants have offered this Court extensive briefing in an effort to save their partisan Congressional Plan, the trial court found that the "legislative Defendants offered *no defense* of the 2021 Congressional Plan." R p 3658 ¶ 424 (emphasis added).

Similarly, the Court held "that the House and Senate maps are partisan outliers in their partisan bias and the degree to which they are optimized for partisan advantage." R p 3575 ¶ 177. Thus, Legislative Defendants' attempt to rely upon the adopted criteria as a defense to partisan bias conveniently ignores the factual findings of the trial court that the criteria were not uniformly applied, and often times only applied when it advantaged Republicans. R p 3569 ¶ 158. Legislative Defendants' argument is plainly contradicted by the factual findings of the trial court,

which effectively found that Republican bias was "not inadvertent" and could not have been reached through a blind application of the adopted criteria.[5]

Moreover, Legislative Defendants ineffectively try to argue that the "strict county-grouping limitation . . . curb[s] political discretion in redistricting." Leg. Defs. Br. 87. But the record shows that when given a choice, Legislative Defendants selected specific clusters that entrenched their partisan advantaged at the expense of both Democrats and voters of color. R p 3562 ¶ 132 ("Legislative Defendants' exercise of this discretion [in selecting certain country groupings] in the Senate and House 2021 Plans resulted in Senate and House district boundaries that enhanced the Republican candidates' partisan advantage, and this finding is consistent with a finding of partisan intent."); *see also* Common Cause Br. 72 (describing Plaintiffs' Expert Dr. Mattingly's determination that Legislative Defendants had a choice of drawing districts in the Duplin-Wayne House Cluster, but instead destroyed a functioning crossover district). As a practical matter, as demonstrated by the evidence before the trial court, the county-grouping requirement may serve as a

[5] Legislative Defendants argue that the trial court repeatedly "credited" the contemporaneous legislative record and the non-partisan goals expressed therein as the basis for the Enacted Maps. Leg. Defs. Br at 149. This is not an accurate description of the trial court's findings. The trial court noted that the General Assembly established "a detailed record of the *stated* purposes of the configurations of the 2021 districts, R p 3548 ¶ 104 (emphasis added), and proceeded to recite the stated goals for the Congressional Plan, Senate Plan and House Plan. R pp 3545-56 ¶¶ 104-114. Although the Court indicated that the Committee "concluded" that the congressional map and Senate Plan satisfies or complies, respectively, with the adopted criteria," R pp 3547, 3554 ¶¶ 105, 110, the trial court itself did not ratify this conclusion as accurate (and, notably, did not even represent that the Committee had made such a finding with respect to the House Plan).

minor procedural speedbump on *how* a General Assembly may implement an extreme partisan gerrymander, but it does not prevent such an endeavor.

The protections afforded to citizens of the state by the North Carolina Constitution prohibit the exact conduct pursued by the Legislative Defendants, as found by the trial court, namely, their "intentional" and "careful" design of the Enacted Maps to maximize the maintenance of partisan advantage by the party in control of the General Assembly at the expense of the voters. R p 3658 ¶ 423. The fact that Legislative Defendants pursued this agenda in contravention of the adopted criteria and stated goals of the redistricting process confirms the intentional partisan outcome pursued by the redistricting effort. The Court must require that the redistricting process and outcome adhere to all Constitutional guarantees and, as such, reject the Enacted Maps.

II. THE ENACTED MAPS VIOLATE NORTH CAROLINA'S EQUAL PROTECTION CLAUSE.

In their Response, Legislative Defendants make the same errors that the trial court did in mischaracterizing Common Cause's intentional discrimination claims as racial gerrymandering claims. They also ignore the evidence in the record that the enacted maps destroy functioning crossover districts and are based on a redistricting process that ignored Black voters.[6] The trial court erred as a matter of law in applying

[6] A crossover district is a district "in which the minority makes up less than a majority of the voting-age population, but is large enough to elect the candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate." *Bartlett v. Strickland*, 556 U.S. 1, 3 (2009).

the law to the facts, which were sufficient to vindicate Plaintiff Common Cause's claim.

A. Common Cause Must Only Show That Race Was a Motivating Factor In Drafting The Enacted Maps.

Legislative Defendants' mischaracterization of Common Cause's claim as a "racial gerrymandering" claim is not a minor mistake—it mistakenly invokes an entirely different legal standard which requires proof that race was a "predominate, overriding factor" in the enactment of the Legislature's plans. Leg. Def. Br. 163 n.27. In doing so, they incorporate the wrong legal standard for scrutinizing the role of race in the enactment of the Legislature's plans. *Id.* at 164 (stating that the plaintiff has "the burden of establishing that race [was] the predominant motive behind the state legislature's actions") (internal citation omitted). As previously explained, Common Cause has lodged claims of intentional discrimination under the Equal Protection Clause and"[a]n act of the General Assembly can violate [that clause] if discriminatory purpose was 'a motivating factor[,]' . . . and Plaintiffs 'need not show that discriminatory purpose was the sole or even a primary motive for the legislation, just that it was 'a motivating factor.'"[7] Common Cause Br. 61 (citing *Holmes v Moore*,

[7] In proving discriminatory purpose, improper motivations by the legislators who voted for a legislative act can serve as evidence in support of an Equal Protection violation. *See Holmes*, 270 N.C. App. at 16-17 (noting that the Supreme Court's decision in *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) preceded the decisions in *Washington v. Davis*, 426 U.S. 229 (1976) and *Arlington Heights*, both of which "seem to nullify *Palmer*'s pronouncement [about the 'motivations of the men who voted' for legislation] . . . "although the Supreme Court has never expressly overturned *Palmer*, the Eleventh Circuit has previously noted the decision's 'holding simply has not withstood the test of time, even in the Fourteenth Amendment equal

270 N.C. App. 7, 16, 840 S.E.2d 244, 254-55 (2020)). Thus, the correct standard for the Court to utilize in reviewing the trial court's treatment of Common Cause's claim is the *Arlington Heights* standard as applied most recently by the Court of Appeals in *Holmes*.

B. North Carolina Has a Long History of Black Voter Suppression.

The first prong of the *Arlington Heights* inquiry supports Common Cause's claim because North Carolina has a long history of Black voter suppression, spanning from outright violence and disenfranchisement, to intentional vote dilution, to passing suppressive voter ID laws. Common Cause Br. 62–65. Legislative Defendants do not dispute this history, but argue that Common Cause failed to connect it to the current redistricting cycle. Leg. Defs. Br. 166. Black voters have been the target of many political fights in North Carolina, and there has been a constant barrage of attacks on their right to vote, one that has been continuous to the present day. These attacks have come from both sides of the aisle in name only, but underneath the same ideological theme: that white supremacy must reign. Common Cause Br. 62–65. The Court should not ignore this history, or attempt to erase it as the trial court and Legislative Defendants do, because the 2021 Enacted Maps are the next iteration in the unbroken cycle of Black voter suppression in North Carolina.

Facially race-neutral laws with disproportionate racial effects, similar to the Enacted Maps, have been the tool of choice for the North Carolina Legislature in

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protection context.' *Church of Scientology v. City of Clearwater*, 2 F.3d 1514, 1529 (11th Cir. 1993) (citations omitted).").

curtailing Black voters' voting rights for decades. The 2021 redistricting cycle proved just as much: the Legislature knew the Enacted Maps would disproportionately harm Black voters because the evidence was presented to them and they ignored it. Adhering to the state's sordid history of discrimination, the Legislature ignored Black voters by using "race-neutral" criteria as a means to insulate themselves from accusations of racial discrimination, Leg. Defs. Br. 169–70; however, the foreseeable and foreseen effect of this ignorance is the dilution of Black voting power in certain districts and the inability of Black voters in these districts to elect their candidates of choice.

C. The Undisputed Record Proves That Legislative Defendants Knew How The Enacted Maps Would Affect Black Voters.

The second and third prongs of the *Arlington Heights* standard require the Court to look at the sequence of events leading up to the passage of the Enacted Maps and their legislative history. Both demonstrate that the Legislative Defendants were indeed knowledgeable about how the Enacted Maps would affect Black voters. Legislative Defendants attempt to characterize their ignorance of the Enacted Maps' effect on Black voters as proof that no such harm was done or could be proven. Leg. Defs. Br. 170–71. But at numerous points throughout the 2021 redistricting process and in this litigation, Legislative Defendants have demonstrated their awareness of the Enacted Maps' impact on Black voters. For example, both Senator Hise and Representative Hall admitted they were aware of where Black voters live in the state, and could not possibly "un-know" this information when drawing district lines. Doc. Ex. 3768:5-17, 3769:13-21 (PX146 Hise Dep. Tr.); Doc. Ex. 3258:17-20, 3300:6-13

(PX145 Hall Dep. Tr.). Common Cause does not ask this Court to "assume that because map-drawers were aware of the basic fact that there are higher minority populations in urban areas than in rural areas, they therefore had an encyclopedic knowledge of the racial composition of all of the VTDs in the State and could draft districts with computer-like precision and from memory to target [B]lack voters." Leg. Defs. Br. 169–70. But it is undisputed that Legislators know more detail about their own districts than a general trends along the rural/urban divide, and as the record shows, Legislators did not draw maps from memory. Representative Hall used "concept maps" that he brought into the room. T3 p 785, line 18 to p 786, line 17 (Hall).

Legislative Defendants also admit to receiving repeated warnings about the racial impact of the enacted maps, Leg. Defs. Br. 169, despite attempts to claim they were not aware of the racial impact of the maps, *id.* at 165. They received warnings both from their legislative colleagues and from counsel for Common Cause, about the serious harms of a purportedly race-blind process. Doc. Ex. 883:2-5 (PX77 12 August 2021 Joint Committee Tr.); Doc. Ex. 1125:8–1126:2 (PX80 5 October 2021 Senate Redistricting Tr.); Doc. Ex. 6854-61 (PX1569 8 October 2021 Letter to NCGA); Doc. Ex. 6862–64 (PX 1570 25 October 2021 Letter to NCGA). Legislative Defendants even received a racially polarized voting study demonstrating these harms, and ignored it. Doc. Ex. 6422–24 (PX1481 Phillips 26 October 2021 Email to Legislative Defendants). These warnings persisted during the votes conducted on the Enacted Maps, where amendments that would undo or ameliorate the harm to Black voters were rejected.

See T3 p 868, line 19 to p 869, line 3, p 872, line 19 to p 873, line 2 (Hawkins); Doc. Ex. 1593:12-25 (PX84 3 November 2021 House Redistricting Tr.); Doc. Ex. 1453:1-6; 1463:2-20; 1478:5-12 (PX83 2 November 2021 Senate Redistricting Tr.). Obviously aware of these harms to Black voters, Legislative Defendants inconsistently argue that even though they were open to receiving evidence of the need for an RPV analysis, they were not obligated to respond to every suggestion from their colleagues or the public. Leg. Defs. Br. 169.

Legislative Defendants' contentions that no one has "establish[ed] awareness by the General Assembly" of these harms, Leg. Defs. Br. 165, is further undermined by the testimony of their own expert. Dr. Jeffrey Lewis testified at trial that, even by his own rushed and incomplete ecological inference analysis, the Enacted Maps destroyed functioning Black crossover districts. T3 p 587, line 8 to p 588, line 1, p 589, line 9 to p 590, line 22 (Lewis). Dr. Lewis' report submitted by Legislative Defendants also ratifies this conclusion. Doc. Ex. 9606-10 (LDTX109 Lewis Rep., Ex. B, Table 1). This conclusion of Dr. Lewis is consistent with that of Dr. Mattingly, finding that the Enacted Maps are the result of conscious choices with the indisputable effect of harming Black voters. Doc. Ex. 6579-80 (PX1485 Mattingly Addendum Rep.).

Finally, fact-finding by the trial court supports Common Cause's allegations. The court below found that "the process in creating the Enacted Maps deviated from past procedure in not following Stephenson by drawing VRA districts first." (R p 3701 ¶ 583). The trial court found that the Senate districts in northeastern North Carolina, "the chosen cluster is the choice that favors the Republican Party and significantly

fractures Black voters in that area." (R p 3702 ¶ 589). About that same choice, the court below found that the cluster not chosen "included many of the more racially diverse counties in the state..." (R p 3615 ¶ 297). The trial court noted that "Legislative Defendants offered no defense of the 2021 Congressional Plan." (R p 3658 ¶ 424). And with respect to Congressional District 2, the Court found that no congressional district in North Carolina has ever combined Washington County and Caswell County, and that CD2 excludes Pitt County and Greenville. (R p 3677 ¶¶ 491-492). This fact-finding strongly supports Common Cause's claims of intentional racial discrimination.

D. The Enacted Maps Have A Disproportionate Discriminatory Effect on Black Voters.

The last prong of the *Arlington Heights* analysis requires the court to consider the impact of the law and whether it bears more heavily on one race than another. In determining the actual effect of the enacted maps on Black voters, Legislative Defendants conflate the test for a Section 2 vote dilution claim with the test for an intentional discrimination claim, arguing that the failure to make out a Section 2 case "dooms" the intentional discrimination claims. Leg. Defs. Br. 170. But the inquiries are distinct: while a Section 2 vote dilution claim requires showing a majority-minority district, intentional discrimination claims do not. Indeed, United States Supreme Court precedent demonstrates that the intentional destruction of effective crossover districts "raises serious questions" of an equal protection violation. *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009). Legislative Defendants do not reckon with this aspect of *Strickland*, alluding only to its holding that the creation of such districts is

not required. Leg. Defs. Br. 171. But it is the intentional *destruction*, not the creation, of crossover districts which Common Cause has alleged in this case. And as shown through evidence offered by both Plaintiffs and Legislative Defendants, such a violation is exactly what has occurred. Functioning crossover districts saw BVAP decreases in all three Enacted Maps. Doc. Ex. 6840-42, 6844, 6846, 6849 (PX1562-67 Ketchie Aff. Exs. 1-6).

Legislative Defendants claim "there is no indication that these decisions will make it more difficult for minorities to elect candidates of choice." Leg. Defs. Br. 170. But Dr. Lewis's own report demonstrates that these reductions in BVAP eliminate functioning crossover districts; in each of the Enacted Maps, these reductions in BVAP destroy districts where Black voters previously had the opportunity to elect candidates of their choice. Doc. Ex. 9606-10 (LDTX109 Lewis Rep., Ex. B, Table 1). Legislative Defendants ignore these facts by legal sleight of hand, incorrectly applying the Section 2 framework to Plaintiffs' intentional discrimination claims. *See* Leg. Defs. Br. 179-80. They do not otherwise make any effort to rebut, recharacterize, or explain these facts. Indeed, they firmly state that this effect is "legally irrelevant," Leg. Defs. Br. 170, binding Supreme Court precedent notwithstanding. When the correct standard is applied to these unrebutted facts, it is clear that Common Cause demonstrated that the Enacted Maps have a disproportionate discriminatory effect on Black voters.

E. Whether VRA Districts Need to Be Drawn Should Be An Evidence-Based Assessment.

The fact that Legislative Defendants ignored this Court's dictate in *Stephenson* to draw VRA districts first, further supports that the Enacted Maps are motivated by race. Legislative Defendants erroneously assert that "*Stephenson* and its progeny do not require the General Assembly to automatically conduct a racially polarized voting analysis as part of its redistricting responsibilities." Leg. Defs. Br. 167. But that directly contravenes this Court's instruction in *Stephenson*. Common Cause Br. 79-80. Legislative Defendants argue that they did not have to draw VRA districts first because they unilaterally determined that VRA districts were not necessary, without any relevant evidence to substantiate this determination and despite requests from their colleagues to conduct an analysis. Legislative Defendants' determination—that they were not required to assess whether VRA districts needed to be drawn—was not based on the results of the 2021 Census. *See* Leg. Defs. Br. 168-69. They state the decision was based on "prior experience and previous litigation[,]" but that prior experience also educated them on where Black voters live and was based on old census data and election results from over a decade ago. *See id.* Additionally, it is undisputed that the Legislature did not even attempt to do a racially polarized voting analysis in order to make a sound decision on the propriety of VRA districts. Common Cause Br. 80-82. Common Cause does not claim that VRA districts are explicitly necessary, but it does claim that the Legislature has an initial duty to determine if VRA districts are necessary, because without such an analysis, Black voters in different parts of the state could be harmed by a failure to create these districts.

As noted above, in a contradictory manner, Legislative Defendants argue they are not required to "respond to and follow the dictates" of their colleagues or community groups, Leg. Defs. Br. 169, but also that they were unaware of the adverse racial impact of the enacted maps, Leg. Defs. Br. 165. The truth is that Legislative Defendants simply dismissed compelling evidence of the racial impact of the Enacted Maps on Black voters because they did not like the source. But that's not how complying with the Constitution or this Court's controlling precedent works. Their bias does not relieve them of their obligation under the Supreme Court's mandate to draw VRA districts first in legislative redistricting in order to protect Black voters, especially upon notification of specific potential issues. Legislative Defendants chose to ignore evidence of racially polarized voting and the effects of the Enacted Maps on Black voters in certain North Carolina districts, and this deliberate racially discriminatory choice pervades the Enacted Maps.

Finally, if the need for a ruling under the Declaratory Judgment Act were not already blatantly clear, the Legislative Defendants' suggestion that they consider it unconstitutional to and will never consider race absent proof of a Section 2 violation is deeply troubling, Leg. Br. 128, n 25, inconsistent with the holding in *Bartlett v. Strickland* that crossover districts are allowed but not compelled and manifests their resistance and hostility toward Black political power except as narrowly understood under Section 2 of the Voting Rights Act. 556 U.S. at 23. If the first step in *Stephenson* is to mean anything—and indeed, if the harmonization of the Whole County Provision with federal is to work at all—this cynical misreading of the law must be corrected.

III. COMMON CAUSE SATISFIES THE STANDING REQUIREMENTS TO BRING ITS CLAIMS.

Legislative Defendants challenge Plaintiffs' standing to bring partisan gerrymandering and intentional discrimination claims on three grounds: justiciability, harm, and associational standing. Leg. Defs. Br. 161–62. Justiciability and harm are addressed in the opening brief, Common Cause Br. 87–93, and Common Cause responds further to the third challenge to standing below.

An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit. *River Birch Ass'n v. Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990). Legislative Defendants do not dispute that Common Cause meet the first two factors. Rather, they inaccurately contend that Common Cause fails the third prong. Leg. Defs. Br. 162. To assess this prong, a court will "evaluate the plaintiffs' claims and the remedies sought to determine whether any of the association's members are necessary parties to the suit." *Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 146 N.C. App. 159, 167, 552 S.E.2d 220, 226 (2001).

Outdoor Amusement Business Association, Inc. v. Department of Homeland Security demonstrates that participation of individual associational members is unnecessary in the case at hand. 983 F.3d 671, 683 (4th Cir. 2021). In *Outdoor Amusement Business Association*, a trade association sued the Department of Homeland Security over its requirement that employers receive a certification from

the Department of Labor for H-2B visas. *Id.* at 676–77. The Fourth Circuit determined individual associational member participation was not required because the association "represents and educates trade members, many of whom use H-2B visas. An injunction reducing delays and costs in the issuance of H-2B visas would therefore benefit many of its members . . . ." *Id.* at 683. Similarly, injunctive relief here requiring a redistricting process that complies with state constitutional law will benefit Common Cause's members who currently reside in districts that have been illegally partisan gerrymandered and who were the victims of intentional racial discrimination. Doc. Ex. 6412 (PX1480 Phillips Aff.). Doc. Ex. 6422 (PX1481 Phillips 26 October 2021 Email to Legislative Defendants).

Legislative Defendants also ignore established precedent when they claim, without citing a single case, that individual member participation is specifically required "where voting rights are at stake." Leg. Defs. Br. 162. There is nothing so unique about a voting rights claim that makes typical standing doctrine inapplicable. In fact, numerous cases establish that associations have standing to assert the rights of their members in voting rights and election law cases, including *North Carolina State Conference of NAACP v. North Carolina State Board of Elections*, 283 F. Supp. 3d 393, 405 (M.D.N.C. 2017) and *Alabama Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026, 1045 (M.D. Ala. 2017). Established case law therefore amply demonstrates that the voting rights claim asserted does not require the participation of individual association members.

Nor does the relief requested require the participation of individual associational members. Individual members' presence is not required "when the association seeks declaratory or injunctive relief," as the relief in such cases normally accrues to all members. *Shearon Farms Townhome Owners Ass'n II, Inc. v. Shearon Farms Dev., LLC*, 272 N.C. App. 643, 650, 847 S.E.2d 229, 235 (2020). In contrast, this factor is ordinarily not satisfied when the association seeks damages "because individual damage claims by their nature are not common to the entire membership, nor shared by all in equal degree." *Id.* at 650 (internal citations omitted). Here, Common Cause seeks injunctive and declaratory relief on behalf of its members, not damages, and easily satisfies this element of associational standing. Common Cause consequently meets the third prong of the associational standing test.

Two more points merit discussion. Legislative Defendants argue Common Cause lacks standing by deliberately misconstruing Plaintiffs' claims. Legislative Defendants claim Common Cause cannot "assert that their members uniformly and without exception prefer Democratic candidates." Leg. Defs. Br. 162. Legislative Defendants effectively argue here that every member of Common Cause must have individual standing. That is incorrect. For an association to have standing, it need only show that "one of its members" suffers harm on account of defendants' actions. *River Birch*, 326 N.C. at 129, 388 S.E.2d at 554. To require every member to show harm would "obliterate associational standing . . . ." *State Emps. Ass'n of N.C., Inc. v. State*, 154 N.C. App. 207, 219, 573 S.E.2d 525, 533 (2002), *rev'd*, 357 N.C. 239, 580 S.E.2d 693 (2003) (Tyson, J., concurring). Common Cause has members in every

county in which Republicans intentionally packed and cracked voters for partisan advantage and members who identify as Black in every county in which Legislative Defendants engaged in intentional racial discrimination. Doc. Ex. 6413–15 (Phillips Aff.). Common Cause therefore clearly meets the requirement that at least *one* member must be harmed.

Second, Legislative Defendants fail to grasp the essential nature of partisan gerrymandering. Common Cause does not bring this case because its members "prefer Democratic candidates." Leg. Defs. Br. 162. It pursued litigation after non-adversarial means failed, Doc. Ex. 3074 (Letter from Common Cause), Doc. Ex. 6422 (26 October 2021 Email), because Legislative Defendants (1) discriminated against Common Cause members who identify as Black, (2) packed and cracked Common Cause members for partisan advantage, and (3) retaliated against Common Cause members for protected political speech and expression. At issue are legal wrongs, not political preferences, which suffice for standing purposes.

IV. THE FEDERAL ELECTIONS CLAUSE PRESENTS NO BAR TO THIS COURT'S ABILITY TO ADDRESS STATE CONSTITUTIONAL INFIRMITIVES IN THE CONGRESSIONAL MAP.

Legislative Defendants improperly raise a new defense under Article I, Section 4, Clause 1 of the United States Constitution. They argue the federal Elections Clause bars any claim against the congressional plan—an argument referenced nowhere in the Trial Court Judgment, not raised at trial, R p 3520 ¶ 14, and not raised in Legislative Defendants' trial court briefing. Further, Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states that "a party must have presented to

the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" to preserve an issue for appeal, but Legislative Defendants' untimely federal Elections Clause argument is not listed in the ROA as a proposed issue on appeal as an alternate basis in law pursuant to Rule 10(c). Importantly, the trial court must rule on the issue for it to be preserved for appeal. *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 195, 657 S.E.2d 361, 363 (2008) (the requirement that "litigants raise an issue in the trial court before presenting it on appeal goes 'to the heart of the common law tradition and [our] adversary system.'") (citing *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 805 (1983)); *id.* at 195-96 ("[A] party's failure to properly preserve an issue for appellate review ordinarily justifies the appellate court's refusal to consider the issue on appeal."). Legislative Defendants failed to meet any of these requirements.

Even if it were not barred, their defense under the federal Elections Clause that state courts have no role in regulating elections to federal office carries no weight. First, not only is there is no legal support for this argument, but for more than one hundred years, the United States Supreme Court has consistently rejected this argument. *See Rucho v. Common Cause*, 139 S.Ct. 2484, 2507 (2019) (acknowledging and describing the ability of state law to constrain legislative action under the Elections Clause); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 808-09 (2015) (holding that a state legislature's redistricting power is subject to limitation via voter initiative); *Smiley v. Holm*, 285 U.S. 355, 372-

73 (1932) (holding that a state legislature's redistricting power is subject to limitation via gubernatorial veto); *Davis v. Hildebrant*, 241 U.S. 565, 570 (1916) (holding that a state legislature's redistricting power is subject to limitation via referendum). The only case that Legislative Defendants offer in support of this argument is *Carson v. Simon,* 978 F.3d 1051 (8th Cir. 2020) which concerns whether some state actor other than the legislature could regulate the time, place, or manner of federal elections without the legislature's approval. This case, however, is about the constraints that the North Carolina Constitution places on the legislature in redistricting and the rights it affords North Carolina voters when being redistricted. *Carson* thus has no bearing on the matter before this Court.

Second, Legislative Defendants' argument is based on a misreading of the Constitution. The historical record is clear that the Framers had a healthy skepticism about state legislative interference with elections, making Legislative Defendants' interpretation of this constitutional provision ahistorical. *See* Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 St. Mary's L.J. __ (forthcoming 2022), manuscript at 28 (reviewing historical evidence that "[t]he Framers' expectation that state constitutions would continue to control 'legislatures'"); Eliza Sweren-Becker and Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 Wash. L. Rev. 997, 999 (2021) ("From the founding era to the present, one would have to look far and wide for evidence that the framers sought to limit these actions only to legislators (as opposed to understanding that language to refer to states generally). Indeed, suspicion of those very legislators

suffuses the purpose and history of the Clause."); Hayward Smith, *History of the Article II Independent State Legislature Doctrine*, 29 Fla. St. L. Rev. 731, 756 (2001) (explaining, with respect to the Electors Clause, how "during the Convention, many of the Framers demonstrated their general hostility to a decisive role for state legislatures in the appointment of electors").

Third, Legislative Defendants' unsupported defense would create jurisprudential and practical chaos if embraced. It would give rise to myriad new legal problems for state and federal courts to parse, would dramatically increase the election caseload in federal courts, and would significantly degrade the role of the state courts and state constitutions. Of note, state reform of the congressional redistricting process, which was practically invited in the *Rucho* decision, 139 S. Ct. at 2507, would be rendered impossible. This defense would also overturn key election laws that have been in place for more than a century, including such common rights as the secret ballot and decades of redistricting reform, resulting in chaos that could undermine voters' confidence that their votes will be counted fairly.

Finally, the argument is internally inconsistent. Legislative Defendants first point to the North Carolina Constitution for the proposition that the General Assembly, not the courts, have the authority to draw state legislative and congressional maps. Leg. Defs. Br. 37-40. Then Legislative Defendants promptly invoke the Elections Clause for the proposition that the North Carolina Constitution's provisions regarding congressional districts are nullities. Leg. Defs. Br. 183-84. Legislative Defendants cannot have it both ways.

For these reasons, Legislative Defendants' untimely federal Elections Clause defense should be rejected.

V. COMMON CAUSE'S SPOLIATION CLAIM WAS PROPERLY PRESERVED AND THE TRIAL COURT'S FAILURE TO IMPOSE SANCTIONS WAS AN ABUSE OF DISCRETION.

Legislative Defendants' contention that Plaintiffs did not properly preserve the spoliation claim on appeal is flatly contradicted by the record and is contrary to precedent. Legislative Defendants argue that Common Cause did not provide proper notice of intent to appeal the trial court's 4 January 2021 order denying the motion for sanctions and that the Harper Plaintiffs', who joined the motion, "abandoned this issue on appeal." Leg. Defs. Br. 184-185 n.36. But Legislative Defendants are wrong.

First, Common Cause, in its Notice of Appeal, stated its intent to appeal "all interlocutory orders that merged with the final judgment." R. p 3777 (Common Cause NOA). According to *Smith v. Independent Life Insurance Co.*, "a notice of appeal should be deemed sufficient to confer jurisdiction on the appellate court on any issue if, from the content of the notice, it is likely to put an opposing party on guard the issue will be raised . . . ." 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979). Plaintiffs' briefing and the trial court's interlocutory order denying sanctions appears in the record. R pp 2234–85 (Spoliation Briefing), 2699 (Order on Motion for Sanctions). Common Cause also identifies the trial court's error in denying its Motion for Sanctions as the very first question in its Proposed Issues on Appeal. R p 3802. As a result, Legislative Defendants cannot seriously argue that they were not put on notice of Common Cause's intent to appeal the order denying sanctions.

Legislative Defendants' own cited cases establish that Common Cause met its burden under Rule 3(d) of the North Carolina Rules of Appellate Procedure. In *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990), defendant gave written notice of appeal from an order denying his motion to set aside the judgment, but then argued that he was also appealing the underlying judgment order. The North Carolina Court of Appeals rejected his argument, finding that a notice of appeal from denial of a motion to set aside a judgment *only*, does not properly present the underlying judgment on appeal. *Id*. That is because a court lacks jurisdiction when "a reader cannot fairly infer from the language of the notice of appeal that appellant intended" to appeal the relevant order. *Id.* at 157 (internal quotations omitted). Legislative Defendants also cited to *Brooks v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984), where the appellate court determined that petitioner had not met the requirements of Rule 3(d) because he gave *oral* notice of appeal from a contempt judgment and subsequently claimed that this oral notice sufficed for notice of appeal of the judgment that the court issued *three months later*. *Id.*

Common Cause, in contrast to the parties in *Von Ramm* and *Brooks*, specifically included all interlocutory orders in its notice of appeal, and thus clearly put Legislative Defendants on notice of Common Cause's intent to appeal the order denying sanctions. Any reader can indeed "fairly infer from the language of the notice of appeal that [Common Cause] intended" to appeal the spoliation motion.

Second, *Harper* Plaintiffs quite clearly demonstrated their intent to appeal the order in their Notice of Appeal from 12 January 2022:

> Harper Plaintiffs hereby give notice of appeal to the Supreme Court of North Carolina from . . . all of the Superior Court's interlocutory orders issued prior to judgment, including . . . its January 4, 2022 order denying the Harper Plaintiffs' motion for sanctions based on Legislative Defendants' spoliation and failure to comply with the court's discovery order . . . ." R p 3781 (Harper NOA).

The spoliation motion is therefore properly before this Court.

Finally on this point, even if the Court were to determine that the notices of Common Cause and the Harper Plaintiffs were lacking, N.C.G.S. § 1-278 would still permit the Court to consider this issue on appeal as the trial court's failure to issue appropriate spoliation sanctions "involve[es] the merits and necessarily affect[s] the judgment." *Charles Vernon Floyd, Jr. & Sons, Inc. v. Cape Fear Farm Credit, ACA*, 350 N.C. 47, 52, 510 S.E.2d 156, 159 (1999) (*abrogated on other grounds by Department of Transp. v. Rowe*, N.C., December 3, 1999) (finding plaintiffs were entitled to appellate review of an interlocutory order that was not specifically mentioned in the notice of appeal of a final judgment).

For the reasons stated in Common Cause's opening brief, the trial court abused its discretion by denying Plaintiffs' spoliation motion under these circumstances. The trial court has essentially created a roadmap for Legislative Defendants to engage in future nefarious activity behind closed doors while lying to the public about the supposed "transparency" of the process. The trial court's reasoning incentivizes legislators to strategically hire and fire staff to successfully evade judicial review. *See* R. p 2702 (Order on Motion for Sanctions). The trial court denied the sanctions motion

based on its belief that "[w]hile Mr. Reel was a legislative employee at the time the House Plans were drawn, he is not *at this time* a legislative employee subject to the demands or requests of a legislator employer . . . ." *Id.* (emphasis added). That finding creates a dangerous loophole ripe for exploitation. Under the order denying sanctions, legislators could intentionally destroy documents related to the redistricting process by temporarily hiring aides and then releasing them from legislative service before litigation, without any consequences whatsoever. According to Legislative Defendants, it is then the plaintiff's job to locate those aides, subpoena them and gather the information and documents. Leg. Defs. Br. 191. That is not how discovery obligations operate. Those documents are, and must remain, in the Legislature's possession. This Court cannot allow Legislative Defendants to so brazenly circumvent their duty to preserve public documents, N.C.G.S. § 120-133, and avoid their discovery obligations.

VI. COMMON CAUSE'S PROPOSED REMEDY IS APPROPRIATE AND LAWFUL AND SHOULD BE UTILIZED BY THIS COURT.

Finally, the Legislative Defendants' position regarding how to remedy their unconstitutional Enacted Maps cannot be squared with their approach to redistricting. Legislative Defendants' declare *Stephenson* to be a well-defined standard for redistricting—even without any textual basis in the Whole County Provision, Leg. Defs. Br. 11-12—yet firmly object to this Court's authority to remedy the Enacted Maps pursuant to *Stephenson*, deeming such an undertaking to be a "constitutional crisis." Leg. Defs. Br. 192. Cherry picking *Stephenson* solely to support their position is neither proper nor persuasive.

While Legislative Defendants demand this Court "understand the precise scope of its legal obligations", Leg. Defs. Br. 194, they conveniently ignore this Court's inherent power to "require valid reapportionment or to formulate a valid redistricting plan", *Stephenson I*, 355 N.C. at 375-76, 562 S.E.2d at 392, despite *Stephenson* setting forth such a "well-defined standard" flaunted by Legislative Defendants themselves. *Stephenson I* is clear:

> Although there is a strong presumption that acts of the General Assembly are constitutional, it is nevertheless the duty of this Court, in some instances, to declare such acts unconstitutional. *Preston,* 325 N.C. at 448–49, 385 S.E.2d at 478; *see also Marbury v. Madison,* 1 Cranch 137, 5 U.S. 137, 177, 2 L.Ed. 60, 73 (1803) (stating that "[i]t is emphatically the province and duty of the judicial department to say what the law is"); *Bayard v. Singleton,* 1 N.C. 5, 6–7 (1787). Indeed, within the context of state redistricting and reapportionment disputes, it is well within the "power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan." *Scott v. Germano,* 381 U.S. 407, 409, 85 S.Ct. 1525, 14 L.Ed.2d 477, 478 (1965) (per curiam).

Id. at 362. It is precisely within this Court's authority to find that Legislative Defendants have forfeited their right to remediate their extreme partisan gerrymandered maps. The Enacted Maps violate, under any standard, the will of the people, and this Court has a duty to order an appropriate and lawful remedial redistricting process, as proposed by Common Cause, Br. 93-95, to protect North Carolinians' most fundamental rights.

CONCLUSION

Legislative Defendants ask, "What could the General Assembly do differently next time?" Leg. Defs. Br. 54. The most simple solution would have been for the Legislature to adhere to the North Carolina constitutional mandate for redistricting

set forth by this Court in *Stephenson*, including to first create all necessary VRA districts by compelling some analysis of potentially racially polarized voting. It could have, consistent with what it pretended it was going to do, not intentionally drawn extreme and durable pro-Republican partisan gerrymanders. It could have been transparent about all redistricting criteria it used and applied them uniformly and in a non-discriminatory way. Doing the right, constitutional thing is not actually complicated. But instead, the Legislative Defendants improperly interpreted *Stephenson* and ignored their obligation to consider Section 2 of the VRA. Instead of using race- and partisan-neutral redistricting criteria as a mask of transparency, Legislative Defendants could have sought to provide for elections that truthfully ascertain the will of the voters rather than the will of themselves. A commitment to provide for fair elections, by acting in accordance with the Constitution, would have likely yielded one of the *thousands* of potential maps shown by the experts that is responsive to the electorate and stopped the cycle of discriminatory redistricting in the state. But Legislative Defendants refused, and thus Common Cause asks this Court to vindicate the constitutional rights of its members and North Carolina voters.

Respectfully submitted this the 31st day of January, 2022.

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This the 31st day of January, 2022.

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