No.413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA
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REBECCA HARPER; et. al., Plaintiffs, vs. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; *et al.*, Defendants, NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; *et al.*, Plaintiffs, vs. REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting; *et al.*, Defendants.	From Wake County 21 CVS 015426 21 CVS 500058

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LEGISLATIVE DEFENDANTS-APPELLEES' BRIEF

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INTRODUCTION

Drawing electoral boundaries is political because of what it is, not because of who does it. All over the world, and throughout history, political lines have been drawn and maintained for predominantly political reasons. The boundaries of nations, states, political subdivisions, school districts, and utility districts exist because someone made a political determination that a line should lie in one place, not another. In the best circumstances, the lines are the result of political negotiation; in the worst, war.

Electoral districts are of the same species. Each decennial redistricting in each United States jurisdiction gives rise to a mini constitutional convention, as political actors make deals resulting in political choices with political effects. An infinite number of redistricting plans governing North Carolina's legislative and congressional elections could be drawn. Trillions were presented in this case. However, "the choice to draw a district line one way, not another, always carries some consequence for politics, save in a mythical State with voters of every political identity distributed in an absolutely gray uniformity." *Veith v. Jubelirer*, 541 U.S. 267, 343 (2004) (Souter, J., dissenting). No rule of law picks one political consequence over another.

Plaintiffs invite this Court to sit in review of the discretional choices made by a political body in one of the most divisive political processes confronting any political body in American political experience. Plaintiffs ask this Court to cease acting as a court of law and begin acting as a political body. But the North Carolina Constitution has no standard for distinguishing good political choices from bad ones. To draw such

a distinction, the Court would have no choice but to legislate one. That would be unfounded not only because the North Carolina Constitution expressly denies this Court any legislative power but also because the North Carolina Constitution expressly commands the General Assembly to redistrict. That command necessarily embraces the political discretion inherent in the political task delegated. And any effort by a court to correct a political decision in favor of one interest group's favor would impose an identical political burden on another. If these burdens are viewed as violations of legal rights, then vindicating the rights of one set of voters will necessarily violate the rights of others.

The three-judge panel (the "Panel") correctly recognized its own limitations to address this political challenge brought by political Plaintiffs seeking a purely political result, and its conclusion that Plaintiffs' political claims present non-justiciable questions is unimpeachable. For generations, redistricting has been conducted in secret by political operatives for transparently partisan ends, and for most of the State's history, the Democratic Party engineered the partisan redistricting train. The Republican-led General Assembly, by contrast, adopted criteria barring partisan data and considerations and mandating that redistricting occur in full public view and be transmitted over video live-stream. No General Assembly before this one ever made that choice. Yet the Panel read into the trial record the unfounded and clearly erroneously conclusion that many electoral districts are so called "partisan outliers." For the court to see no factual difference between the 2021 redistricting and the prior redistricting processes, even though two legislators

gave live testimony—which the Panel did not discredit—attesting that partisan data and considerations did not enter the line drawing, confirms that courts are incapable of resolving these types of disputes.

If there was ever a case that proved beyond serious dispute that these claims are non-justiciable, this is it. Judicially manageable standards direct that different cases receive different treatment resulting in different outcomes. But Plaintiffs' position, accepted at face value, would produce the same result in every case. A legislative-drawn plan would, in every foreseeable event, fail their amorphous tests because even when a political body forbids use of political data in drawing plans, and draws plans with profound transparency, some amount of political effect still surfaces. Their preferred result would be to eject the General Assembly from its redistricting role notwithstanding the state Constitution's specific delegation of that role to the General Assembly. Plaintiffs, in fact, admit they want this and demand that this Court seize the redistricting pen for itself. But the question of who is responsible for this task is not a question this Court is entitled to answer; the North Carolina Constitution plainly answers it. Plaintiffs do not present a legal claim within the courts' purview to decide, and the Panel was correct, at least, in seeing that much. Its judgment should be affirmed.

STATEMENT OF FACTS

A. Historical Background and Prior Litigation

After each decennial census, "States must redistrict to account for any changes or shifts in population." *Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003). In North Carolina, the State Constitution commits that task solely to the authority of the

General Assembly. N.C. Const. art. II, §§ 3, 5. "Redistricting is never easy." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). It has not been easy in North Carolina. These lawsuits should be understood against a lengthy historical and procedural background, which is summarized below. That history is not simply just examined so that one political party can say the sins of the other political party excuse their own, but to point out that throughout the various times Plaintiffs argue our state's constitutional provisions have historically prohibited partisan gerrymandering, no one interpreted or applied the provisions at the time to mean as such.

1. Reconstruction Through the 2000s Cycle

"North Carolina has an extensive history of problematic redistricting efforts tracing back to the 1730s, which has generated significant litigation." *Dean v. Leake*, 550 F. Supp. 2d 594, 597 (E.D.N.C. 2008). From Reconstruction through the 2000 redistricting cycle, the Democratic Party controlled the redistricting process and was responsible for those "problematic redistricting efforts."

"After the Reconstruction Era and the rejuvenation of the Democratic Party, the practice of gerrymandering . . . became a favored tactic in gaining partisan control of the congressional delegation." D. Orr, Jr., *The Persistence of the Gerrymander in North Carolina Congressional Redistricting*, 9 Southeastern Geographer 29, 43 (1969). The paradigmatic example were the "bacon-strip" districts:

> Republican strength in North Carolina had been concentrated in the western mountain sections, where similar social and economic interests prevail. If those counties were combined into congressional districts, Republican congressmen would be elected. Democrats have chosen the dispersal alternative. A few Republican counties are grouped with Democratic counties in the

> central section of the state. The effect created one-county wide congressional districts that run horizontally across the state, creating what some have called bacon strips.

Leroy C. Hardy, *Considering the Gerrymander*, 4 Pepp. L. Rev. 243, 258–59 (1976). "One such district extended from Pender County on the coast, westward along the South Carolina line through seven more counties all the way to Mecklenburg, a total distance of approximately 250 miles." Orr, *supra*, at 43.

No equal-population requirement curbed the Democratic Party's political aims, and the notion that a partisan-fairness requirement was lurking then and there in the State Constitution was preposterous. *See id.* at 43. The result of "180 years" of Democratic dominance in redistricting was "the rural domination of the state's congressional delegation" and the frustration of "the rising tide of Republicanism" in the State. *Id.* at 39.

In fact, in the early 1960s, when a Republican congressional candidate, Charles Jonas, successfully tailored his message to win one of the bacon-strip districts, the Democratic General Assembly promptly redrew the lines to pair him with a Democratic member in a district predominantly composed of Democratic-leaning territory (which could as easily be identified then as now, because vote totals then and now are reported at the precinct level). *Id.* at 44. But voters have free will:

> Amid Republican charges of gerrymandering, Jonas soundly defeated [the Democratic incumbent] in the 1962 election. In addition, when the legislators 'stacked' the Eighth District boundaries so as to include a preponderance of Democratic counties, they simultaneously gave the adjoining Ninth District an increased Republican character, an oversight which allowed another Republican, James T. Broyhill of Caldwell County, also to be elected to Congress.

Id. Representative Jonas received no assistance from the state courts in winning elections.

In the first redistricting after the Supreme Court announced the one-person, one-vote rule, the Democratic-controlled General Assembly drew districts that "were as distorted as could be found in any state in the country." *Id.* at 46. A court invalidated that plan for failure to comply with the one-person, one-vote rule, but allowed an election to occur under it because of "the tremendous gulf which existed between the status quo and the constitutional requirements" and the "imminence of the 1966 primaries." *Drum v. Seawell*, 250 F. Supp. 922, 925 (M.D.N.C. 1966). Democrats set right back to work, drawing a district that was publicly described as "a dinosaur or a left-handed monkey wrench" that was "'packed' with a projected vote favorable to Representative Jonas far in excess of that needed to win." Orr, *supra,* at 49. Stated differently, Democratic map drawers sought to collect Republican voters in one district and remove them from neighboring districts to make the neighboring districts more favorable to Democratic electoral prospects. Other districts were "hardly compact and barely contiguous." *Id.* The federal court expressed its disappointment with the obvious gerrymandering, noting "[r]egretfully, … that tortuous lines still delineate the boundaries of some of the districts" and hoped that, "following the 1970 decennial census," the districts would be drawn to be "reasonabl[y] compact." *Drum v. Seawell*, 271 F. Supp. 193, 195 (M.D.N.C. 1967). Nevertheless, it allowed the districts to be used, allowing the Democratic Party to again achieve the spoils of their electoral victory—which "is a compelling reminder

that, indeed, 'elections have consequences.'" *Dickson v Rucho*, No. 11 CVS 16896, 2013 WL 3376658, at *1 (N.C. Super. Ct. July 08, 2013).

The Democratic Party was not done. After the 1980 census, the Democratic-controlled General Assembly redrew the congressional lines, and a paramount concern was its "need . . . to protect its turf and its incumbents." Beeman C. Patterson, *The Three Rs Revisited: Redistricting, Race and Representation in North Carolina*, 44 Phylon 232, 233 (1983). Among the results of this approach "was the incongruous lines drawn in the Second Congressional District to satisfy the incumbent, L.H. Fountain, who wanted to be sure that urban areas, such as the city of Durham, would be excluded from his district," resulting in an odd shape "called 'Fountain's Fishhook' because of the way it curved around urban areas." *Id.* In creating the district, the General Assembly used race as a proxy for politics, as "white congressmen openly manipulated redistricting to buttress their positions against candidates who might appeal to black voters." J. Morgan Kousser, Colorblind Injustice: Minority Voting Rights and the Undoing of the Second Reconstruction 2487 (1999). Indeed, "racial, partisan, and incumbent-protecting goals interacted, often producing unlikely coalitions because of the 'ripple effects' of changes in one district on the shape of another." *Id.*

"The incident shows that in drawing districts for a specific political purpose, 20th Century North Carolina legislators [were] not much different from their counterparts in 19th Century Massachusetts.' 'The Legislature,' [a prominent newspaper] paper noted in another editorial a few days later, 'has given the state

districts that are hooked, humped, and generally ungainly – in a word, gerrymandered – to protect incumbents.'" *Id.* at 251 (citation omitted).

In 1992, the Democratic-controlled General Assembly drew perhaps the most infamous district of all time, known as the freeway district:

> It is approximately 160 miles long and, for much of its length, no wider than the I–85 corridor. It winds in snakelike fashion through tobacco country, financial centers, and manufacturing areas "until it gobbles in enough enclaves of black neighborhoods." Northbound and southbound drivers on I–85 sometimes find themselves in separate districts in one county, only to "trade" districts when they enter the next county. Of the 10 counties through which District 12 passes, 5 are cut into 3 different districts; even towns are divided. At one point the district remains contiguous only because it intersects at a single point with two other districts before crossing over them. One state legislator has remarked that "'[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district.'"

Shaw v. Reno, 509 U.S. 630, 635–36 (1993) (*Shaw I*) (citations omitted). In fact, the entire redistricting plan was, as one redistricting expert described it, "a contortionist's dream," composed of four of the least compact districts in the nation and districts that "plainly violate the traditional notion of contiguity." Timothy G. O'Roarke, Shaw v Reno *and the Hunt for Double Cross-Overs*, 28 Political Science and Politics 36, 37 (March 1995). The plan was drawn in secret by Democratic political consultant John Merritt and "emerged as the result of consultations among aides to incumbent congressmen and members of the redistricting committees"—which, of course, occurred in secret. *See Shaw v. Hunt*, 861 F. Supp. 408, 466 (E.D.N.C. 1994). In short, "the North Carolina legislature threw caution to the wind,

sacrificing political community, compactness, and contiguity to a mixture of demands arising from party, incumbency, and race." *Id.*

Republican-affiliated redistricting plaintiffs asserted that the plan was an unconstitutional partisan gerrymander, and their claim was promptly dismissed. *Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C.), *aff'd*, 506 U.S. 801 (1992). Another set of plaintiffs challenged the majority-minority districts as racial gerrymanders, and their claim succeeded. *See Shaw I*, 509 U.S. at 657–58 (recognizing a cause of action for racial gerrymandering); *Shaw v. Hunt*, 517 U.S. 899, 918 (1996) (*Shaw II*) (striking down the district under this cause of action).

In dissent, Justice Stevens observed "that this case reveals the *Shaw* claim to be useful less as a tool for protecting against racial discrimination than as a means by which state residents may second-guess legislative districting in federal court for partisan ends." *Shaw II*, 517 U.S. at 920 (Stevens, J., dissenting). He observed that Democratic legislators "rejected Republican Party maps that contained two majority-minority districts because they created too many districts in which a majority of the residents were registered Republicans." *Id.* at 937. In other words, the hideous "*Shaw*" districts were, in his view, really partisan gerrymanders.

Justice Stevens anticipated the Democratic Party's next move. The General Assembly enacted a new congressional plan containing a new bizarrely shaped district, which "retains the basic 'snakelike' shape and continues to track Interstate 85." *Hunt v. Cromartie*, 526 U.S. 541, 544 (1999) (*Cromartie I*). This time, the General Assembly, led by then-Chairman of the Senate Redistricting Committee, Roy Cooper,

asserted that it "drew its district lines with the intent to make District 12 a strong Democratic district." *Id.* at 549.

The Supreme Court accepted this "legitimate political explanation for its districting decision" and rejected the challenge—thereby allowing the Democratic Party to reap the benefit of its control of the General Assembly. *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (*Cromartie II*). In fact, the Supreme Court gave the partisanship defense a privileged status in redistricting litigation. It emphasized that, where this defense is raised, extra "[c]aution is warranted," given that "race and political affiliation are highly correlated." *Id.* at 242. Most importantly, the Supreme Court imposed an onerous requirement for a redistricting plaintiff, when the partisanship defense is raised, to present "alternative ways" in which "the legislature could have achieved its legitimate political objectives" with a "greater racial balance." *Id.* at 258. Partisanship had been established as the best defense to a claim of racial gerrymandering.[1]

Now that partisan gerrymandering had been approved—and became a legally advisable tactic—the Democratic Party plowed into the 2001 redistricting with partisan impunity. The 2001 congressional plan, like all the Democratic Party's plans, "were drawn outside of the General Assembly," in secret. (R p 608). What was

[1] Although a state may also defend on the ground that "traditional districting principles," rather than race, predominated, this has proven to be a weak defense. A plaintiff need not show "alternative ways" in which the redistricting plan could have been drawn, and the plaintiff need not show a departure from traditional districting principles at all. *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 797–800 (2017).

not secret was the partisan motive. Democratic Representative Wright stated expressly at a Redistricting Committee hearing that the plan was drawn "with the intent of certainly keeping the Democratic advantage." (R p 689). He also agreed that District 13, another visible oddity that ran from Wake County to the Virginia border and then south into Guilford County to pick up highly Democratic areas, was "done to make sure that the 13th was a Democratic district" and, in fact, to be "a more stronger Democrat district than" before, and he expressly clarified that Democratic members were "looking at ways to enhance the performance Democratically . . . ." (R pp 691–92).

Because this was the legally correct course of action, none of these districts were invalidated. Indeed, no challenge was even filed.

2. *Stephenson v. Bartlett*: A Well-Defined Standard

The last North Carolina Supreme Court case that settled questions on redistricting standards under the North Carolina Constitution is *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*). In *Stephenson I*, the Court recognized four clear, express provisions in Article 2, Sections 3 and 5 of the North Carolina Constitution, when harmonized with the federal "one-person one-vote" standard, form "objective restraints" on legislative redistricting for non-VRA districts: (1) equal population (with the ideal population within plus or minus five percent); (2) contiguity; (3) whole county provision (no traversals); and (4) compactness. *Id.* at 362–72, 383–84, 562 S.E.2d at 384–90, 396–98. In so holding, the Court also recognized that these four traditional redistricting criteria must be upheld to the maximum extent possible, except to the extent superseded by federal law;

however, legislators could consider partisan advantage and incumbency protection as "discretionary districting decisions." *Id.* at 372, 562 S.E.2d 390 (citing *Gaffney v. Cummings*, 412 U.S. 735 (1973)). The objective traditional redistricting criteria are easily understood, drawn from express provisions of the North Carolina Constitution, and have been affirmed in several decisions. *See Stephenson v.* Bartlett, 357 N.C. 301, 582 S.E.2d 247 (2003); *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007); *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016). As such, all parties to the present litigation understood what these traditional redistricting criteria mean and how they are express state constitutional limits on gerrymandering.

3. The 2010s Cycle

In 2011, the Republican Party controlled both chambers of the General Assembly for the first time since Reconstruction—control gained by winning seats in House and Senate redistricting plans drawn and passed by a Democratic-controlled legislature for partisan advantage. This new Republican majority was achieved under Democratic-drawn and Democratic-favored maps and without court intervention.

In the 2011 redistricting, the General Assembly interpreted the Supreme Court's decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009), which held that Section 2 of the Voting Rights Act (VRA) imposes a "majority-minority" rule, *id.* at 17, to require the creation of majority-minority districts with a black voting-age population, or "BVAP," of at least 50%. Accordingly, the General Assembly included twenty-eight (28) majority-minority house and senate districts in the 2011 legislative plans and two additional majority-minority districts in the congressional plan.

In May 2015, residents of those districts, represented by some of the same counsel for Plaintiffs-Appellants here, and now-Justice Earls, filed a federal suit alleging that the majority-minority districts were racial gerrymanders. They relied on the principle that "[t]he Equal Protection Clause of the Fourteenth Amendment . . . prevents a State, in the absence of 'sufficient justification,' from 'separating its citizens into different voting districts on the basis of race.'" *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (quotation omitted). Under the governing framework, a state's predominant use of race in redistricting triggers strict scrutiny and compels the state to establish that the use of race is narrowly tailored to a compelling state interest. *Id.* at 1464–65. Where a state invokes VRA Section 2, the state must prove the three conditions for a majority-minority district established in *Thornburg v. Gingles*, 478 U.S. 30 (1986), that (1) "the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district," (2) "the minority group . . . is politically cohesive," and (3) "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50–51; *Cooper*, 137 S. Ct. at 1470. "If a State has good reason to think that all the '*Gingles* preconditions' are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. But if not, then not." *Cooper*, 137 S. Ct. at 1470 (internal citation omitted).

A three-judge district court sided with the *Covington* plaintiffs. First, it found predominance because of the General Assembly's goal of VRA compliance and its policy of drawing VRA districts "first, before any other 'non-VRA' districts were

drawn." 316 F.R.D. 117, 130–31 (M.D.N.C. 2016).[2] Second, it found that the use of race was not narrowly tailored, even though the General Assembly relied on an expert polarized voting analysis, because neither that analysis nor any other "made any determination whether majority bloc voting existed at such a level that the candidate of choice of African-American voters would usually be defeated without a VRA remedy." *Id.* at 168. In other words, even if voting is polarized, polarization is not "legally significant" unless white bloc voting is sufficient to defeat Black-preferred candidates in districts below 50% BVAP *Id.* at 168–69. The *Covington* court enjoined the 2011 plans. But it made "no finding that the General Assembly acted in bad faith or with discriminatory intent." *Id.* at 124 n.1. That is, the *Covington* court determined that General Assembly made only a legal mistake in considering race in reliance on a statistical analysis that failed to establish the third *Gingles* precondition.

After being afforded the opportunity to remedy the federal law violation, the General Assembly adopted a different deliberative process. Among the criteria it adopted was the following:

> No Consideration of Racial Data. Data identifying the race of individuals or voters shall not be used in the drawing of legislative districts in the 2017 House and Senate plans.

Covington v. North Carolina, 283 F. Supp. 3d 410, 418 (M.D.N.C. 2018) (quoting the criterion). The General Assembly implemented that criterion in the redistricting. To be sure, the *Covington* court itself considered racial data, *see id.* at 421, and

[2] The *Covington* court "express[ed] no view as to whether the *Stephenson* cases require that VRA districts be drawn first both in priority and in time." *Covington*, 316 F.R.D. at 132 n.12.

ultimately made alterations in small portions of the General Assembly's plans to "cure[] the unconstitutional racial gerrymanders," *id.* at 449 (citation omitted). The *Covington* court, however, did not assert that the General Assembly's process was unlawful. Instead, it affirmed most of the 2017 Plans as enacted by the General Assembly. *Id.* at 458.

The State defended some of the districts on the ground that they were drawn for predominantly political, not racial, reasons. *Cooper*, 137 S. Ct. at 1468–69, 1472–73 (2017). That is, the State raised the *Cromartie II* defense, but the district court in the congressional case rejected it. *Harris v. McCrory*, 159 F. Supp. 3d 600, 618–21 (M.D.N.C. 2016). Central to that ruling was its finding that the political explanation was not a sufficiently prominent rationale to protect District 12 because it "was more of a post-hoc rationalization than an initial aim." *Id.* at 620. The court emphasized that the redistricting chairpersons' contemporaneous public statements "attempted to downplay" the role of politics and did not, at the time, assert "that their sole focus was to create a stronger field for Republicans statewide." *Id.* If it had, the legislature could have had sufficient justification for the plan.[3] A similar ruling was issued in the legislative case. *Covington*, 316 F.R.D. at 139 ("[T]here is no evidence in this record that political considerations played a primary role in the drawing of the challenged

[3] That was the position of the plaintiffs in that case. Their briefing criticized the General Assembly for "revisionist history" and for public statements affirming the importance of the Voting Rights Act while omitting any reference to partisanship. Appellees' Br., *McCrory v. Harris*, 2016 WL 5957077, 20 (2016).

districts."). The Supreme Court affirmed both decisions. *Cooper*, 137 S. Ct. 1455; *North Carolina v. Covington*, 137 S. Ct. 2211 (2017).

Having been denied the defense established in *Cromartie II* that allowed the Democrat majority to draw maps favoring their party, the General Assembly set to work redistricting with the Supreme Court's—and Plaintiffs' lawyers—admonitions in mind. The General Assembly did not consider race in redrawing the legislative and congressional lines. But because not considering race was insufficient in *Cooper*—since the courts found that it *did* use race despite its contrary assertions—it was necessary to make a clear record to establish the *Cromartie II* defense. In redrawing legislative and congressional boundaries, the General Assembly represented in its criteria and in public statements that partisan data was a predominant criterion used in redistricting.

Plaintiffs, represented by some of the lawyers in this case, sued. First, in November 2018, they challenged the legislative plans in this state court. *Common Cause v. Lewis*, No. 18 CVS 014001 (filed Nov. 13, 2018). The *Common Cause* court ruled for the first time in North Carolina history that partisan motive in redistricting renders a plan invalid under various provisions of the State Constitution, including its Equal Protection Clause and its Free and Fair Elections Clause. The *Common Cause* court, however, insisted that it was not claiming a judicial right "to engage in policy-making by comparing the enacted maps with others that might be 'ideally fair' under some judicially-envisioned criteria." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *128 (N.C. Super. Ct. Sep. 03, 2019). Rather, it believed

that the judicial task is "to take the Adopted Criteria that the General Assembly itself, in its sole discretion, established, and compare the resulting maps with those criteria to see 'how far the State had gone off that track because of its politicians' effort to entrench themselves in office.'" *Id.* (quoting *Rucho v. Common Cause*, 139 S. Ct. 2484, 2521 (2019)). The finding of partisan motive was not particularly difficult because "Legislative Defendants openly admitted that they used prior election results to draw districts to benefit Republicans in both 2011 and 2017." *Id.* at *115. The *Common Cause* court also relied in part on expert mapping-simulation reports that purported to show that the legislative plans were partisan outliers when compared to a baseline of innumerable maps supposedly drawn to achieve the General Assembly's own criteria. *Id.* at *45.

The *Common Cause* court soon learned the problem with that latter reliance. The *Common Cause* court placed exceptional limits on the General Assembly's remedial process, *id.* at *133, and the General Assembly responded with a process—conducted completely in public on live audio and video livestream—that selected districts at random from maps provided at the liability phase by one of the *Common Cause*'s experts (Dr. Chen), followed by subsequent minor modification. Nevertheless, the *Common Cause* plaintiffs objected, called the resulting plan an "extreme partisan gerrymander," and presented an expert report of Dr. Chen purporting to show that *his own simulated districts* (with minor modifications) were partisan outliers. The *Common Cause* court overruled the objections. (R pp 752–79).

As to race, the General Assembly adopted the strategy it utilized after the *Covington* ruling, and "race was not used." The *Common Cause* court had, in fact, imposed severe restrictions on racial considerations by, *inter alia*, (1) forbidding the General Assembly from asserting that consideration of race was necessary in certain county groupings where expert evidence had shown it was not necessary and (2) requiring the General Assembly to "provide evidentiary support" for any asserted need to consider race. *Common Cause*, 2019 WL 4569584, at *133.

The court approved the General Assembly's remedial plans without modification and without any indication that the process was defective. Order Approving Remedial Plans, *Common Cause v. Lewis*, No. 18 CVS 014001 (filed Oct. 28, 2019). To be sure, the court itself looked at a racial analysis. In a subsequent order, the court considered a racially polarized voting study presented by the Plaintiffs-Appellants (since the General Assembly did not conduct one), and found that one or more of the *Gingles* preconditions was not satisfied in each region analysis. Order on VRA, *Common Cause v. Lewis*, No. 18 CVS 014001 (filed Jan. 22, 2020). Thus, the *Common Cause* court found as recently as January 2020 that no Section 2 districts are required in North Carolina.

Harper Plaintiffs-Appellants, represented by the same lawyers, challenged the congressional plan enacted to remedy the *Shaw* violation, and the same panel that decided the *Common Cause* case issued an injunction. Order on Injunctive Relief, *Harper v. Lewis*, 19 CVS 012667 (entered Oct. 28, 2019). The court, however, found a likelihood of success predicated entirely on the General Assembly's "detailed

record . . . of partisan intent and the intended partisan effects . . . ." *Id.* at 12. The court found that the General Assembly had formally permitted consideration of partisan data in the criteria and instructed the map-drawing consultant to use partisan data in constructing the districts. *Id.* at 12–13. The court *did not* rely on the expert mapping simulations in *Harper*.

The General Assembly conducted another redistricting, again in public view and without a partisan-intent criterion. Again, the *Common Cause* plaintiffs objected, presented expert mapping simulations purporting to show that the new plan was "an extreme and obvious partisan gerrymander," and again asked for injunctive relief. Plaintiffs' Motion to Set Schedule for Review of Remedial Plan, *Harper v. Lewis*, 19 CVS 012667 (filed Nov. 15, 2019). The panel had now seen expert simulations purporting to show that every plan the General Assembly adopted, no matter how public the process and no matter how close of a result to the *Plaintiffs'* prior simulated maps, constituted an extreme partisan gerrymander. The panel had enough and rejected the challenge. Order, *Harper v. Lewis*, 19 CVS 012667 (filed Dec. 2, 2019).

B. The 2021 Redistricting

The 2021 redistricting was uniquely difficult because of a five-month delay in the release of the census results due to the global Covid-19 pandemic. (FOF ¶ 34). North Carolina did not receive the census data necessary to redistrict until 12 August 2021. (FOF ¶ 37). And because that data did not come in a "ready to draw" package, it took several additional weeks for legislative staff to load data and configure software for terminals that legislators and the public could use.

The General Assembly worked promptly to redistrict all the same. Both the House Redistricting Committee the Senate Redistricting and Elections Committee had already been conducting meetings, and they adopted criteria to govern the congressional and legislative line-drawing before the census results were released. On 12 August 2021, the House Committee on Redistricting and the Senate Committee on Redistricting and Elections met, and enacted Joint Criteria for redistricting. (FOF ¶ 54). These criteria largely mirror traditional districting criteria, including in relevant part instructions that:

- the number of people in each congressional district be as equal as practicable under the 2021 decennial census;
- the number of people in each legislative district be within 5 percent of the ideal population under the 2021 decennial census;
- districts be contiguous;
- that voting districts or (VTDs) should be split only when necessary;
- the Committees make reasonable efforts to draw compact districts;
- the Committees may consider municipal boundaries;
- the Committees may consider member residence;

(FOF ¶ 54; R pp 823–24). To avoid violations identified in the 2010 cycle, the criteria also included the following directives:

> **Racial Data**. Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2021 Congressional, House, and Senate plans. The Committees will draw districts that comply with the Voting Rights Act.
>
> ***

> **Election Data**. Partisan considerations and election results data shall not be used in the drawing of districts in the 2021 Congressional, House, and Senate plans.

(R pp 823–24). An additional criterion relevant to this case reads in full:

> **Community Consideration**. So long as a plan complies with the foregoing criteria, local knowledge of the character of communities and connections between communities may be considered in the formation of legislative and congressional districts.

Id. There was no priority to the criteria.

The General Assembly conducted public hearings across the State, beginning on 8 September 2021 and running through 30 September 2021. Legislators then began drawing maps, on public terminals during sessions that were recorded. All of the map-drawing occurred in this public process and on terminals containing no partisan or racial data. After submissions and proposals by legislators and the public, additional hearings throughout the state were held on 25 and 26 October, including in Raleigh, Wilmington, Charlotte, and Greenville.

In early November, maps were proposed and voted on leading to the adoption of enacted plans on 4 November (the "2021 Plans"). During all Senate and House Redistricting Committee meetings, and during all full sessions of the House and Senate, members of the Democratic Party were given a meaningful opportunity to offer amendments, and comment on proposed plans. In addition, the General Assembly established a detailed record of the purposes of the configurations of the districts, which the trial court adopted in its opinion. (FOF ¶¶ 103, 108, 111).

In introducing the bill that ultimately was enacted as the House and Senate plans, Senator Hise explained in detail, on a district-by-district and sometimes a

VTD-by-VTD basis, the rationale for the decisions made in drawing the map that was ultimately passed as the 2021 Senate Plan. (Vol.1, Ex. p 1409). Senator Hise explained, for example, why three New Hanover County precincts were selected for inclusion in Senate District 8, *id.* at 1414, the reason for VTD splits and efforts to keep municipalities whole in Wake County, *id.* 1416–18, why Forsyth County was paired with Stokes County as opposed to Yadkin County, *id.* at 1427, and the choices concerning the southwestern North Carolina county grouping configurations involving Cleveland, Gaston, Lincoln, Henderson, Polk, and Rutherford Counties, *id.* at 1431–32.

Similarly, while Representative Hall did not go into detail about each of the 120 House districts, at the House Redistricting Committee hearing on 1 November 2021, he gave an overview of the 2021 House Plan, describing how the proposed map followed the adopted criteria and the overarching goal of retaining the cores of prior districts where possible. (Vol.1, Ex. p 1296). Representative Hall answered all questions from committee members as to why districts are configured as they are. The General Assembly also made available extensive data pertaining to each of the enacted plans.

In addition, the Senate Committee received and adopted two amendments offered by Democratic members of the Committee, concerning the Durham/Chatham and Guilford/Rockingham regions. (Vol.1, Ex. p 1508). Incumbent, black Democratic members, Gladys Robinson and Natalie Murdock, both testified in open committee

that the groupings were "fair" and had no VRA issues. *Id.* The committee adopted them, and they are in the 2021 Senate Plan.

C. The Present Lawsuits

The NCLCV Plaintiffs-Appellants filed their Complaint on 16 November 2021. (R pp 30-122). They allege that the Enacted Plans violate the North Carolina Constitution by establishing severe partisan gerrymanders in violation of the Free Elections Clause, Art. I, § 10, the Equal Protection Clause, Art. I, § 19, and the Freedom of Speech and Assembly Clauses, Art. I, §§ 12, 14; by engaging in racial vote dilution in violation of the Free Elections Clause, Art. I, § 10, and the Equal Protection Clause, Art. I, § 19; and by violating the Whole County Provisions, Art. II, §§ 3(3), 5(3). (*Id.*)

Harper Plaintiffs-Appellants filed their Complaint on 18 November 2021 and amended their Complaint on 13 December 2021. (R pp 128-176; 897-964). Harper Plaintiffs-Appellants' operative Complaint alleges that Enacted Plans violate the North Carolina Constitution—namely its Free Elections Clause, Art. I, § 10; its Equal Protection Clause, Art. I, § 19; and its Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12, 14. (*Id.*)

On 3 December 2021 the NCLCV and Harper cases were consolidated and the Panel held a hearing on Plaintiffs-Appellants' Motions for Preliminary Injunction. (R pp 867-870). The same day, after considering the extensive briefing and oral arguments on the motion, the Panel denied both motions. (R pp 871-884). Plaintiffs-Appellants immediately filed a notice of appeal with the North Carolina Court of

Appeals, which denied a requested temporary stay on 6 December 2021. (R pp 885-898).

On 8 December 2021, Plaintiffs-Appellants filed their Petitions for Discretionary Review Prior to Determination by the Court of Appeals, Motion to Suspend Appellate Rules to Expedite a Decision, and Motion to Suspend Appellate Rules and Expedite Schedule with this Court. This Court granted a preliminary injunction and temporarily stayed the candidate filing period "until such time as a final judgment on the merits of Plaintiffs-Appellants' claims, including any appeals, is entered and remedy, if any is required, has been ordered." (R p 893). The Order also directed the Panel to hold hearings on the merits on Plaintiffs-Appellants' claims and issue a ruling by 11 January 2022. (*Id.*)

On 13 December 2021, Common Cause moved to intervene in these consolidated cases as a Plaintiff. (R pp 965-1068). After the Panel granted Common Cause's motion, it filed its Complaint on 16 December 2021. (R pp 1232-1239). Common Cause alleges that the Enacted Plans violate the North Carolina Constitution—namely its Equal Protection Clause, Art. I, § 19; its Free Elections Clause, Art. I, § 10; and its Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12, 14—and seek, among other relief, a declaratory ruling under the Declaratory Judgment Act.

After an expedited two-and-a-half week discovery period, the Panel conducted a bench trial from 3 January to 6 January, 2022.

Legislative Defendants presented expert testimony demonstrating that the Enacted Plans were neither a partisan outlier, nor discriminated against the minority population of North Carolina. (T pp 483-730; R pp 2872-3202; 3302-3368; 3371-3462). And Legislative Defendants also called the two members of the General Assembly with direct personal knowledge of the line-drawing: Senator Hise and Representative Hall. They explained the non-partisan reasoning behind districts they were responsible for drawing and testified that they neither used partisan data nor employed partisan considerations in drawing the Enacted Plans. (T pp 791-795).

The Panel issued its opinion on 11 January 2022 and denied all of Plaintiffs-Appellants' claims. (R pp 3512-3771).

Political Claims. The Panel rejected Plaintiffs-Appellants' partisan gerrymandering claims because they were neither justiciable, nor cognizable under the North Carolina Constitution. The Panel concluded that Plaintiffs-Appellants' partisan gerrymandering claims presented political questions and, therefore, did not present a justiciable controversy for two independent reasons. First, "satisfactory and manageable criteria or standards do not exist for judicial determination of" how much partisanship is too much in our politics. Such standards are necessary because "[w]ith uncertain limits" the court "would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." (COL ¶ 140). The Panel recognized that this Court previously rejected prior to attempts to "apportion political power as a matter of fairness" in *Dickson v. Rucho*, when it held that the state Constitution's "Good of the Whole" provision provides no justiciable standard upon which to strike

down maps duly enacted by the legislature. And, as the Panel observed, none of Plaintiff's' experts could "inform the Court of how far the Enacted Maps are from what is permissible partisan advantage" and therefore could not provide any indication of what is or is not actually permissible. (FOF ¶ 567).

Second the North Carolina "Constitution commits [the] issue" of redistricting to the legislature. (COL ¶ 136). The North Carolina Constitution and democratic processes have left redistricting "solely in the province of the legislature subject to only four objective restraints," none of which the Enacted Plans violate, "and accountability through frequent elections." (COL ¶ 149). Further "[r]edistricting is a political process that has serious political consequences. It is one of the purest political questions which the legislature alone is allowed to answer." (COL ¶ 153). Because the court rightly recognized that it was not permitted to "usurp[] the political power and prerogatives of an equal branch of government," it concluded that Plaintiffs-Appellants claims were not justiciable.

The Panel also concluded that none of Plaintiffs-Appellants' proffered Constitutional hooks—the Free Elections Clause, the Equal Protection Clause, and the Free Speech and Right of Assembly Clauses—prohibit partisan gerrymandering.

Given the Free Elections Clause's history, including the lack of any evidence in the historical record that it has ever been viewed as operating as a restraint on the General Assembly's ability to consider partisan advantage in redistricting, the Panel concluded that Plaintiffs-Appellants' claims under that clause were not cognizable. (COL ¶¶ 70–107). The Panel also concluded that the North Carolina Equal Protection

Clause could not provide Plaintiffs-Appellants' proposed relief because no voter is "entitled to be included in a district that is more likely to elect a candidate for their own party," COL ¶ 121, and ultimately Plaintiffs-Appellants are neither "denied the right to vote, nor are they in a district where they have less voting power than those in other districts." (COL ¶ 120). Lastly, the Panel concluded that neither the Free Speech, nor Right of Assembly Clauses of the North Carolina Constitution could provide relief because the Enacted Plans work "no restrictions on speech, association, or any other First Amendment activities." (COL ¶¶ 127–31).

Because the Panel concluded that Plaintiffs-Appellants had no avenues of relief under the North Carolina Constitution, its finding that some—but not all—of the districts drawn in the Enacted Maps evinced partisan intent on behalf of the General Assembly is of little consequence. In doing so, however, the Panel contradicted the credited testimony of Representative Hall and Senator Hise, both of whom testified that partisanship and partisan effects were not considered as part of the map-drawing process. (T pp 733:25-734:3, 739:4¬-7, 741:1-4 (Hise); T pp 762:7-9, 763:9-11, 764:8-10, 765:15-17, 766:6-8, 769:24-770:1 (Hall)). No other fact witness provided evidence of partisan intent. Plaintiffs-Appellants had an opportunity to call fact witnesses, and they called two. One was someone who reviewed the recorded live feed of the map-drawing sessions but had no interaction with legislators and provided no testimony about partisan intent. (T pp 333-364). The other, Representative Hawkins, had the opportunity to testify that he saw partisan intent drive the process but the most Plaintiffs-Appellants could elicit from him was that he disagreed with

the decision to not use racial data, that redistricting this cycle was conducted on an incredibly compressed timeframe, and that legislative compromise means everyone is left unfulfilled. (T pp 864). Further, the Panel ignored the credited reasoning behind many of the decisions that Plaintiffs-Appellants claim have led to the impermissible partisan gerrymandering. The Panel's overreliance on Plaintiffs-Appellants' experts conflicts with its observation that Plaintiff's experts are "unable to take the human element out of the human" when it comes to redistricting. (FOF ¶568).

Racial Gerrymandering Claims. The Panel rejected Plaintiffs-Appellants' racial gerrymandering claims because Plaintiffs-Appellants failed to show that race predominated over traditional race-neutral redistricting principles and did not otherwise prove that the General Assembly acted with discriminatory purpose. (FOF ¶570-598).

Recognizing that the General Assembly's Adopted Criteria "proscribed the use of racial consideration in the drawing of the Enacted Plan[s]" and that Plaintiffs-Appellants had failed to prove any evidence that the legislature failed to follow its criteria, the court concluded that Plaintiffs-Appellants had no direct evidence of racial discrimination. (COL ¶ 172).

The court also found that Plaintiffs-Appellants were unable to show a predominant racial motive with the circumstantial evidence they provided. Plaintiffs-Appellants were unable to overcome the court's conclusion that the General Assembly acted primarily with partisan intent. What's more, Plaintiffs-Appellants failed to

demonstrate the that the "General Assembly sought to dilute the voting strength of Blacks based upon their race, or that Blacks have less of an opportunity to vote for or nominate members of the electorate less than those of another racial group." (COL ¶ 171).

Addressing NCLCV Plaintiffs-Appellants' claim that the Enacted Plan dilutes the voting power of African Americans in violation of the Free Elections Clause, the Court reiterated its conclusion that the Clause does not speak to questions of redistricting at all. (COL ¶ 175). And addressing Common Cause Plaintiff-Appellant's claims that the General Assembly had erred in failing to conduct a racially polarized voting analysis, the Court concluded that the General Assembly had complied with *Stephenson* in drafting districts without having conducted a racially polarized voting analysis. (COL ¶ 183). The General Assembly's conclusion that no VRA districts were required— based on its recent history with redistricting lawsuits—was consistent with the law and would not be second-guessed by the court. (*Id.*)

Whole County Claims. The Court also rejected NCLCV Plaintiffs-Appellants' claims that the Enacted Plans violate the Whole County Provisions of the North Carolina Constitution. It concluded that the General Assembly grouped counties consistent with *Stephenson* and that any county traversals were appropriate because they were predominantly for traditional and permissible redistricting principles. (COL ¶ 177-78).

STANDARD OF REVIEW

"This Court reviews de novo legal conclusions of a trial court." *Sykes v. Health Network Sols., Inc.*, 372 N.C. 326, 332, 828 S.E.2d 467, 471 (2019). The trial court's factual findings are reviewed for clear error. *State v. Reed*, 373 N.C. 498, 507, 838 S.E.2d 414, 421 (2020).

ARGUMENT

I. PLAINTIFFS-APPELLANTS' POLITICAL CLAIMS LACK MERIT

A. The Political Claims Present Non-Justiciable Political Questions

The Panel correctly concluded that Plaintiffs-Appellants' so-called partisan-gerrymandering claims present non-justiciable political questions. The political-question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to" the political branches of government. *Bacon v. Lee*, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001) (citation omitted); *see also Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004). Because "[t]he Judiciary is particularly ill-suited to make such decisions," it is "well established that the courts will not adjudicate political questions." *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (quotation omitted). A question is non-justiciable "when either of the following circumstances are evident: (1) when the Constitution commits an issue, as here, to one branch of government; *or* (2) when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue." *Hoke Cty.*, 358 N.C. at 639, 599 S.E.2d at 391 (citing *Baker v. Carr*, 369 U.S. 186, 210 (1962)); *see also Bacon*,

353 N.C. at 717, 549 S.E.2d at 854. Plaintiffs-Appellants' partisan claims are non-justiciable under each test.

1. Plaintiffs-Appellants' Claims Challenge the General Assembly's Political Discretion in a Fundamentally Political Process

The State Constitution vests the question of what political composition is appropriate for electoral districts solely with the General Assembly. This is "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (citation omitted). "The political question doctrine controls, essentially, when a question becomes not justiciable because of the separation of powers provided by the Constitution." *Cooper v. Berger*, 370 N.C. 392, 407, 809 S.E.2d 98, 107 (2018). For this reason, "the Court necessarily has to undertake a separation of powers analysis in order to determine whether the political question doctrine precludes judicial resolution of a particular dispute." *Id.* at 408, 809 S.E.2d at 107. That analysis yields the clear result here. The political question of where electoral district lines should fall is vested in the General Assembly alone, not in any court of law.

Constitutional Text. The Constitution's text commits the redistricting decisions challenged in this case to the General Assembly: "The General Assembly . . . shall revise the senate districts and the apportionment of Senators among those districts." N.C. Const. art. II, § 3; *see* N.C. Const. art. II, § 5 (same for State House). "Constitutional interpretation begins with the plain language as it appears in the text." *N.C. State Bd. of Educ. v. State*, 371 N.C. 149, 159, 814 S.E.2d 54, 61 (2018). And it could easily end there as well, because this plain language leaves

the judiciary no room to seize that power for itself. *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989) ("In interpreting our Constitution . . . where the meaning is clear from the words used, we will not search for a meaning elsewhere."). Because "a constitution cannot be in violation of itself," *Stephenson I*, 355 N.C.at 378, 562 S.E.2dat 378, a delegation of a political task to a single political branch of government impliedly forecloses the other branches of government from undertaking that task. *See id.* at 71–72, 562 S.E.2d at 390.

It would make no sense to read the Constitution to delegate the General Assembly exclusive redistricting authority but to deny it the power to exercise political discretion in the process. Because redistricting is "root-and-branch a matter of politics," *Vieth* v. *Jubelirer*, 541 U.S. 257, 285 (2004) (plurality opinion), the power to redistrict necessarily entails discretion to harbor political "intent" and consider political "effect." *See* Harper Plaintiffs-Appellants' Br. p 35 (criticizing such considerations). Plaintiffs-Appellants would have the Court believe the Constitution vested political discretion solely with political actors and yet contemplated—without saying so—that they would erase political thoughts from their minds for that—and only that—task. Adopting that view would either assume North Carolina's constitutional framers were incompetent, or it would "countermand the Framers' decision to entrust districting to political entities." *Rucho*, 139 S. Ct. at 2497 (2019). Neither possibility lends itself to this Court's serious consideration.

The Court has repeatedly acknowledged that this constitutional text is a grant of unreviewable political discretion to the legislative branch, explaining that "[t]he

General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions." *Stephenson*, 355 N.C. at 371, 562 S.E.2d at 390; *see also Dickson v. Rucho*, 367 N.C. 542, 570, 766 S.E.2d 238, 257 (2014), *cert. granted, judgment vacated*, 575 U.S. 959 (2015) (recognizing "partisan advantage" as a "legitimate governmental interest[]"). It has also recognized that "the political process is not enhanced if the power of the courts is consistently invoked to second-guess the General Assembly's redistricting decisions." *Pender County v. Bartlett*, 361 N.C. 491, 506, 649 S.E.3d 364, 373 (2007). These observations are not "dicta." *Cf.* Harper Plaintiffs-Appellants Br. at 41. They stood between the General Assembly—then controlled by the Democratic Party—and the redistricting overhaul that could have occurred in *Stephenson*, *Dickson*, and *Pender County*. And, in any event, these observations are compelled by the constitutional text, which Plaintiffs-Appellants fail to meaningfully address in well over 300 combined pages of briefing.

Plaintiffs-Appellants also misread *Stephenson*, pointing out that *Stephenson* went on to say that political considerations must be exercised "*in conformity with the State Constitution*." Harper Plaintiffs-Appellants Br. ar 41 (quoting 355 N.C. at 371–72, 562 S.E.2d at 390); *see also* NCLCV Plaintiffs-AppellantsBr. at 57 (same argument). Plaintiffs-Appellants reason that (in their view) the State Constitution bars political considerations, so *Stephenson* endorsed their legal theory. This is incorrect. Plaintiffs-Appellants would nonsensically rewrite *Stephenson* to say as follows:

> 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, which forbids considering partisan advantage and incumbency protection.

Stephenson I, 355 N.C. at 371, 562 S.E.2d at 390 (citation omitted) (altered to incorporate Plaintiffs-Appellants' legal theory). That is clearly not what *Stephenson* said or meant.

Rather, *Stephenson* was referring to the constitutional restrictions on the General Assembly's authority, including 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." N.C. Const. art. II, § 3; *see also id.* art. II, § 5. Those were the criteria *Stephenson* interpreted and applied, and the Court acknowledged that partisan redistricting is permissible so long as these textually demonstrable rules are satisfied. *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 390. In this way, *Stephenson* recognized that the State Constitution sets a balance of constitutional roles, empowering the judiciary to review redistricting plans according to objective and discrete criteria, such as the whole-county rules, and otherwise empowering the General Assembly to exercise political discretion. *See Stephenson I*, 355 N.C. at 399, 562 S.E.2d at 407 (Orr, J., concurring in part and dissenting in part) ("The General Assembly may also utilize nonmandatory criteria acknowledged by the federal courts as acceptable—i.e., community of interest, incumbent protection, and *partisan considerations*—so long as such use does not result in a violation of the *mandatory*

criteria." (emphasis added)). Just as the General Assembly may not contravene these objective, textually explicit criteria, the judiciary may not exercise the General Assembly's discretion or otherwise restrict it.

And that is manifestly correct as a matter of basic interpretive principles. Just as the Constitution provided a series of restrictive criteria, it *could* have provided criteria limiting political considerations, such as by forbidding, like other state constitutions, "the intent to favor or disfavor a political party or an incumbent," Fla. Const. Art. III, §§ 20-21, or requiring that "[d]istricts be drawn in a manner that achieves both partisan fairness and, secondarily, competitiveness," Mo. Const. Art. III § 3(b)(5). The omission of such rules confirms that the judiciary has no power to invent them. "Unless the Constitution *expressly* or by *necessary implication* restricts the actions of the legislative branch, the General Assembly is free to implement legislation as long as that legislation does not offend some specific constitutional provision." *Cooper v. Berger*, 371 N.C. 799, 811, 822 S.E.2d 286, 296 (2018) (citation omitted). This is because the State Constitution "is not a grant of power. All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." *Id.* at 810–11, 822 S.E.2d at 296 (quoting *State ex rel. Martin v. Preston*, 325 N.C. at 448 49, 385 S.E.2d at 478). Because nothing in the Constitution restricts the General Assembly's political discretion in redistricting, there is no constitutional basis for this Court to infer such restrictions.

Constitutional Structure. The constitutional structure confirms this. The North Carolina Constitution is careful to exclude other branches of government from redistricting. Even the Governor—who otherwise enjoys the right to veto legislation for purely political reasons—is expressly denied a role in the redistricting process. N.C. Const., art. II, § 22(5)(b)-(d). That constraint saw endorsement on a bipartisan basis when the North Carolina Constitution was amended in 1995 to provide an executive veto for the first time. (T p 520:15–25). Although the General Assembly proposed an amendment providing this new veto power, it withheld that power in express terms as to legislative and congressional redistricting. (FOF ¶ 59). The amendment was approved by the Republican-controlled House of Representatives and the Democratic-controlled Senate before its ratification by the populace in November 1996. (*Id.*) Legislative Defendants' expert Dr. Taylor also testified that the Amendment also received support from Democratic Governor, Jim Hunt and former Republican Governor James G. Martin. (T p 520:15–25). Accordingly, even as the State altered its constitutional tradition—which had "never given the Governor the veto power," *Commissioners of Bladen Cty. v. Boring*, 175 N.C. 105, 95 S.E. 43, 47 (1918)—it recognized that redistricting is a uniquely legislative function and explicitly provided that only legislative power should be brought to bear on that process.

There is no basis to infer a *judicial* veto power over the discretionary choices made by the General Assembly in redistricting legislation when the Constitution expressly denies an *executive* veto power. Whereas the Governor otherwise possesses

a veto power, the judiciary does not. *See White v. Hill*, 125 N.C. 194, 34 S.E. 432, 433 (1899) (rejecting the proposition that "the court possesse[s] the veto which our constitution has denied to the governor"). Yet, not only do Plaintiffs-Appellants effectively advocate a judicial veto—asking the Court to disagree with the General Assembly's purported political choices—but they go a step further and demand that this Court exclude the General Assembly altogether and "draw nonpartisan maps now." Harper Br. 77. Plaintiffs-Appellants' contention that this is the way "to implementing constitutional redistricting plans," Harper Plaintiffs-Appellants Br. 78, overlooks that a redistricting plan cannot be constitutional unless "[t]he General Assembly . . . revise[d] the . . . districts." N.C. Const. art. II, § 3; *see also id.* art. II, § 5. The request also asks this Court to ignore N.C. Gen Stat § 120-2.3, which gives the General Assembly the right to redraw any districts deemed unconstitutional by a Court.

Related Constitutional Provisions. This Court is familiar with provisions affording the General Assembly power to establish political boundaries and has had little difficulty finding exclusive authority vested in the General Assembly to exercise political discretion. For example, Article VII, Section 1, provides that "[t]he General Assembly shall provide for the organization and government and the fixing of boundaries of counties, cities and towns, and other governmental subdivisions," and this Court has recognized that this provision renders drawing such political lines "an exercise of the General Assembly's plenary authority," *Town of Boone v. State*, 369 N.C. 126, 136, 794 S.E.2d 710, 718 (2016); *see also id.* at 152, 794 S.E.2d at 728 (Ervin,

J., concurring) (agreeing "that Article VII, Section 1 gives the General Assembly plenary authority over municipal boundaries").

Indeed, "the General Assembly has long enjoyed plenary power to create political subdivisions of local government, [and] establish their jurisdictional boundaries," even though this was "not expressly stated in our first constitution." *Id.* at 131, 794 S.E.2d at 714. One instructive decision is *Howell v. Howell*, 151 NC 575, 66 S.E. 571, 573 (N.C. 1911), which rejected as non-justiciable a claim that lines of a special-tax school district "were so run as to exclude certain parties opposed to the tax and include others favorable to it." 66 S.E. at 572. The Court (1) found that an "attempt to gerrymander" the district "was successfully made," (2) could not "refrain from condemning" that as a matter of policy, and (3) concluded that the body that adopted the lines acted erroneously in ignorance and without full knowledge that the private party that proposed the plan had intended to gerrymander the district. *Id.* at 574. And yet the Court *still* held that "the courts [are] powerless to interfere and aid the Plaintiffs-Appellants." *Id.* "There is no principle better established than that the courts will not interfere to control the exercise of discretion on the part of any officer to whom has been legally delegated the right and duty to exercise that discretion." *Id.* at 573. That case involved the grant of discretion to a local legislative body; the General Assembly stands all the more immune from other branches' review of its political discretion, being their co-equal branch of government.

Similar decisions fill the North Carolina reports. *See, e.g.*, *Norfolk & S.R. Co. v. Washington Cty.*, 154 N.C. 333, 70 S.E. 634, 635 (1911) (holding the General

Assembly's authority to "declare and establish" the "true boundary between…counties…is a political question, and the power to so declare is vested in the General Assembly."); *see also Carolina-Virginia Coastal Highway v. Coastal Tpk. Auth.*, 237 N.C. 52, 60, 74 S.E.2d 310, 317 (1953) ("[T]he power to create or establish municipal corporations…is a political function which rests solely in the legislative branch of the government."); *State ex rel. Tillett v. Mustian*, 243 N.C. 564, 569, 91 S.E.2d 696, 699 (1956) ("The power to create and dissolve municipal corporations, being political in character, is exclusively a legislative function."); *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 7, 269 S.E.2d 142, 147 (1980) ("Annexation by a municipal corporation is a political question which is within the power of the state legislature to regulate."); *Raleigh & G.R. Co. v. Davis*, 19 N.C. (2 Dev. & Bat.) 451 (N.C. 1837) ("The necessity for the road between different points is a political question, and not a legal controversy; and it belongs to the legislature. So, also, does the particular line or route of the road . . . .").

Fixing the lines of electoral districts is like fixing the lines of other political entities, both as a matter of constitutional text and concept. There is a clear similarity between the command that "[t]he General Assembly shall provide for . . . the fixing of boundaries of counties, cities and towns, and other governmental subdivisions," N.C. Const. art. VII, § 1, and the command that "[t]he General Assembly . . . shall revise the [electoral] districts," N.C. Const. art II, § 3, 5. Plaintiffs-Appellants offer no reason why such similar text would bear such different meaning. Nor would that make conceptual sense. The North Carolina Constitution affords political bodies like

the General Assembly power to draw these boundaries because only political considerations, not legal considerations, are available to inform the task. Any boundary of any political entity could as easily be five miles (or 100 miles) further from where it lies, it could go north rather than south, or be at a slightly different angle, and no principle of law would be implicated. Just like the boundaries of nations, states, counties, towns, and cities exist for political reasons, so do the lines of electoral districts. For a court to interpose itself in these decisions, and on the basis of politics, would impinge on authority granted solely to the General Assembly.

Constitutional History. The constitutional history of this State further confirms that the courts are not empowered to review the General Assembly's political redistricting decisions. *See Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953) (holding that courts should "look to the history, general spirit of the times, and the prior and the then existing law in respect of the subject matter of the constitutional provision under consideration"). As the Panel explained, "North Carolinians have been electing individuals to representative bodies for approximately 350 years." (COL ¶ 34). As explained by Dr. Taylor, it never occurred to anyone until recently that North Carolina's democracy depended on judicial review of legislative political discretion in drawing districts. (T pp 489–90).

One historical problem with this concept is that redistricting is, as a default matter of constitutional tradition, a quintessentially legislative matter.[4] *See Rucho*

[4] Legislative Defendants' expert Dr. Taylor provided historical context for the various North Carolina Constitution provisions relied upon by Plaintiffs and concluded that there was no historical basis to make an association between redistricting and those constitutional

v. Common Cause, 139 S. Ct. at 2498 (“‘The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States.’” (quoting *Davis v. Bandemer*, 478 U.S. 109, 145 (O’Connor, J, concurring))). That is evidenced in virtually every redistricting case since 1964, which all assert that redistricting is a political process to be carried out by political actors in all but extraordinary circumstances. *Reynolds v. Sims*, 377 U.S. 533, 586 (1964); *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (“[R]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court[.]”); *Connor v. Finch*, 431 U.S. 407, 414–15 (1977) (“[A] state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality[.]”); *Voinovich v. Quilter,* 507 U.S. 146, 156 (1993) (“Time and again we have emphasized that reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.”) (quotation marks omitted); *Cromartie II*, 532 U.S. at 242; *Perry v. Perez*, 565 U.S. 388, 392 (2012) (“Redistricting is primarily the duty and responsibility of the State.”) (quotation marks omitted); *League of United Latin Am. Citizens v. Perry,* 548 U.S. 399, 414–415 (2006) (explaining that the Constitution “leaves with the State’s primary responsibility for the apportionment of their federal congressional…districts”) (quotation marks omitted).

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provisions. (T pp 489:19–490:23). Dr. Taylor’s testimony was not rebutted and credited by the Panel in its opinion. (FOF ¶218-228).

Another is that, for much of North Carolina's history, the State's counties either served as the electoral districts or else formed their fundamental basis. (COL ¶¶ 42–56). Because "the power to create counties and draw their boundaries was necessarily vested in the people of this State, through their elected representatives," COL ¶ 45, "[t]here were no constitutional checks on the legislature's ability to create counties, COL ¶ 96; *see also Town of Boone*, 369 N.C. at 136, 794 S.E.2d at 718. The power to draw legislative districts was inextricably intertwined with that power. It is therefore difficult to see how Plaintiffs-Appellants can plausibly contend that political considerations are forbidden in legislative redistricting but not in fixing county boundaries.[5]

Another historical problem is that courts in North Carolina have never exercised the authority Plaintiffs-Appellants purport to invoke. This was not for lack of opportunity. As recounted above, the General Assembly has aggressively used its authority to exercise political discretion, and the Democratic Party has for most of the State's history been the beneficiary of this power. *See NAACP v. Moore*, 273 N.C. App. 452, 457, 849 S.E.2d 87, 91 (2020) ("Democrats engaged in gerrymandering when they controlled our General Assembly."). "[T]he history of legislative and executive interpretation of the State Constitution . . . adds weight" in the predicate

[5] This is yet another respect in which *Stephenson* cuts against Plaintiffs' arguments. By reconciling the county-line provisions with modern decennial redistricting practice, *Stephenson* brought redistricting back to its historical, traditional, and constitutional foundations as being tied closely to county boundaries. *See Stephenson*, 355 N.C. at 365–66, 562 S.E.2d at 385–87. By contrast, Plaintiffs' theories of partisan fairness have no foundation in this State's history or constitutional tradition and are completely new.

constitutional inquiry of whether a practice has, in truth, been forbidden all along. *Brannon v. N.C. State Bd. of Elections*, 331 N.C. 335, 346, 416 S.E.2d 390, 396 (1992); *see also Corp. Comm'n v. Oxford Seminary Const. Co.*, 160 N.C. 582, 76 S.E. 640, 643 (1912) (similar analysis); *accord NLRB. v. Noel Canning*, 573 U.S. 513, 514 (2014) ("The longstanding 'practice of the government,' can inform this Court's determination of 'what the law is' in a separation-of-powers case." (citation omitted)). Moreover, members of the political branches, including Governor Cooper, have gone beyond partisan redistricting to argue in court—successfully—that this fact *cuts in favor* of the resulting plans' constitutionality. *Cromartie II*, 532 U.S.at 242. That said, unlike the executive or the judiciary, the members of the General Assembly, are more accountable to the people through elections every two years.

Yet another historical problem is that the people of North Carolina, and their representatives of both political parties, have long understood that the right way to address the problem of politics in redistricting (if it is a problem) is to legislate a response via constitutional amendment. "Beginning with the 1835 Amendments to the 1776 Constitution, every proposed change since then relating to the drawing of legislative districts was proposed by elected representatives of the people of this State and ratified by the eligible voters." (COL ¶ 149). For this Court to introduce new criteria barring politics would, against that backdrop, amount to a constitutional amendment, not interpretation. The Panel observed that "there has been several proposed redistricting bills in both the House and Senate of the General Assembly" to curb partisanship in redistricting, and "[n]one of these bills passed, or even crossed

over." (COL ¶¶ 99–100). The Panel identified 16 such bills introduced during Democratic Party control of the General Assembly. (COL ¶ 101). This widespread acknowledgment that the Constitution must be amended if partisan redistricting is to be curbed is further evidence that no such constitutional text currently exists that can reasonably be inferred to restrain partisan advantage in redistricting.

Plaintiffs-Appellants practically acknowledge all of this history and concede that their own theories enjoy no historical support. They seem to view that as a virtue. Plaintiffs-Appellants contend that there is no "grandfather clause whereby violations that persist long enough become immune to scrutiny," Harper Br. 53, but they ignore that consistent and unchallenged practice spanning hundreds of years is relevant to constitutional interpretation. *Brannon*, 331 N.C. at 346, 416 S.E.2d at 396; *Noel Canning*, 573 U.S. at 514. They also resort to empty rhetoric, calling it "remarkable" for the Panel to find the claims non-justiciable. Harper Br. 37. A sober look at this assertion undermines it: the Panel simply carried on the *status quo* lasting hundreds of years. What *is* remarkable is that without amending a single word of the Constitution or even a passing reference to a statute, 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. Finally, Plaintiffs-Appellants' spirited assertion that "[j]ustice delayed is better than justice denied," Harper Br. 53, rings hollow. Do they expect this Court to tell the generations of Republican voters who purportedly suffered constitutional violations at the hands of Democratic legislators that their delayed justice is now served

through a court-drawn redistricting plan designed to continue *Democratic* hegemony over redistricting?

Separation of Powers. For all of these reasons, for this Court to claim the prerogative to review the General Assembly's discretionary and political redistricting choices would plainly offend the State's separation of powers, i.e., the principle that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other," N.C. Const. art. I, § 6. The doctrine is violated when one branch "prevent[s] another branch from performing its core functions." *Cooper*, 370 N.C. at 410, 809 S.E.2d at 108. Here, the core function of redistricting is *legislative* and necessarily encompasses a broad array of political considerations. In asking this Court to intrude in the redistricting process and distinguish beneficial from harmful considerations, Plaintiffs-Appellants ask this Court to usurp the General Assembly's core functions. Plaintiffs-Appellants admit all of this by demanding that this Court actually go ahead and seize the map-drawing for itself.

Other Redistricting Claims. Plaintiffs-Appellants fail to meaningfully engage with the textual, structural, and historical problems with their theory that courts must police the General Assembly's political considerations. Plaintiffs-Appellants acknowledge that the justiciability analysis mandates an embedded separation-of-powers analysis, Harper Br. 33, but fail to offer one and invite a separation-of-powers violation. Plaintiffs-Appellants rely on the argument that *other* types of redistricting claims are justiciable, from which they infer that *all* types of redistricting claims are

justiciable. Harper Br. 40–41; NCLCV Br. 76–79; Common Cause Br. 55–59. This erroneously relies on the theory that "[j]justiciability is about the power of the courts to resolve entire *categories* of cases," Harper Br. 37, which Plaintiffs-Appellants apparently construe to mean redistricting cases.

But that is neither an accurate description of this Court's justiciability precedents nor does it make interpretive sense. This Court has on many occasions found some claims touching on an exercise of power to be justiciable, but not others. In *Hoke*, the Court concluded that "the determination of the proper age for school children has indeed been squarely placed in the hands of the General Assembly" and is non-justiciable, but that "the question of whether the General Assembly must address the particular needs of children prior to entering the school system is a distinct and separate inquiry" that is justiciable. 358 N.C. at 639–40, 599 S.E.2d at 391. In *Cooper*, the Court differentiated prior cases that, on the one hand, deemed "the Governor's exercise of his clemency power" non-justiciable and, on the other hand, deemed a claim "to certain clemency records within the possession of the Governor" justiciable. 370 N.C. at 408–09, 809 S.E.2d at 107–08. Likewise, in the eminent-domain context, this Court has concluded that (1) the question whether taking is for a public purpose is justiciable; (2) "the question as to the necessity or expediency of devoting the property to public use" is non-justiciable, so long as "the applicable statutes have been followed"; and (3) the question of just compensation is justiciable. *See City of Charlotte v. McNeely*, 281 N.C. 684, 690, 190 S.E.2d 179, 184 (1972). In none of these cases did the Court conclude that it was required to deem all

"education" cases, "clemency" cases, or "takings" cases either justiciable or non-justiciable.

And that would not have made sense. Again, the justiciability question is whether a court is being asked to make "value determinations constitutionally committed for resolution to" another branch. *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (citation omitted). The constitutional division of power, rather than formalistic phrases like "redistricting case" or "takings case," govern that question. Where the State Constitution, for example, vests the General Assembly with power to take property for a public use, the scope of the delegation dictates that its determination regarding public use—a legal standard—be reviewable, but the Constitution leaves no room for the courts to determine which property the General Assembly should have condemned. Likewise, where the General Assembly is granted "exclusive authority to classify property for taxation-related purposes," the judiciary has no power to decide that a rate of 8% rather than 10% should be applied to fast-food restaurants, even though it may decide whether the General Assembly utilized a forbidden classification, like religious exercise. *See Cooper*, 370 N.C. at 411, 809 S.E.2d at 109 (using this example). It is the power committed to one branch, and any textually demonstrable limits on that power, that control the question, not Plaintiffs-Appellants' superficial labels.

Here, the problem with Plaintiffs-Appellants' claims is not that they fit within a genre known as redistricting cases, but that they ask this Court to exercise the discretion afforded to the General Assembly. The constitutional delegation of

redistricting power is a *political* delegation restricted only by explicit criteria. For a court to police that exercise is no different from policing a tax rate or the choice of which property to condemn. It would be virtually identical to judicial policing of the necessarily political considerations the Governor exercises in granting clemency or exercising the unreviewable veto power. If a political scientist or mathematician ran a billion simulated veto exercises or clemency grants, excluding politics from the algorithm, the courts would see no relevance in such a useless project. Nor would persons allegedly aggrieved by these exercises—convicts denied clemency because they did not meet the Governor's political criteria for clemency; citizens alleging they would have benefited from legislation vetoed for purely political reasons—receive any sympathy from a court of law. This is because the Governor's purposes in granting clemency or vetoing bills are often political—even partisan—and that is what the Constitution *contemplates*. To deem partisan "intent" and "effect" in these processes invidious would be absurd and unconstitutional—not to mention anti-democratic.

Plaintiffs-Appellants demand that the judiciary police the General Assembly's *politics* fares no better. This is not like a claim that districts are malapportioned, which would implicate the constitutional requirement that districts be of "an equal number of inhabitants." N.C. Const. art. II, § 3; *see Vieth*, 541 U.S. at 290 (plurality op.) (debunking the comparison between partisan-gerrymandering and equal-population claims). Nor is it like a claim of discrimination on the basis of an immutable characteristic like race, which would trigger strict scrutiny. *See id.* at 292–93 (debunking this comparison as well). Rather, Plaintiffs-Appellants have hired

unelected and mostly out-of-state political scientists and mathematicians who believe they have a better idea of how "fair" districts can be drawn. In no other context would a political actor's exercise of political discretion be even arguably subject to judicial review on this basis. Plaintiffs-Appellants' contention that their experts are better than elected representatives fares no better in this context than in any other.

2. There Are No Judicially Manageable Standards, Rooted in the Constitution, To Govern Plaintiffs-Appellants' Claims

Plaintiffs-Appellants' partisan-gerrymandering claims are non-justiciable for the independent reason that "satisfactory and manageable criteria or standards do not exist for judicial determination of the issue." *Hoke Cty.*, 358 N.C. at 639, 599 S.E.2d at 391. The judicial power "is not *whatever* judges choose to do." *Vieth*, 541 U.S. at 278 (plurality op.). "It is the power to act in the manner traditional for . . . courts." *Id.* "One of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*." *Id.* Otherwise, this Court's judgments would amount to nothing but the "partisan preferences" of litigants or judges—or, in other words, a veto power. *Rucho*, 139 S. Ct. at 2501 (quoting *Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018)). That is the result Plaintiffs-Appellants advocate. Because "[p]olitics and political considerations are inseparable from districting and apportionment," *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973), a partisan gerrymandering claim could only proceed with some reliable standard for distinguishing good from bad politics. No such standard exists in the State Constitution, nor can one be reasonably inferred.

This Court held as much in *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238, which *unanimously* rejected a partisan-gerrymandering claim asserted under the "Good of the Whole" clause of Article I, Section 2. *Id.* at 575, 766 S.E.2d at 260; *see also id.* (Beasley, J., concurring in part and dissenting in part) ("I agree with the majority's holding with respect to Plaintiffs-Appellants' challenge under the 'Good of the Whole' Clause in Article I, Section 2 of the Constitution of North Carolina."). The Plaintiffs-Appellants in *Dickson*, like Plaintiffs-Appellants here, "proffered maps represent[ing] their good faith understanding of a plan that they believe best for our State as a whole." *Id.* The Court rejected the premise, holding that "Plaintiffs-Appellants' argument is not based upon a justiciable standard." *Id.*

Like the "Good of the Whole" Clause, similarly vague constitutional provisions relied upon by Plaintiffs-Appellants in this case provide no manageable standards in two distinct, but interrelated, senses. First, there are no standards that distinguish between an offending redistricting plan and a compliant one, and Plaintiffs-Appellants' focus on courts' ability to identify the former, but not the latter, highlights this problem. Second, any standard that might be applied has no foundation in the State's constitutional text. Any number of concepts for producing "fair" redistricting plans might be devised, but the State Constitution picks none of them. The fact that it would have to be created first before being applied only confirms that such imaginary standards are not *judicially* manageable.

a. No Manageable Standard Exists

Plaintiffs-Appellants claim to have found judicially manageable standards in "this case, perhaps more than any other," because "[t]he trial court had no trouble

concluding that the 2021 Plans are extreme partisan gerrymanders." Harper Br. 34; *see also* NCLCV Br. 80 (similar argument). In any case, Plaintiffs-Appellants' description of the Panel's holding is incorrect—the trial court concluded that the districts were a product of pro-Republican redistricting (without defining the terms). The Panel specifically did not find that the districts are "extreme partisan gerrymanders." Moreover, this argument nonsensically assumes that courts' ability to *find* "gerrymandering" (assuming that occurred) proves the existence of a line between *legitimate* and *illegitimate* redistricting."[6] *Id.* This is illogical because a standard that "almost invariably produce[s] the same result," *Vieth*, 541 U.S. at 279 (plurality op.), is a standard lacking in manageability. Stated differently, the question is not whether application of a standard would result in rejecting a given redistricting plan in a given case; the question is whether the standard draws a line that would separate the proverbial wheat from the chaff, producing like results in like cases and different results in different cases in a fair and predictable manner. For such a standard to be manageable, some plans would need to be *upheld* in a manner whereby the public can see a fair, non-partisan standard at work, and the General Assembly can know its constitutional obligations and conform its plans to them.

On that issue, Plaintiffs-Appellants have nothing persuasive to say. As discussed above, every redistricting conducted by the General Assembly was conducted by a partisan body and criticized as partisan in intent and effect, and prior

[6] As discussed below, *see infra* Section II, the Panel, in fact, badly misread the record and had all kinds of trouble with the factual question posed. Whether or not this Court agrees, however, the absence of manageable standards is evident.

governments have even expressly acknowledged partisan intent in court as a *defense* from other claims. *Cromartie II*, 532 U.S. at 242. To establish judicially manageable standards, Plaintiffs-Appellants would be obligated to identify which of those prior redistricting efforts crossed the line, and which did not. Moreover, for their argument to carry any force, *most* would have to satisfy the proposed standard since the State Constitution does not contemplate that "the power of the courts" should be "consistently invoked to second-guess the General Assembly's redistricting decisions." *Pender Cnty.*, 361 N.C. at 506.

Plaintiffs-Appellants cannot do this, because they practically acknowledge that no redistricting in State history satisfied their standard. The fact that they claim the 2021 Plans are unusually partisan, *see, e.g.*, Harper Br. 2, in no way distinguishes this case from any other. In partisan gerrymandering litigation, Plaintiffs-Appellants always say that the plan they challenge is "the most extreme[] partisan gerrymander" of all time. Brief for Common Cause Appellees at 1, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (Nos. 18-422 and 18-726). *See also* Relator's Merits brief at 1, *Adams v. DeWine*, No. 2021-2148 (Ohio, Dec. 13, 2021) ("Ohio's current congressional plan . . . is one of the most extreme partisan gerrymanders in American history."); Compl. ¶1, *Whitford v. Gill*, No. 3:15-cv-00421-bbc (W.D. Wis. July 8, 2015), ECF No. 1 (Wisconsin's map was "by any measure, one of the worst partisan gerrymanders in modern American history"); Br. for Appellants at 41, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02- 1580) (Pennsylvania had created "the paradigmatic example of an extreme partisan gerrymander"). None of it is true. As discussed below, the most

extreme gerrymanders were, quite obviously, rotten boroughs in England containing enough persons to count on two hands. Nothing Plaintiffs-Appellants could show would demonstrate gerrymandering to that degree, and the Court will never encounter anything like that because the federal courts already fixed the problem. Plaintiffs-Appellants' inability to see this dooms their claim for lack of manageability.

And it is "this case, perhaps more than any other" that illustrates the problem. Plaintiffs-Appellants' standard does not distinguish *Common Cause*, where the General Assembly publicized that it engaged in gerrymandering because (like the Democratic General Assembly did in *Cromartie II*), from the 2021 redistricting, where the General Assembly not only forbade partisan data and considerations in its criteria, but also mandated that redistricting occur in public on video livestream. The two ranking legislators responsible for the redistricting plans appeared in court and testified that they did not consider partisan data or other information. (T pp 739:4–7 (Sen. Hise), p 760:19-21 (Rep. Hall)). Nothing like that had ever occurred in North Carolina. To Plaintiffs-Appellants, these differences do not matter. The General Assembly receives no credit for its transparency, the legislators' testimony plays no role in the analysis, and this case and *Common Cause* are tossed into the same basket notwithstanding the vast differences. Harper Br. 35–36. A standard that cannot detect these differences is no use at all.

It is no solace that Plaintiffs-Appellants cite "extensive mathematical and statistical evidence from Plaintiffs-Appellants' experts." Harper Br. 34. As discussed in depth below, that evidence was wholly exterior to the General Assembly, was not

presented to the General Assembly during the redistricting, is easily manufactured, and is beyond the ken of most trial judges to interpret and vet. There is nothing the General Assembly could do to avoid this showing. No amount of transparency, no amount of safeguards, no amount of neutral criteria will protect it from these claims. It is not enough even for the General Assembly to hire an expert to show that the plans are not outliers. Legislative Defendants hired one here, the expert found that the plans are not outliers, and Plaintiffs-Appellants do not care. They simply say that his analysis supports them. Harper Br. 39. What could the General Assembly do differently next time? Plaintiffs-Appellants have no answer—because they do not want to give an answer. They want a new Constitution, they want it now, and they want this Court to usurp the authority to draw districts based upon newly discovered and unprecedented standards. *See* Harper Br. 76–78 (demanding that there not be a next time).

One can predict from Plaintiffs-Appellants' briefs that in no case will a court ever find that districts are not extreme gerrymanders because Plaintiffs-Appellants' standard is the Midas touch that makes every plan extreme. That is the lesson learned from the *Common Cause* remedial phase a few years ago. Plaintiffs-Appellants insist that "[c]ourts in North Carolina and across the country have easily identified illegal partisan gerrymanders in recent years." Harper Br. 39. Exactly. The absence of any case where a court has easily identified a plan that was *not* an extreme gerrymander renders this fact, not only irrelevant, but damning for Plaintiffs-

Appellants.[7] Plaintiffs-Appellants say that "a dual requirement of intent and effect necessarily limits judicial intervention to extreme cases," but practically disclaim this in the following sentences, which describe all the ways courts can find gerrymandering and no way a court could ever find otherwise. Harper Br. 39. Unsurprisingly, the Supreme Court long ago rejected Plaintiffs-Appellants' formulation of "intent plus effect" both because "it is not judicially manageable" and because "the Constitution contains no such principle." *Vieth*, 541 U.S. at 288 (plurality op.); *see also id.* at 306 (Kennedy, J., concurring) (agreeing with this holding). Plaintiffs-Appellants rely on the dissenting opinion in *Rucho*, but that opinion, too, exhibits this error, opining that examples solely of plans being found extreme gerrymanders—and no plans being found anything else. *Rucho*, 139 S. Ct. at 2513.

It is likely for these reasons that Plaintiffs-Appellants ultimately contend that no "definitive, one-size-fits-all test" is necessary because it can emerge in "future cases." Harper Br. 37–38. "That is not even trying to articulate a standard or rule." *Rucho*, 139 S. Ct. at 2505. And it is not a permissible response here. This Court lacks a veto power over redistricting legislation (or any legislation), and simply announcing a political disagreement with the General Assembly's redistricting—and asserting

[7] To be sure, the federal courts were plagued by the opposite problem for two decades after *Davis*. *Davis* set a formidable standard, requiring the plaintiffs to show that their party "had essentially been shut out of the political process," *id.* at 139, and plaintiffs virtually always lost. *Vieth*, 541 U.S. at 218 (plurality op.) (concluding that "[e]ighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists."). It is no answer that standards can be fashioned giving every plaintiff a victory.

that someday a future Court will explain why—would do more than stray beyond traditional institutional boundaries. In short, if this Court is not applying a manageable standard it is not acting as a court.

b. No Judicial Standard Exists

The problem in this case is even more fundamental than the lack of a manageable standard. There also is no *judicial* standard. "The Legislature makes the laws. The judicial branch interprets them and enters judgment." *Goble v. Bounds*, 281 N.C. 307, 310, 188 S.E.2d 347, 349 (1972). Any standard that might arise to the level of manageable does not exist in the State Constitution as currently written. Stated differently, it is impossible to decide the question Plaintiffs-Appellants pose—the correct political composition of districts—"without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. A legislative process must first identify how this problem will be addressed and only subsequently can a court apply that legislative will through manageable standards. This is so in many respects.

First, there are different manners in which the supposed problem of partisan gerrymandering may be addressed, resulting in different redistricting processes. For example, a redistricting authority may be forbidden from considering political data or drawing lines for partisan reasons, as Florida's constitution mandates. Fla. Const. Art. III, §§ 20-21 (prohibiting districts from being drawn with "the intent to favor or disfavor a political party or an incumbent"). By contrast, a redistricting authority may be required to achieve partisan fairness, as Ohio's constitution states. Ohio Const. Article XI, Section 6(B). Although both approaches can claim the mantle of

good redistricting reform, they mean markedly different things in practice—as the former redistricting process involves no consideration of partisan data and the latter involves an affirmative consideration of partisan data to achieve a "'bipartisan' gerrymander to ensure the 'right' outcome." *Johnson v. Wisconsin Elections Comm'n*, 967 N.W.2d 469, 484 (Wis. 2021). In this respect, Plaintiffs-Appellants' positions are in conflict. The Harper Plaintiffs-Appellants compare the 2021 Plans against ensembles of allegedly non-partisan plans; the NCLCV Plaintiffs-Appellants compare the 2021 Plans against an "optimized" plan drawn *with* partisan data to achieve proportionality. But the State Constitution does not pick a dog in this fight; it does not address the issue. For the Court to choose one or the other would not be judging; it would be legislating.

Second, there are different measures of partisan neutrality even within these broader categories. When, for example, the NCLCV Plaintiffs-Appellants contend that "a nonpartisan plan would treat both parties fairly," *NCLV* Br. 80, they mean that it would result in political parties winning a majority of seats on obtaining a majority of the vote, *id.* at 22–25. But the State Constitution does not articulate any such standard. *Cf. Rucho*, 139 S. Ct. at 2499 (rejecting the view that the Constitution "requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be"). Any contrary ruling would amend the Constitution, not interpret it.

Third, similar problems abound under any test of partisan neutrality. One question is what elections to use to evaluate whether a gerrymander is durable or even exists. *See Vieth*, 541 U.S. at 288 (plurality op.). "There is no statewide vote in this country for the House of Representatives or the state legislature. Rather, there are separate elections between separate candidates in separate districts, and that is all there is." *Id.* (quoting Lowenstein & Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, 33 UCLA L. Rev. 1, 59–60 (1985)). Yet Plaintiffs-Appellants used statewide elections to show that *legislative* and *congressional* seats are gerrymanders. The State Constitution says nothing on this topic; how to construct the analysis is a policy choice.

Fourth, there is not even a cognizable measure of a gerrymander within the confines of any expert method. Even assuming the "right" elections are chosen and the "right" expert system is selected, the question whether a plan crosses the line between acceptable and unacceptable is a value judgment that the State Constitution does not address. In this case, Plaintiffs-Appellants' experts found that numerous districts and county groupings are *not* "partisan outliers," and the General Assembly's expert, Dr. Barber, showed that dozens of districts and groupings are not outliers. (Vol.5, Ex. p 9238). Plaintiffs-Appellants therefore shifted gears, contending that the *cumulative* impact of the districts and groupings amounted to an outlier. Hence, the question becomes whether the gerrymandering claim exists at the statewide level or at the district or grouping level. *See Vieth*, 541 U.S. at 300 (plurality op.) (discussing "the difficulties of assessing partisan strength statewide

and of ascertaining whether an entire statewide plan is motivated by political or neutral justifications"). One might look in any number of places to reach an informed opinion on that question; but the last place to look is the State Constitution, because that document will not yield an answer. The Court would have to torture one out.

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Numerous other examples along these lines can be recited, but the point is clear. The partisan gerrymandering claims before this Court—and any claim to follow in their footsteps—consist of component parts requiring discrete choices and the answers to subordinate questions. Plaintiffs-Appellants ask this Court to look everywhere *but* the State Constitution to answer these questions. That is because the State Constitution does not even begin to answer them.

"[I]t would be quixotic to attempt to bar state legislatures from considering politics as they redraw district lines." *Vieth*, 541 U.S. at 285 (plurality op.) (citation omitted). Yet Plaintiffs-Appellants appear to demand just that. The reason, then, that their claims have no basis in the Constitution is that the Constitution rejects their view that the General Assembly should not draw the districts. No standard ejecting the General Assembly in this way could be grounded in the Constitution, and Plaintiffs-Appellants, in truth, do not disagree—and do not care.

Further, if it opens this door, the Court will be required to prescribe a remedy that fails to cure the supposed constitutional violation as to some individual voters and works a new constitutional violation on others. In an effort to uncrack and unpack Democratic voters, the Court will have little choice but to crack and pack

Republican voters and leave still other Democratic voters cracked. A hypothetical the Panel described highlights this problem. (*See* COL ¶ 156). Consider a plan drawn by the General Assembly that would net a political party 75 seats in the House when they would otherwise be expected (using various metrics suggested by Plaintiffs-Appellants) to net 65 seats. On Plaintiffs-Appellants' theory, the Court would be required to order the General Assembly to redraw maps consistent with this expectation. But given that these 65 seats result from some allowable weighing of political considerations, some voters in those 65 districts would still suffer the supposed ills of partisanship that the voters in the other 10 districts would have suffered but for judicial intervention. That type of "remedy" is not judicial; it is legislative, and Plaintiffs-Appellants are wrong to demand it from a court.

B. The Political Claims Present No Cognizable Claim Under the Constitution

Plaintiffs-Appellants' partisan gerrymandering claims fail for the additional reason that political redistricting violates no provision of the State Constitution. Plaintiffs-Appellants' claims do not fall within the scope of the constitutional provisions they cite: the Equal Protection Clause, the Free and Fair Elections Clause, and the Speech and Assembly Clauses. These provisions guarantee distinct individual rights, not the group rights to partisan fairness that form the basis of Plaintiffs-Appellants' claims.

The inquiry begins with the formidable presumption that any act of the General Assembly is constitutional. *Wayne Cnty. Citizens Ass'n for Better Tax Control v. Wayne Cnty. Bd. of Comm'rs*, 328 NC 24, 399 S.E.2d 311, 315 (1991). "The

Constitution is a restriction of powers and those powers not surrendered are reserved to the people to be exercised through their representatives in the General Assembly; therefore, so long as an act is not forbidden, the wisdom and expediency of the enactment is a legislative, not a judicial, decision." *Id.* (quotation marks omitted). Those challenging an act of the General Assembly have a high bar to clear: "A statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground." *Id.*; *see also Glenn v. Board of Education*, 210 N.C. 525, 529–30, 187 S.E. 781, 784 (1936) (same); *Town of Boone*, 369 N.C. at 130, 794 S.E.2d at 714 (2016). Plaintiffs-Appellants cannot clear this bar.

1. Plaintiffs-Appellants Identify No Equal Protection Violation

The General Assembly's exercise of political discretion in redistricting does not work an equal-protection violation. The equal-protection principle of Article I, Section 19 "requires that all persons similarly situated be treated alike." *Richardson v. N.C. Dep't of Correction*, 345 N.C. 128, 134, 478 S.E.2d 501, 505 (1996). The threshold question is whether a statute draws a distinction based "upon a suspect class or a fundamental right." *Id.* If not, "it is necessary to show only that the classification created by the statute bears a rational relationship to some legitimate state interest." *Id.*; *see also Rhyne v. K-Mart Corp.*, 358 N.C. 160, 180, 594 S.E.2d 1, 15 (2004).[8] Plaintiffs-Appellants have failed to establish a violation under these principles.

[8] "Our courts use the same test as federal courts in evaluating the constitutionality of challenged classifications under an equal protection analysis." *Richardson*, 345 N.C. at 134, 478 S.E.2d at 505.

No Cognizable Distinction. A threshold problem is that Plaintiffs-Appellants fail to identify a cognizable distinction among North Carolina citizens. The redistricting plans, to be sure, place some voters into some districts and other voters into other districts, but that does not fail to treat citizens "alike." *Richardson*, 345 N.C. at 134, 478 S.E.2d at 505. Every voter receives a district, and all districts are of roughly equal population. The treatment is therefore similar, not differential.

This case is not like *Stephenson I*, *see* Harper Br. 55–56, where the General Assembly placed some voters in single-member districts and others in multi-member districts. That is an example of differentiation: "voters in single-member legislative districts, surrounded by multi-member districts, suffer electoral disadvantage because, at a minimum, they are not permitted to vote for the same number of legislators and may not enjoy the same representational influence or 'clout' as voters represented by a slate of legislators within a multi-member district." 355 N.C. at 377, 562 S.E.2d at 393. No such differential treatment is present here. Every voter is within an equally apportioned district represented by *one* member and enjoys the same opportunity as every other cast a vote and have it counted on an equal basis. A similar distinction lies between this case and *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 392 S.E.2d 352 (1990), where "a part of the landowners who live in the drainage district can vote for the clerk who appoints the commissioners and a part may not." *Id.* at 746–47, 392 S.E.2d at 356. Here, no voter is excluded from legislative or congressional elections; every North Carolina voter—including every Plaintiff here—lives in a house, senate, and congressional district

that complies with equal protection requirements. And *Blankenship v. Bartlett*, 363 N.C. 518, 681 S.E.2d 759 (2009), was an equal-population case, where "gross disparity in voting power" was shown by evidence that some judicial districts had five times the population of others. *Id.* at 528–28, 681 S.E.2d at 766.

This case involves no analogous differential treatment. As far as the individual right to vote is concerned, there is nothing objectively inferior about being drawn into one congressional or state legislative district over another. Each voter's vote is equally weighted; each voter is similarly situated; and each voter casts an equal vote.

No Denial of Voting Power. Plaintiffs-Appellants' contention that the voters lack "equal voting power," Harper Br. 56, "is rhetorical hyperbole masked as constitutional argument." *Johnson*, 967 N.W.2d at 486 (citation omitted). Plaintiffs-Appellants assume that each voter experiences inequality if that voter has less chance to persuade other voters in the district to vote for that voter's preferred candidate. It bears repeating that each vote in the 2021 Plans is equally weighted, so every vote has equal sway in an election. Having no colorable contention to the contrary, Plaintiffs-Appellants complain in essence that some voters are in districts with persons who often vote for other candidates—such that it will be more difficult for them to persuade their neighbors to vote for their preferred candidates—and other voters are in districts with *too many* persons who often vote for the *same* candidates—such that it will be too easy for them to persuade their neighbors to vote for their preferred candidates. But no precedent of this Court holds that a voter is differently treated based on how hard or easy it is to *persuade* other voters to coalesce around

the same candidates. The right to vote means the right to an equal say in the election, not a right to be grouped with likeminded persons who are likely to vote the same way. *See New York State Bd. of Elections v. Torres*, 552 U.S. 196, 205 (2008) ("None of our cases establishes an individual's right to have a 'fair shot' at winning . . . ."); *Johnson*, 967 N.W.2d at 659–60 (same).

Nor would such a doctrine hold conceptual weight. In any redistricting plan, some—in fact, many—voters will find themselves in this scenario, regardless of who draws the plans and regardless of what criteria are used. Some partisans will find themselves in the majority of a district; others in the minority. Even under "[a] bipartisan gerrymander," "[s]ome groups within each party will lose any chance to elect a representative who belongs to their party, because they have been assigned to a district in which the opposing party holds an overwhelming advantage." *Davis*, 478 U.S. at 154 (O'Connor, J., concurring). Because this cannot be avoided, reading an equal-protection burden into this fact of life reduces the concept to absurdity.

Plaintiffs-Appellants only sidestep this problem by redefining North Carolina voters, not as individual voters entitled to equal voting rights, but as members of either the Republican or Democratic parties—who are alleged to have, on an aggregate basis, a right to equal opportunity to win. The NCLCV Plaintiffs-Appellants, for instance, repeatedly refer to a vague requirement "to ensure that maps treat *both* parties fairly and symmetrically." NCLCV Br. 58 (emphasis added); *see also id.* at 21, 25, 80, 87.

But an equal-protection right that must be administered, not to individuals, but to the major parties has strayed far from equal-protection first principles. "Constitutional law does not privilege the 'major' parties; if Democrats and Republicans are entitled to proportional representation, so are numerous minor parties." *Johnson*, 967 N.W.2d at 653. So, for that matter, are independent voters. So are members of the major parties who fall outside their own parties' mainstream views. And importantly, so do North Carolina's numerous "crossover voters" who vote for candidates on both sides of the aisle. In Plaintiffs-Appellants' expert Dr. Cooper opinion, over 8% of North Carolinians voted for Governor Cooper, and Donald Trump in 2020. (Vol.5, Ex. pp 9551-52) How can the Court craft a standard to protect not just the voter, but each voter's choice? And what happens if voters change their mind in the course of a single election cycle?[9] These practical examples that happen in every election cycle in North Carolina, show the folly of Plaintiffs-Appellants' equal protection claims. If Republicans and Democrats have an equal protection right to districts enabling them to elect their preferred candidates, so do these citizens.

An equal-protection right to be placed into districts that enable each individual voter an equal opportunity to join a majority of likeminded voters to win would either place some voters ahead of others in the equal-protection calculus or place the rights of all citizens into hopeless conflict. This cannot stand under the Fourteenth Amendment.

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[9] *See, e.g.*, William H. Frey, *Biden's victory came from the suburbs*, Brookings (Nov. 23, 2020), https://www.brookings.edu/research/bidens-victory-came-from-the-suburbs/; Carol E. Lee, *North Carolina Cools on Obama,* Politico (Apr. 22 2010), https://www.politico.com/story/2010/04/north-carolina-cools-on-obama-036241.

No Invidious Intent. It does not help Plaintiffs-Appellants' equal-protection argument to focus on legislative "intent." Harper Br. 3. For one thing, the NCLCV Plaintiffs-Appellants insist that intent is not even required—thereby buying wholesale into the above-described idea that the two major parties are privileged above other citizens. *See* NCLCV Br. 110 (arguing that Republicans and Democrats, but not, e.g., monarchists and Green Party members, have a right to elect their preferred candidates).[10]

For another thing, the intent to draw a distinction lacking any cognizable harm is not invidious. The fact, for example, that some citizens are drawn into a city, and some into a county, does not impose a constitutional harm, and, as a result, the fact that the legislature does so with intentionality—imposing the difference with intent to produce an effect—carries no equal-protection significance. So too here. Equal protection doctrine recognizes this, as it must. "If the statute does not impact upon a suspect class or a fundamental right, it is necessary to show only that the classification created by the statute bears a rational relationship to some legitimate state interest." *Richardson*, 345 N.C. at 134, 478 S.E.2d at 505; *State ex rel. Utilities Comm'n v. Carolina Util. Customers Ass'n, Inc.*, 336 N.C. 657, 681, 446 S.E.2d 332, 346 (1994).

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[10] This Court "focused on the dilutive *effects*" in *Stephenson* and *Northampton* because they were obviously intended. NCLCV Br. 110. No one argued in those cases that the multi-member district scheme or division of voting power occurred inadvertently.

Membership in a political party is not a suspect classification. *See Libertarian Party of N.C v. State*, 365 N.C. 41, 51, 707 S.E.2d 199, 206 (2011). "Clearly, members of the Democratic and Republican Parties cannot claim that they are a discrete and insular group vulnerable to exclusion from the political process by some dominant group: these political parties *are* the dominant groups." *Davis*, 478 U.S. at 152 (O'Connor, J., concurring). "If members of the major political parties are protected by the Equal Protection Clause from dilution of their voting strength, then members of every identifiable group that possesses distinctive interests and tends to vote on the basis of those interests should be able to bring similar claims." *Id.* at 147.

As Justice Kennedy explained in his *Vieth* concurrence, "[t]hat courts can grant relief in districting cases where race is involved does not answer our need for fairness principles here," because "[r]ace is an impermissible classification," but "[p]olitics is quite a different matter." *Vieth*, 541 U.S. at 307 (Kennedy, J., concurring). "A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied"; Plaintiffs-Appellants must identify an "agreed upon model of fair and effective representation." *Id.* For reasons explained above, this does not exist. To construe the doctrine otherwise would do a disservice to those classifications that *are* suspect, such as race and ethnicity. "[E]ven the bounds of normal political exaggeration are exceeded when the Republicans of California attempt to suggest that their political role can even be spoken of in the same breath as that of the *Blacks of Burke County,*

Georgia and Mobile, Alabama." Badham v. Eu, 694 F. Supp. 664, 672 (N.D. Cal.), *sum aff'd* 488 U.S. 1024 (1989). The same can be said of Democrats in North Carolina.

And, for reasons explained above, the redistricting plans do "not impact . . . a fundamental right." *Richardson*, 345 N.C. at 134, 478 S.E.2d at 505. Only if the right to vote entailed the right to voting districts of a given favorable composition could a redistricting plan, drawn with partisan intent, be logically said to burden that right. Because the premise fails, the conclusion does not follow. *See Town of Beech Mountain v. Cty. of Watauga*, 324 NC 409, 378 S.E.2d 780, 783 (1989) (applying rational basis scrutiny when restrictions "impinge[d] to some limited extent on" the exercise of a fundamental right and expressly declining to apply strict scrutiny).

Rational Basis Review. For all these reasons, rational basis review applies, Plaintiffs-Appellants cannot meet its demanding test, and they do not even try. The question is whether the 2021 Plans "bear[] a rational relationship to some legitimate state interest." *Richardson*, 345 N.C. at 134, 478 S.E.2d at 505. They handily pass this test. It is, in fact, sufficient that the 2021 Plans "classifies tracts of land, precincts, [and] census blocks," which is a compelling state interest. *Cromartie I*, 526 U.S. 541, 547 (1999). "Perfection in making the necessary classifications is neither possible nor necessary." *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976). And, because an inquiry into hidden motive is improper under rational-basis review, *see, e.g.*, *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937), the inquiry can end there. Further, the political classifications themselves, if they are even relevant, are rational because it is "absolutely unavoidable" that "the location and shape of districts

may well determine the political complexion of the area." *Gaffney*, 412 U.S. at 753. For the General Assembly to consider and address these facts of life within its broad political discretion is not irrational.

2. Plaintiffs-Appellants Identify No Free Elections Violation

A related set of problems plagues Plaintiffs-Appellants' claims under the Free Elections Clause. Plaintiffs-Appellants fail to identify a lack of freedom of elections; they instead identify lack of practical opportunity to prevail, which can never be afforded and cannot be deemed part of the Clause.

No Voting Restriction. "The meaning [of North Carolina's Free Elections Clause] is plain: free from interference or intimidation." John Orth & Paul Newby, The North Carolina State Constitution 56 (2d ed. 2013) (hereinafter "Orth"). The Free Elections Clause bars state action that denies a voter the ability to freely cast a vote. *See Clark v. Meyland*, 261 N.C. 140, 143, 134 S.E.2d 168, 170 (1964); *Obie v. N.C. State Bd. of Elections*, 762 F. Supp. 119, 121 (E.D.N.C. 1991). This is consistent with Dr. Taylor's analysis, which reveals that "free elections really are about whether or not there is – people can file, potential candidates have access to filing, that candidates are free to campaign, and political parties are free to campaign, that voters are free to express voting rights and go vote, and that there is some freedom of choice on the ballot in front of voters." (T. p 491.) Nothing like that is present here: there is no barrier between any voter and a ballot or a ballot box, no restriction on the candidates the voter may select, and no bar on a person's ability to seek candidacy for any office.

Again, Plaintiffs-Appellants' assertions reduce the Free Elections Clause guarantee to an equal opportunity to prevail, and, again, this makes no conceptual sense and would either privilege some citizens' alleged rights over other or else doom the Clause to absurdity in administration. The alleged right to assistance in winning fares no better than the alleged right to financial assistance in elections, which the Court of Appeals had little trouble dismissing in *Royal v. State*, 153 N.C. App. 495, 499, 570 S.E.2d 738, 741 (2002). Indeed, the alleged right here is less defensible than an alleged right to public financing because the latter at least can arguably be administrated on a fair basis: it is possible for the General Assembly to send equal checks to all candidates. It is impossible, by contrast, for the General Assembly to ensure that each citizen is in a district that maximizes that citizen's opportunity to elect a preferred candidate in each election. The Free Elections Clause cannot possibly be read to place such an affirmative obligation on this Court to pick and choose political winners and losers.

No Manipulation of Election Outcomes. Plaintiffs-Appellants contend that the Free Elections Clause is violated because the 2021 Plans "prevent election outcomes from reflecting the will of the people." Harper Br. 49. But this is not true. Every election contest in any of these districts is, and will be, decided by a vote of the people. "When legislatures draw districts, they in no way select who will occupy the resulting seats." *Johnson*, 967 N.W.2d at 486 (citation omitted). "Voters retain their freedom to choose among candidates irrespective of how district lines are drawn." *Id.*

The 2021 Plans manifest a system "in which 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) (emphasis added). The operative legal expression of the majority's will comes through majority-rule contests in the equally populated districts. In every instance, the candidate who obtains a majority of the votes of that candidate's neighbors in the given district prevails. Only under faulty assumptions regarding what the outcome *should* be—such as that majority-rule for purposes of the Free Elections Clause is measured at the statewide level, *see* NCLCV Br. 53—can Plaintiffs-Appellants lodge a challenge to the 2021 Plans. That is precisely the "initial policy determination of a kind clearly for nonjudicial discretion" that renders the question non-justiciable. *Baker*, 369 U.S. at 217

Constitutional History. Reading the Free Elections Clause to contain limits on political discretion in district boundaries would be ahistorical and contrary to the original public meaning of the Clause. *See Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 389 (looking to "history of the questioned provision and its antecedents" in interpreting the State Constitution). (T pp 490:21-491:12).

The Free Elections Clause derives from the English Declaration of Rights of 1689, which provided that "election of members of Parliament ought to be free" from interference by the Crown. Orth 56.[11] This dictate contained no prohibition against

[11] *See also* English Bill of Rights 1689: An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown ("English Declaration of Rights"), Yale Law School: The Avalon Project, https://avalon.law.yale.edu/17th_century/england.asp (last visited Dec. 2, 2021).

"partisan gerrymandering" because it was not designed to limit parliamentary control over parliamentary elections. (T pp 490:21-491:12). In fact, it served the opposite purpose. As the trial court recognized, "[w]hile the English Bill of Rights . . . sought to address the Crown's interference with the affairs of Parliament, there is no indication that" its Free Election Clause "was directed at anyone but the Crown, much less a restriction on the power of Parliament." (COL ¶ 79). Put another way, the declaration that elections would be "free" addressed separation-of-powers concerns. (T p 491:2-12). Going forward, Parliament controlled the "methods of proceeding" as to the "time and place of election" to Parliament. 1 William Blackstone, Commentaries 163, 177–179 (George Tucker ed., 1803); 4 E. Coke, Institutes of Laws of England 48 (Brooke, 5th ed. 1797). To demand (as Plaintiffs-Appellants do) that the judiciary play the officious intermeddling role formerly played by the executive and seize control of legislative elections is to court a violation of the Free Elections Clause, not its vindication.[12]

Moreover, the English Declaration of Rights did not forbid district configurations far more inimical to democratic ideals than so-called partisan gerrymandering. It did not, for example, prohibit drawing electoral districts at

[12] The NCLCV Plaintiffs contend that the incorporation of this text in North Carolina was intended, without any alteration in language, to restrict the General Assembly's prerogative to manage its own affairs merely because the Clause belongs to the Constitution's Declaration of Rights. NCLCV Br. 59. But also found in the Declaration of Rights is the guarantee of separation of powers. N.C. Const. art. I, § 6. Surely, no one would read this guarantee to permit judicial intrusion on legislative power simply because it is contained in the Declaration of Rights. Likewise, the text of the Free Elections Clause, and its historical meaning, indicate its scope better than abstract arguments about its location in the Constitution.

substantially unequal population and thereby affording different voters a vastly unequal right to vote. Elections to the English Parliament were often conducted in so-called rotten boroughs—districts far and away more gerrymandered than anything possible now because they could be created with only a handful of constituents. (COL ¶¶ 97-104). They continued to be conducted in rotten boroughs for centuries after the English Bill of Rights was promulgated. Rotten boroughs were not eliminated in England until the Reform Act of 1832. They were eliminated by the parliament, not the English courts. The notion that they were somehow outlawed in England in 1689 (or, in North Carolina, in 1776) is untenable. Plaintiffs-Appellants' argument that the English Bill of Rights, and its North Carolina counterpart, did much more and, in fact, required redistricting in equally populated districts according to *additional* partisan-fairness standards is many steps removed from the original public meaning of the text.

Nor is there evidence that iterations of the Free Elections Clause on the other side of the Atlantic placed curbs on gerrymandering. As the trial court explained, North Carolina's Free Elections Clause has additional parentage in Section 3 of the Virginia Declaration of Rights. (COL ¶ 75). At the time of that Free Election Clause's drafting, its author, Patrick Henry, was "attempting to partisan gerrymander districts to the detriment of James Madison," who also bore some responsibility for the inclusion of the Clause in the Declaration. (COL ¶ 106). No one thought this was a constitutional problem.

The framers of the North Carolina Constitution were not concerned with placing substantive restrictions on districting at all. As explained by the trial court, the framers of the North Carolina Constitution were concerned with "the Royal Governors and their Council who represented the interests of the Crown," (COL ¶ 80), and upon receiving independence sought to vastly reduce the powers of the Governor and greatly strengthen the power of the General Assembly." (COL ¶ 91; *see also* COL ¶¶ 81–90). "Any argument that the Free Elections Clause placed limits on the authority of the General Assembly to apportion seats flies in the face of the overwhelming authority given to the General Assembly in the 1776 Constitution." (COL ¶ 92). As just one example, apportionment was by county and town and "[t]he General Assembly, and only the General Assembly, had the right to create counties." (COL ¶ 92). There were no constitutional checks on the legislature's ability to create counties,…nor is there any evidence of the need for any constraints on that authority." (COL ¶ 96).

What Plaintiffs-Appellants want would sound eerily familiar to the English, the framers of the North Carolina Constitution, and the citizenry that enjoyed the protections of the Free Elections Clause for generations. And they would recoil at it. Plaintiffs-Appellants are avowed supporters of the Democratic Party not concerned with "free" elections properly understood. They want to use North Carolina courts to elect more Democrats, a theory, if adopted, that is easily applied to any political party seeking a judicially imposed electoral boost. Boiled down, this is an attack on, not a vindication of, free elections. As history shows, commitment to separation of powers

preserves free elections. The Free Elections Clause does not "authorize[] this court to recast itself as a redistricting commission in order to make its own political judgment about how much representation particular political parties deserve—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end." *Johnson*, 2021 WL 5578395, at *10. The Free Elections Clause is best read to *forbid* that.

Plaintiffs-Appellants do not place this history in meaningful dispute, and their attempts to argue out of it fall flat.

To begin, one set of Plaintiffs-Appellants contends that history is irrelevant, arguing that it makes no difference that "a drafter of Virginia's Free Elections Clause would not have anticipated its application to partisan gerrymandering." Harper Br. 53. That is an odd assertion when the same brief acknowledges that "[i]t is the duty of this Court to ascertain and declare *the intent of the framers* of the Constitution and to reject any act in conflict therewith." *Maready v. City of Winston-Salem*, 342 N.C. 708, 716, 467 S.E.2d 615, 620 (1996) (emphasis added); *see* Harper Br. 31 (quoting this rule). This Court's precedent has continuously looked to "the historical context in which the people of North Carolina adopted the applicable constitutional provision" to ascertain its meaning. *Berger*, 368 N.C. at 639, 781 S.E.2d at 252; *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613, 264 S.E.2d 106, 110 (1980) ("Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation."). Plaintiffs-Appellants' concession that the

meaning they afford the Free Elections Clause was unimaginable to the generations of North Carolinians who adopted it, and most since, is damning.[13]

Another set of Plaintiffs-Appellants reject historical analysis as "always infirm" because it "would condone laws that discriminate against minority citizens, that deny women equal rights, and that punish core political speech in the mode of the Alien and Sedition Acts." NCLCV Br. 61; *see also* Harper Br. 52–53 (similar). This outright disdain for this Court's precedent, *see, e.g.*, *Berger*, 368 N.C. at 639, 781 S.E.2d at 252, is not commendable. And it sweeps too broadly. This Court's precedent does not treat historical analysis as a silver bullet, but worthy of consideration. Legislative Defendants have placed history in this context and demonstrate why it is consistent with the text and precedent related to the Free Elections Clause. Plaintiffs-Appellants, by contrast, appear to believe that the Court should, in knee-jerk fashion,

[13] The case Plaintiffs cite, *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020), rejects their own theory, reaffirming that courts "interpret[] a statute in accord with the ordinary public meaning of its terms *at the time of its enactment*." *Id.* at 1738 (emphasis added). Plaintiffs overread *Bostock*'s determination that "the limits of the drafters' imagination" do not cabin the reach of the law, which is not a license to change the original meaning of the text. *Id.* at 1737. *Bostock* turned on the meaning of the word "sex" in Title VII, which "in 1964 referred to 'status as either male or female [as] determined by reproductive biology.'" *Id.* at 1739. Because an employer who discriminates on the basis of sexual orientation necessarily makes a judgment on the basis of sex—treating a male in a relationship with a male differently from a female in a relationship with a male—the Court determined that this *original* meaning of the word "sex" was triggered by sexual-orientation discrimination. *Id.* at 1740–45. The Court did not, however, view itself as entitled to change the meaning of "sex" from what it meant in 1964. Plaintiffs here, by contrast, are asking for a definition of "free" elections completely foreign to North Carolina's general public at the time of its ratification or at any time subsequently.

adopt the opposite reading of whatever history may suggest. They cite no authority of any court for that idea.[14]

Plaintiffs-Appellants also contended that the example of Rotten Boroughs was considered and rejected in the Supreme Court's one-person, one-vote precedents. *See Baker*, 369 U.S. at 237; NCLCV Br. 62–63. But the same brief answers this objection in the next sentence, acknowledging that "[t]he delegates [to the Constitutional Convention] referred to rotten borough apportionments in some of the state legislatures as the kind of objectionable governmental action that the Constitution should not tolerate." *Wesberry v. Sanders*, 376 U.S. 1, 14–15 (1964); *see* NCLCV Br. 63 (quoting this). In fact, there is ample historical evidence to make a compelling case for the equal-population rule as a matter of U.S. constitutional history. *See* 1 William Blackstone, Commentaries, note D at 190 (George Tucker ed., 1803) ("[N]o just reason therefore can be assigned why ten men in one part of the community should have greater weight in its councils, than one hundred in a different place, as is the case in England, where a borough composed of half a dozen freeholders, sends perhaps as many representatives to parliament, as a county which contains as many as thousands."). And conceptually, the equal-population rule incorporates a theory of "fair and effective representation for all citizens," *Reynolds*, 377 U.S. at 565–66, grounded in "individual rights," not "generalized partisan preferences," *Gill v.*

[14] Legislative Defendants are not arguing that "[a] right enacted in a specific historical context is . . . forever confined to that exact context." Harper Br. 52. The right to elect one's preferred candidates does not exist—not in the historical context in which the Free Elections Clause was promulgated, not in today's context.

Whitford, 138 S. Ct. at 1933. Plaintiffs-Appellants have neither the historical nor conceptual foundation in the State Constitution to support their claim that the ancient provisions they cite had any relevance to their novel partisan-fairness notions.

The historical arguments Plaintiffs-Appellants do tender—half-heartedly, given their resistance to constitutional history and tradition—are unpersuasive. The Harper Plaintiffs-Appellants acknowledge the historical purpose of the Free Elections Clause rooted in separation of powers but fail to explain why this provision would justify judicial interference in legislative affairs where it forbids executive interference. Harper Br. 51. The NCLCV Plaintiffs-Appellants concede that North Carolina courts did not condemn partisan redistricting under the Free Elections Clause (or any other state constitutional provision), but claim this is "because in early North Carolina, party politics was limited, and this State's first Constitution required Senate and House districts to follow county lines." NCLCV Br. 61. But this is circular. As explained above, the General Assembly had (and has) plenary authority to fix county lines, so the General Assembly's plenary authority over redistricting was equally strong and the opportunities for mischief equally present, where the county lines could be (and were) drawn for *political* reasons, not *legal* reasons.

3. Plaintiffs-Appellants Identify No Free Speech or Free Association Violation

Plaintiffs-Appellants' partisan-gerrymandering claims also cannot find a home under the State Constitution's Free Speech and Association Clauses. The Free Speech Clause provides that "[f]reedom of speech . . . shall never be *restrained*," N.C. Const.

art. I, § 14 (emphasis added), yet Plaintiffs-Appellants practically admit that no restraint or even burden on speech exists. *See* NCLCV Br. 70–71.

No Burden on Speech. The right to free speech is impinged when "restrictions are placed on the espousal of a particular viewpoint," *State v. Petersilie*, 334 N.C. 169, 183, 432 S.E.2d 832, 840 (1993), or where retaliation motivated by speech would deter a person of reasonable firmness from engaging in speech or association, *Toomer v. Garrett*, 155 N.C. App. 462, 574 S.E.2d 76, 89 (2002) (explaining that the test for a retaliation claim requires a showing that "plaintiff . . . suffer[ed] an injury that would likely chill a person of ordinary firmness from continuing to engage" in a "constitutionally protected activity," including First Amendment activities); *see Evans v. Cowan*, 132 N.C. App. 1, 510 S.E.2d 170, 177 (1999).

No restraint or burden exists here. The 2021 Plans place no "restrictions . . . on the espousal of a particular viewpoint." *Petersilie*, 334 N.C. at 183, 432 S.E.2d at 840. That type of restraint is simply not part of what the plans actually do: separate different tracts of land into different districts. And the 2021 Plans would not even arguably "chill a person of ordinary firmness from continuing to engage" in expressive activity, *Toomer*, 155 N.C. App. at 478, 574 S.E.2d at 89. As shown above, partisan redistricting has been ubiquitous in state history. If this practice chilled speech, someone should have noticed by now. No evidence, however, was presented of this below, and it defies reason to suggest that North Carolina citizens have chosen not to speak for fear of being placed in a gerrymandered redistricting plan.

No Right to Government Assistance in Speech. Plaintiffs-Appellants do not contest any of this. They do not contend that any burden on speech exists. They instead make the untenable argument that any state action rendering speech "***less effective***" constitutes an impermissible burden on speech. NCLCV Br. 71. Really? The Environmental Protection Agency issues guidance stating that global climate change is the result of human activity and rejects the assertion of advocates who disagree. Their speech is less effective due to governmental activity. A North Carolina health agency issues a warning that Ivermectin is not an effective method of treating Covid-19 and may even be harmful. The speech of persons who disagree is rendered less effective. The Governor meets with civil-rights advocates to listen to their policy proposals, but he declines to meet with white supremacists to hear their proposals. An advocate's speech is not as effective as it would be if the Governor listened. According to Plaintiffs-Appellants—unbeknownst to anyone and in defiance of all common sense—the State Constitution (and likely the U.S. Constitution)[15] forbids all of this.

If that sounds wrong, that is because it is. Plaintiffs-Appellants "desire districts drawn in a manner ensuring their political speech will find a receptive audience;" however, nothing in" any free-speech doctrine "gives rise to such a claim." *Johnson*, 967 N.W.2d at 487. "Associational rights guarantee the freedom to

[15] North Carolina courts interpret the rights to speech and assembly in alignment with federal case law under the First Amendment. *Feltman v. City of Wilson*, 283 N.C. App. 246, 767 S.E.2d 615, 620 (2014); *State v. Petersilie*, 334 N.C. 169 432 S.E.2d 832, 841 (1993); *State v. Shackelford*, 264 N.C. App. 542, 825 S.E.2d 689, 696 (2019).

participate in the political process; they do not guarantee a favorable outcome." *Id.* The U.S. Supreme Court decades ago rejected the notion that free-speech doctrine contains "an entitlement to a government audience for [citizens'] views." *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 282 (1984). Plaintiffs-Appellants have no cognizable right to be drawn into voting districts with persons likely to be inclined to receive their speech in a favorable way.

Plaintiffs-Appellants cite no case to the contrary. The statute invalidated in *Heritage Vill. Church & Missionary Fellowship, Inc. v. State*, 40 N.C. App. 429, 253 S.E.2d 473 (1979), *aff'd*, 299 N.C. 399, 263 S.E.2d 726 (1980), prohibited the solicitation of funds within North Carolina without a permit—a plain restriction on speech. *Id.* at 437, 253 S.E.2d at 478. The U.S. Supreme Court explained, in the decision *Heritage* applied, that such a system of granting or denying a religious group of "its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth." *Cantwell v. State of Connecticut*, 310 U.S. 296, 305 (1940). By contrast, the 2021 Plans require nothing whatsoever of Plaintiffs-Appellants or the Democratic Party in order to raise funds or otherwise operate politically. Nor are the 2021 Plans like the scheme invalidated in *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011), which sent competing public funds to the opponents of privately funded candidates for public office, which had the same effect as "restrictions on campaign expenditures" by diluting dollars spent. *Id.* at 734. Nothing in the 2021 Plans operates as a speech restriction, either in a formalistic or functionalist sense—or any sense.

And Plaintiffs-Appellants' reliance on *Citizens United v. FEC*, 558 U.S. 310 (2010), is particularly off base, since that case addressed "civil and criminal penalties" applied to speech. *Id.* at 321. The Court will search in vain for civil or criminal penalties on speech (or anything else) in the 2021 Plans.

What matters, in short, is that "there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The Plaintiffs-Appellants are free to engage in those activities no matter what the effect of a plan may be on their district."[16] *Rucho*, 139 S. Ct. at 2504.

C. The Costs—Both Constitutional and Practical—of Court Intervention Would Outweigh Any Arguable Benefits

Plaintiffs-Appellants proffer claims with no underlying constitutional principle. Instead, they deliver the ultimatum that, because (in their view) the General Assembly is "impervious to public opinion," the supposed problem of gerrymandering cannot be solved through the legislative process. Harper Br. 54; NCLCV Br. 83. They reason further that because the judiciary can solve the problem it must. There are innumerable problems with this position. Here are just a few.

An initial problem is that, by Plaintiffs-Appellants' own calculus, the General Assembly is *not* "impervious to public opinion." Harper Br. 54. Plaintiffs-Appellants also seemingly forget that, in the case they repeatedly cite, the prior decade's legislative plans were invalidated, new plans were enacted, they were based almost entirely off simulated plans presented by the Plaintiffs-Appellants' expert in that

[16] It is, to say the least, odd for Plaintiffs to rely on U.S. Supreme Court free-speech precedents with no relationship to redistricting and yet ignore *Rucho* which directly addressed, and rejected, a free-speech challenge to a redistricting law.

case, those plans met the approval of the *Common Cause* panel, and *they were used in the 2020 elections*. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584 (N.C. Super. Sep. 03, 2019). These facts defeat Plaintiffs-Appellants' bluster: the 2020 legislative elections to the House and Senate were drawn under purportedly fair plans—as Plaintiffs-Appellants define them—and the General Assembly—as currently constated—must by Plaintiffs-Appellants' own calculus, be deemed *responsive* to the public that elected them. That Plaintiffs-Appellants have still failed to persuade the legislature to propose a constitutional amendment curbing gerrymandering suggests merely that the responsive body has not responded to *this* demand. That should be dispositive.

It also should not surprise anyone. Plaintiffs-Appellants are not the North Carolina citizenry. They are a select few citizens identified as appropriate Plaintiffs-Appellants by the political powerhouses, sitting on troves of cash and directing this litigation from out of state, funding this case. Plaintiffs-Appellants have not all stood for election, most have obtained no vote of support from the people for their ideas, and none have identified means of establishing that their views are widely held or remotely popular. Just because they demand something does not mean the public wants it. There is no way for this Court to conclude that their ideas are better reflective of popular will than the ideas of the people *elected* to office *by voters*. The proof is in the pudding: even under plans enacted with Court supervision, the General Assembly still rejects Plaintiffs-Appellants' views. The people have spoken in a way that is beyond reproach, and Plaintiffs-Appellants lost.

Even if Plaintiffs-Appellants' position had factual grounding, it enjoys no legal support. The U.S. Supreme Court unanimously rejected the proposition that "that this Court can address the problem of partisan gerrymandering because it *must*." *Gill*, 138 S. Ct. 1916, 1929 (2018). "Failure of political will does not justify unconstitutional remedies." *Id.* (quoting *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring)). That admonition applies all the more under the State Constitution, which expressly codifies the separation-of-powers principles underpinning these concepts and adheres to them all the more robustly. *State ex rel. Wallace v. Bone*, 304 N.C. 591, 599, 286 S.E.2d 79, 83 (1982) ("North Carolina, for more than 200 years, has strictly adhered to the principle of separation of powers."). Plaintiffs-Appellants are asking for judicial legislation, and the argument that the State's legislative body has declined to legislate provides no support for this demand.

Plaintiffs-Appellants have not made a compelling case that partisan redistricting is even a problem. Their sky-is-falling rhetoric depends on highly artificial expert constructions with no relation to reality and no sense of perspective. The Court need only look to the State's history to see the error in Plaintiffs-Appellants' contention that political "redistricting plans subvert the democratic process." Harper Br. 2. If that is so, North Carolina has never experienced democracy. This Court should reject that nonsense.[17] Redistricting in this State, and every state,

[17] For example, in 2010 the people elected a majority Republican legislature under lines drawn by Democrats in 2003 that came after Democratic majorities in 2004, 2006, and 2008. Regardless of Plaintiff's rhetoric, like the 2003 plans drawn by Democrats under which the people elected a Republican majority in 2010, the people retain the power to elect a Democrat majority under maps drawn by Republicans.

has always been political because that is the nature of the process. It can appear messy. It can *be* messy. But that is because democracy is messy. It is an anti-democratic impulse that demands to expel politics—with its unprincipled compromises, questionable motives, self-interest, and tribal impulse—from civil society. Democracy is political, or it is not democracy. Plaintiffs-Appellants' hunt to rid the democracy of politics is war on democracy, not on gerrymandering.

A better place to look for guidance on this divisive topic is the opinion of Justice Sandra Day O'Connor in *Davis*. 478 U.S. at 144 (O'Connor, J., concurring). Justice O'Connor was "a Justice with extensive experience in state and local politics," *Rucho*, 139 S. Ct. at 2498, having served six years as an Arizona state senator, including during the 1971 Arizona legislative redistricting process. *See* Oyez, Sandra Day O'Connor.[18] A leading centrist and a pragmatist, Justice O'Connor had no use for rhetoric demanding judicial review of politics. Justice O'Connor recognized that "the legislative business of apportionment is fundamentally a political affair" and presents "a political question in the truest sense of the term." *Davis*, 478 U.S. at 145 (O'Connor, J., concurring). Justice O'Connor also understood that "there is good reason to think that political gerrymandering is a self-limiting enterprise," since, "[i]n order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat-risks they may refuse to accept past a certain point." *Id.* at 152.[19] "Similarly, an overambitious gerrymander can lead

[18] https://www.oyez.org/justices/sandra_day_oconnor.

[19] That occurred in 1994 when the people of North Carolina elected a majority of Republicans to their Congressional delegation under the heavily gerrymandered 1992

to disaster for the legislative majority: because it has created more seats in which it hopes to win relatively narrow victories, the same swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious." *Id.* Besides, this nation enjoys "a strong and stable two-party system." *Id.* at 144. The major parties have "ample weapons at [their] disposal" to avoid or withstand gerrymandering, and there is "no proof" that "political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves." *Id.* at 152. This voice, not Plaintiffs-Appellants' generally hyperbolic rhetoric, should inform this Court's judgment.

The trial record shows that any impact of gerrymandering in this case is muted. At the congressional level, Plaintiffs-Appellants are arguing over one seat, as their expert (Dr. Chen) contends that a neutral ensemble of maps would tend to produce 9 Republican seats and that the current plan produces 10. (T p 50:4-22). At the legislative level, Plaintiffs-Appellants' experts' methods consistently showed a difference of just a handful out of 170 state legislative seats. *See infra* at 113–48.

A significant reason political redistricting does not bear invidious effects is that the judiciary already has tools to limit it, and much progress has been made in ensuring voting equality in redistricting. The most significant protection is the one-person, one-vote rule, which places tight limits on the degree to which gerrymandering is possible by forbidding rotten boroughs that would truly

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Congressional Plan drawn by the Democrats specifically to protect Democrat Incumbents. *See Shaw v. Hunt*, 861 F. Supp. 408, 460–68 (E.D.N.C. 1994), *reversed on other grounds*, 517 U.S. 899 (1996).

disenfranchise voters. In this State, that rule is fortified by strict county-grouping limitations governing legislative districts, which also curb political discretion in redistricting. Meanwhile, the federal and state prohibitions on race-based redistricting, as well as the Voting Rights Act's guarantee against districts having even the effect of racial vote dilution, further cabin legislative options. Plaintiffs-Appellants' policy contentions ignore these robust limitations, and they fail to make that case that *more* judicial intervention in redistricting is appropriate.

Thus, on the one hand, political considerations in redistricting do not pose nearly the problem Plaintiffs-Appellants propose, and, on the other, Plaintiffs-Appellants have nothing to say of the many problems of judicial intervention. Those problems are legion and far outweigh any marginal benefit that might be gained by recognizing gerrymandering claims.

First, these claims will be the Hotel California. The Court can check in, but it can never leave. Once judges deliver partisan interest groups their preferred partisan results, partisan interest groups will never stop asking for partisan results. "Apportionment is so important to legislators and political parties that" no "burden of proof" the Court "places on political gerrymandering Plaintiffs-Appellants is unlikely to deter the routine lodging of such complaints." *Davis*, 478 U.S. at 147 (O'Connor, J., concurring). As discussed, every plaintiff can say that "[r]arely do redistricting plans subvert the democratic process to the extent found by the trial court here." Harper Br. 2. It will not be rare at all. What *is* rare about this case is the exceptional transparency the General Assembly utilized.

Second, recognizing these claims will damage the judiciary's reputation for non-partisanship and impartiality. Because members of this Court and the State's lower courts are members of political parties and stand for election on a frequent basis, there is a substantial likelihood—even a certainty—that litigants will view their prospects of success in gerrymandering litigation as a matter of court composition, on the view that Democratic judges are bound to cast Democratic votes in these cases and that Republican judges are bound to cast Republican votes.[20] For the same reason, the general public is practically certain to view orders in partisan-gerrymandering cases merely as partisan politics in the courts. And no amount of *actual* impartiality can resolve this problem. When there are no manageable standards to govern these highly partisan claims, no amount of assurance that politics do not influence the decisions is likely to persuade the public that these claims are resolved by neutral legal principles, rather than by partisan affiliation.

Governor Cooper and the Attorney General's brief just proves the point. The Governor argues that the General Assembly using its discretion to draw district boundary lines that favor one political party over another is unconstitutional. However, the Governor has been relentless in his pursuit of partisan control of the executive branch, eschewing bipartisan control of election administration as

[20] That risk materialized in this case. The Harper Plaintiffs went to exceptional lengths to obtain a panel established during last decade's redistricting litigation and to resist the appointment of a new panel, even though one member of the prior panel retired and another recused himself. One need only review the party affiliation of the personnel involved—Plaintiffs, the Chief Justice responsible to appoint the panel, and the panel members—to understand Plaintiffs' motives, which are at least as partisan as the legislators they criticize.

unconstitutional. Indeed, the Governor has successfully persuaded this Court that him *not* being able to favor his own political views and priorities in the discretionary administration of election laws is unconstitutional.

For instance, in *State v. Berger*, 368 N.C. 633, 647, 781 S.E.2d 248, 257 (2016), this Court examined an instance in which the Court determined the General Assembly's appointment power of executive officers left "the Governor with little control over the views and priorities" of the commissions at issue. Further, when dealing with the discretion provided to the executive branch to make certain policy or rulemaking decisions, this Court struck down a bipartisan elections and ethics board as unconstitutional because "the relevant provisions of Session Law 2017-6, when considered as a unified whole, leave the Governor with little control over the views and priorities of the Bipartisan State Board." *Cooper v. Berger*, 370 N.C. 392, 416, 809 S.E.2d 98, 112 (2018) (cleaned up). Chief Justice Martin in his dissent noted that "the majority opinion constitutionalizes a *partisan* makeup of the Bipartisan State Board. *Id*. at 426, 809 S.E.2d at 118-19 (Martin, C.J., dissenting) (emphasis in original). Governor Cooper, then having the ability to appoint more republican party-affiliated or democratic-party affiliated members to the State Board of Elections gerrymandered the Board in favor of democrats. *See* N.C.G.S. § 163-19 ("Not more than three members of the State Board shall be members of the same political party.").

Even though the partisan make-up of the State Board of Elections fails to account for the nearly 2,500,000 unaffiliated registered voters in North Carolina, this

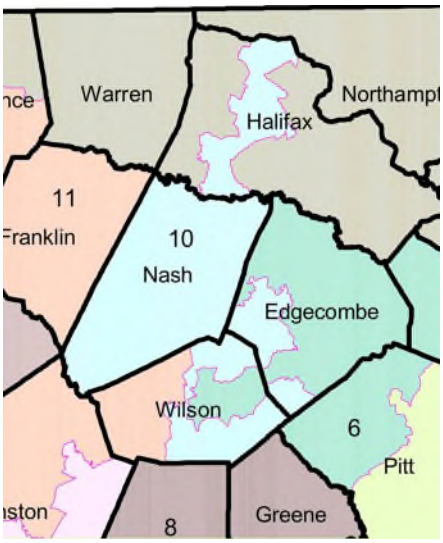
Court has said it would be unconstitutional *to deny* the Governor partisan control of the State Board. That exercising discretion to favor the partisan nature of the decision-maker is constitutionally required when exercised by the executive branch but unconstitutional when exercised by the legislative branch is not a framework for a workable standard of review on partisan gerrymandering. Rather, it is simply substituting the partisan preference of the decision-makers in the judicial branch for those in the legislative branch, here, at the request of the chief executive—a leader who certainly favors his own partisan policies and viewpoints over others.

Governor Cooper's contention that "[t]he history of the free elections clause shows that it prohibits practices like partisan gerrymandering" is especially hollow considering Governor Cooper's part in dictating the "history of…this provision" (Cooper and Stein Amicus Br. P. 9) and his role in creating predominately partisan districts in North Carolina.

Before assuming his current role, Governor Cooper served in the General Assembly for over a decade, including as chair of the Senate Redistricting Committee, and then as Attorney General of North Carolina. Not once in his role drafting North Carolina's legislative or Congressional districts did Governor Cooper raise the issue using partisanship to draw districts as a violation of <u>any</u> portion of North Carolina's Constitution, much less the free and fair elections clause, or the equal protection clause. Nor did the Governor raise this issue during his many years as Attorney General, including those spent defending a Republican led- General Assembly against gerrymandering claims following the 2010 cycle. Rather, the Governor

latches on to these bizarre interpretations of the North Carolina Constitution because it is politically convenient for him to do so. Put another way, when Governor Cooper was actively involved in districting in this State, he sung another tune than the one advocated in this brief, one that simply cannot be reconciled with this position today.

Let's first turn to the district Governor Cooper drew himself, and that he ran in for the majority of his time in the North Carolina Senate (SD10).



This type of district, later found to actually violate the North Carolina Constitution by *Stephenson* and it's progeny, sliced and diced three rural portions of eastern North Carolina and added them to the Governor's home in Nash County. Especially noticeable are the jagged crocodile jaws that cut down the middle of Wilson County and take a bite out of Edgecombe County. These jaws dissect rural Wilson County into three different districts.[21] Atop of Nash County sits a another jagged cut

[21] This makes any criticisms of Legislative Defendants' drawings of the Congressional Districts in Wake or Mecklenburg especially ironic considering that these were split for population reasons and to minimize other splits, and there was no legitimate population need to split Edgecombe, Wilson, or Halifax counties in this manner.

out of Halifax County, that entirely separates the county from other parts. Where, when drawing these districts, or running in them, was the Governor's concern for free and fair elections in North Carolina?

Governor Cooper's participation in drawing of Congressional Districts also belies any serious argument that he believes partisan considerations in districting violate North Carolina's Constitution. Then-Senator Cooper chaired the Senate Committee on Redistricting during the re-draw of North Carolina's 12th Congressional district after it was struck down as a racial gerrymander in *Shaw v. Hunt*. In the subsequent suit challenging the re-draw of the 12th Congressional District, Governor Cooper testified, and the United States Supreme Court relied upon his statements that the 12th Congressional District was drawn in large part to protect incumbents and existing partisan makeups of North Carolina's Congressional districts. *Easley v. Cromartie,* 532, U.S. 234, 254-257 (2001). This district, along with its predecessor district, which Governor Cooper voted for, is largely regarded as one of the most infamous gerrymanders in history.

Next, the separation-of-powers injury a judgment for Plaintiffs-Appellants would inflict would be devasting for inter-branch comity in this State. After the General Assembly undertook entirely unprecedented steps of conducting a live-stream process with plans drawn in public by members of the General Assembly, legislators will have no way to know what other steps could possibly be taken to avoid judicial interference in redistricting. The absence of manageable standards, and Plaintiffs-Appellants' suggestion that no standard even be articulated, will leave this

Court no ability to explain the result, aside from its own political judgment exercised in what would be, in truth, a veto.

Lastly, there is little assurance that judgments in gerrymandering cases will be accurate. The evidentiary records in redistricting suits are enormously complicated, the temptation for judges to set aside judicial norms in favor of partisan preference is potentially overpowering, and the prospect of error in determination is high. Given the inherent malleability of any standard the Court might impose, and these other complications, there is little basis for confidence that the right result will be reached in any given case. "Nothing in [this Court's] precedents compels [it] to take this step, and there is every reason not to do so." *Davis*, 478 U.S. at 144 (O'Connor, J., concurring).

D. Plaintiffs-Appellants' Political Claims Fail Under Any Arguably Manageable Standard

Even if Plaintiffs-Appellants' political claims were justiciable and cognizable, they would be unable to meet any arguably manageable standard. Jurists who have argued that partisan-gerrymandering claims are appropriate for judicial decision have opined that courts must "not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, [the correct standard] takes as its baseline a State's *own* criteria of fairness, apart from partisan gain." *Rucho*, 139 S. Ct. at, 2516 (Kagan, J., dissenting). They should not "try to compare the State's actual map to an ideally 'fair one' (whether based on proportional representation or some other criterion)." *Id.* at 2520. Instead, the relevant comparator is "what the State would have done if politicians hadn't been intent on partisan gain.

Or put differently, the comparator (or baseline or touchstone)" must not be the result "of a judge's philosophizing but of the State's own characteristics and judgments." *Id.*

The *Common Cause* trial ruling Plaintiffs-Appellants repeatedly cite endorsed this view: it did not claim a judicial right "to engage in policy-making by comparing the enacted maps with others that might be 'ideally fair' under some judicially-envisioned criteria." 2019 WL 4569584, at *128. Rather, it held that the judicial task is "to take the Adopted Criteria that the General Assembly itself, in its sole discretion, established, and compare the resulting maps with those criteria to see 'how far the State had gone off that track because of its politicians' effort to entrench themselves in office.'" *Id.* (quoting *Rucho*, 139 S. Ct. at 2521 (Kagan, J., dissenting)).

Plaintiffs-Appellants do not speak to this test—or any test. Instead, they suggest their own standards to produce a desired partisan goal. The Harper Plaintiffs-Appellants effectively concede that no manageable standards exist, encouraging the Court to strike down the enacted plans and only later determine what standard supports that result. Harper Br. 37-40. The NCLCV Plaintiffs-Appellants propose a test of proportionality in-all-but-name, encouraging this Court to adopt a rule that "a political party whose candidates receive a majority of votes statewide" must "receive[] at least half the seats statewide, across a wide range of electoral conditions. NCLCV Br. 79. And *Common Cause* Plaintiff-Appellant's do not endeavor to provide a standard at all, instead making only a circular reference to its cognizability arguments and asserting that the North Carolina Constitution is unique. Common Cause Br. 57.

Plaintiffs-Appellants' refusal to propose a test to this Court belies that neither they, nor their experts can satisfy the test outlined by Justice Kagan in *Rucho*. None considered the General Assembly's justifications for its decisions in their analysis. And none used the General Assembly's own criteria when creating their "comparison" maps. They are, therefore, useless as comparators.

Plaintiffs-Appellants' experts' analysis greatest flaw is that none took into account the credited, non-partisan explanations provided by the General Assembly on the legislative record. (*E.g.* T p 196:8-14 (Mattingly); T p 297:18-298:6 (Pegden)). Failure to consider these explanations divorces the experts' analyses from *what actually happened* and the General Assembly's adherence to its stated criteria to produce the Enacted Maps. Failure to consider what these humans did in the real world makes their analysis useless.

But even assuming Plaintiffs-Appellants' attempts to rely on criteria that could be reduced to formula was valid, each of its simulation experts' algorithms contains variations on the General Assembly's Adopted Criteria that make them inappropriate tools for evaluating the Enacted Plans under the *Rucho* dissent's test.

Dr. Chen's analysis does not speak to the legal standard proposed by Justice Kagan in *Rucho* because it does not honor the General Assembly's criteria. Dr. Chen programmed his algorithm to meet the "mathematically minimum" number of VTD splits in the state. (T p 58:2-14). However, the Adopted Criteria on their face do not include mathematical minimums for splits. (R p 823). Dr. Chen also added a constraint to the algorithm to prevent double traversals, despite not being listed in

the Adopted Criteria. (T p 59:6–14). And Dr. Chen did not analyze how the Enacted Plans compared to plans with permissible partisan advantage. (T pp 80:22–81:23).

Dr. Mattingly's analysis also fails to support the legal standard proposed by Justice Kagan in *Rucho* because it deviated from the Adopted Criteria. Dr. Mattingly did not attempt to restrict his simulations so that the General Assembly's decisions concerning the divisions of cities, or the combination of cities, would be similar to the divisions of cities made by his simulations. (T p 203:16–25). The Panel made findings that numerous non-partisan goals were achieved, (*e.g.* FOF ¶ 108), and Dr. Mattingly made no effort to determine whether the allegedly partisan effect of the plans was the result of anything other than these non-partisan goals. Given how important it was to the General Assembly to maintain municipality boundaries when if at all possible, simulations that do not account for that goal do not form a proper comparison to the enacted districts.

Dr. Pegden's analysis similarly fails to speak to Justice Kagan's standard, as it deviated from the non-partisan criteria relied upon by the General Assembly. Dr. Pegden flouted these criteria in allowing his maps to split populations of thousands in municipalities when the General Assembly's splits affected no one. (T pp 281:2–6, 284:1-7). The General Assembly would never have split population in this way. Further, Dr. Pegden's methodology—applying a number of purportedly minor "perturbations" to the enacted plan to create a comparison between the enacted plan and altered maps—leads to maps that are, to be blunt, ugly. These sorts of maps

would never be considered or passed by the General Assembly and cannot be comparators.

Nor does Dr. Magelby's analysis speak to the legal standard proposed by Justice Kagan in *Rucho*. Dr. Magelby simply "set aside" any consideration of municipal boundaries because it was "really hard to figure out" an "appropriate methodological process." (T p 399:14-21). But the Adopted Criteria included a consideration and respect for municipal boundaries. (R p 823). What's more, his simulations created state legislative maps that were illegal under North Carolina allow: he allowed population deviation of up to 6.5%, despite North Carolina law prohibiting any population deviation greater than 5%. *See Stephenson I*, 355 N.C. at 384.[22] (T p 401:12-14).

Ultimately, as the trial court noted, these sorts of simulations analyses are inherently problematic and untrustworthy. They rely on "either the vote share of a party on a single or aggregated statewide race or races," that have only "one thing in common . . . that they all occur in North Carolina." (FOF ¶ 568). And they "do not take into account the individual needs and issues that are important to each of the 170 legislative districts and 14 congressional districts at issue"; instead they "treat the candidates as inanimate objects" by failing to "consider the personality or qualifications of each candidate, any political baggage each candidate may carry,"

[22] Another of Plaintiffs- Appellants' experts, Dr. Moon Duchin, testified that she did not conduct a simulations analysis, despite being an expert in simulations analyses. And Dr. Christopher Cooper did not provide any mathematical analysis, instead providing color commentary on the Enacted Plans.

and "a host of other considerations that voters use to select a candidate." (FOF ¶ 568). So while Plaintiffs-Appellants' experts believe "the computer can take the human element out of the human" and politics," "that is a process we doubt they can do and hope will never happen." (FOF ¶ 3). In fact, as Legislative Defendants' expert Dr. Barber stated, it simply is not possible for a computer algorithm to take into account all of the inputs used in enacting legislative maps, due to the legislative influence or "sausage making" of the legislative process. (T pp 632:10–633:6). It is this negotiation, this compromise, this "sausage making" that is inherent in any bill passed by the body of the people.

The legislators involved in the redistricting process publicly announced the criteria they were going to rely on and followed it. That criteria explicitly rejected the use of partisan data. And the General Assembly left a contemporaneous record of its decisions that demonstrates they did not act with partisan intent and that remains unimpeached. Adherence to these criteria and the explanations belies any claim that they rejected their own redistricting criteria to seek partisan advantage.

The Committees explicitly barred the use of partisan data in the map-drawing process: "Partisan considerations and election results data *shall not* be used in the drawing of districts in the 2021 Congressional, House, and Senate plans." (R p 824). Legislators drew and submitted maps using software on computer terminals in the Committee room that did not contain political data and which were being livestreamed the entire time. Senator Hise and Representative Hall testified, at trial and under oath, that they did not use partisan data in drawing these maps. (T pp

739:4–7 (Sen. Hise), T p 760:19–21 (Rep. Hall)). And the trial court issued no finding that the General Assembly considered political data in drawing the Enacted Plans.

Plaintiffs-Appellants' only response is to rely on innuendo and testimony not credited by the Panel to imply that partisan data must have been relied on. *See* Common Cause Br. 10–12. For instance, they claim that consulting with Staff, who were at times looking at their phones in the hearing rooms where the map-drawing occurred, is evidence that the General Assembly lied to the people and to the Panel. There is nothing nefarious about part-time legislators working alongside staff. That they are "partisan assistants" because they work for members of the General Assembly does not alter this analysis. There is also nothing strange about staffers checking their phones while assisting members of the General Assembly in the tedious process of drawing district lines by hand. They are only human.

After they completed drawing the maps, Senator Hise and Representative Hall provided contemporaneous explanations for their districting decisions to the legislature. They repeated these explanations at trial, and the trial court credited this testimony. For instance, Senator Hise testified that the Senate Mecklenburg-Iredell County grouping was designed to keep Iredell County whole; to keep the municipality of Davidson (which spans Mecklenburg and Iredell Counties) whole; and to craft a district containing the non-Charlotte portions of Mecklenburg County. (T p 734:12–21). Representative Hall testified that the Mecklenburg County House districts were drawn to do as little harm to the Democrat-drawn, court-blessed districts drawn in 2019, while accounting for population changes that necessitated drawing an extra

seat in the county. This led the House to unsplit Mint Hill (which had been split previously) and combine it with Matthews—two communities that share many characteristics. (T pp 761:3–762:6; *see* FOF ¶ 112(b)).

As another example, take the Senate grouping containing Guilford County. Senator Hise explained how the Senate accepted an amendment from Senator Ben Clark, a Democrat, dividing Guilford County so as to avoid double-bunking two of their Democratic colleagues; one of those colleagues, Senator Gladys Robinson, testified before the General Assembly that she thought the amended map fairly divided Guilford County. (T p 735:4-19). (And yet Plaintiffs-Appellants' experts identify this as a partisan outlier.) No one has yet to credibly explain why a Democratic Senator would draw a pro-Republican district, an act that certainly never occurred in the decades Democrats in North Carolina controlled redistricting. On the House side, Representative Hall testified that he sought to change the districts as little as possible from Special Master Persily's court-ordered districts in *Covington* given the history of litigation over Guilford County, shifting a few precincts necessary to achieve population balancing because Guilford County added no seats. (T 762:17-763:7; Vol.5, Ex. pp 8919–9168). Again, no one has yet to credibly explain why Dr. Persily would draw a partisan gerrymander.

The record is replete with these and other reasonable, non-partisan explanations for the General Assembly's decisions. And Legislative Defendants' expert, Dr. Barber was the only expert who tried to control for these non-partisan explanations, by conducting his simulations on a county group by county group basis,

as the General Assembly did, and trying to investigate districts that were outside of the mathematical norms to see if there were other issues at play, like protecting incumbents, or preserving the core of previously judicially upheld districts. (T p 613, 631–33). These explanations—credited by the Panel and consistent with the Adopted Criteria—deserve significantly more weight than Plaintiffs-Appellants' simulations and demonstrate that the General Assembly followed its Adopted Criteria.

E. The Panel's Findings Concerning Partisan Intent and Effect Are Based on Flawed Evidence

The Panel demonstrated that trial courts are not capable of handling the political questions presented by gerrymandering claims. Its conclusion that the most transparent legislative redistricting in North Carolina history produced partisan plans—no different from the plans produced in past, secret redistricting processes—lacks any basis in competent evidence or common sense.

1. The Expert Analyses Were Fundamentally Flawed

Plaintiffs-Appellants' expert evidence was fundamentally flawed.

a. *Dr. Chen*. The Panel credited the testimony of Republican Senators that the 2021 Congressional Plan was based upon specific, non-partisan criteria. The enacted congressional maps promote traditional redistricting criteria in historically significant ways: "[o]nly two municipalities were split in the entire state." (FOF ¶ 105). "County, VTD, and community of interest divisions were minimized." (*Id.*). "The 2021 Congressional Plan divided 11 counties solely to equalize population." (*Id.*).

"VTDs were split only when necessary to balance population or keep municipalities whole, and a total of 24 VTDs were split." (*Id.*).

Despite these findings, the court below made an inconsistent finding that the 2021 Congressional Plan represents an "intentional, pro-Republican redistricting." (*See* FOF ¶ 482). The Court made this finding, which is itself inconsistent with its prior findings that the 2021 Congressional Plan was based upon non-partisan criteria, mostly relying on the expert testimony of Dr. Chen. Specifically, the Panel found that Dr. Chen "programmed his algorithm to follow the traditional districting principles mandated by the General Assembly's Adopted Criteria." (FOF ¶ 425). The Court's reliance on Dr. Chen's simulations is not based on competent evidence because of at least three flaws in Dr. Chen's simulations, each of which introduce bias into his simulations and undermine any notion that these simulations are a "neutral baseline" for comparison with the 2021 Congressional Plan.

First, Dr. Chen misinterpreted the plain meaning of the Adopted Criteria regarding county splits. Rather than minimizing the number of counties that are split, Dr. Chen's algorithm minimized the number of county splits. As a result, while the 2021 Congressional Plan only split 11 counties, Dr. Chen's algorithm split 13 counties. (Vol.5, Ex. pp 7177-7241; T p 57:12-17). Likewise, while the 2021 Congressional Plan contained 14 county splits, Dr. Chen's algorithms only contained 13 county splits. (*See id.*). Dr. Chen's misinterpretation of the county split criteria means his attempt at providing a "neutral baseline" to compare to the 2021 Congressional Plan fail. Both of these discrepancies would have impacted his

simulations in unknown ways, but likely in ways that made his simulations even more similar to the 2021 Congressional Plan than the simulations referenced in his report.

Second, Dr. Chen misinterpreted the plain meaning of the Adopted Criteria regarding VTD splits. Dr. Chen programmed his algorithm to meet the "mathematically minimum" number of VTD splits in the state. (T pp 57:22–58:1). However, the Adopted Criteria plainly do not adopt any mathematical minimum standards, and they do not state that VTDs should only be split when necessary for equalizing population. (FOF ¶54). Indeed, the legislative record contains significant evidence from the legislature about when and why VTDs were split, which occurred for one of two purposes, as Senator Daniel stated: equalizing population *or* keeping cities together. (*See, e.g.*, FOF ¶ 104(e)). While Dr. Chen claimed that it was "clear what the adopted criteria say" and that this was not simply "his interpretation" of the criteria, Dr. Chen admitted that he did not look at any the legislative record other than the Adopted Criteria, meaning he made no effort to ensure his simulations matched the interpretations of the General Assembly regarding the meaning of the Adopted Criteria. (T pp 58:2–59:4). By tethering his simulations to an absolute minimum of VTD splits, Dr. Chen ensured that his simulations would not provide a neutral baseline, but instead would exaggerate differences between the simulations and the 2021 Congressional Plan.

Third, related to Dr. Chen's ill-advised decision to program a mathematical minimum of VTD splits into his algorithm, Dr. Chen's algorithm did not control for

the splitting of municipalities in his original report in support of the Harper Plaintiffs-Appellants' Motion for Preliminary Injunction. He claims to have adjusted his algorithm in his 23 December 2021 Expert Report to allegedly "further increase the preservation of municipal boundaries." (T pp 67:19–68:16). However, a review of the native files of Dr. Chen's backup code show that the average of municipal splits across the congressional plans discussed in the report in support of the preliminary injunction was 13.864, while the average of municipal splits in his 23 December 2021 Report was 16.387—an increase of almost 2.5 *more* municipalities split after Dr. Chen supposedly attempted to increase preservation of municipal boundaries. (T pp 73:24–76:12). And more notably, both of Dr. Chen's reports include significantly more (between 11 and 14 more) municipal splits than the two municipal splits included in the Congressional Map. (Vol.5, Ex. pp 7177-7241). Accordingly, by reverting VTDs to a mathematical minimum of splits, Dr. Chen increased the number of municipalities split in his simulations, and once again ensured that his simulations would exaggerate differences with the 2021 Congressional Plan and not provide a neutral baseline.

If Dr. Chen had truly been interested in determining whether the General Assembly applied the Adopted Criteria in ways that advantaged Republicans, he would have applied the criteria as interpreted by the General Assembly rather than his own interpretations. Instead, Dr. Chen's analysis was focused on making seemingly minor—but actually significant—interpretive differences in his algorithm to ensure that his simulations differed sufficiently to support the conclusions he was

hired to provide. As a result of the bias introduced by Dr. Chen in programming his algorithms, any findings made by the Panel on Dr. Chen's testimony was not based on competent evidence, making such findings in error.

What's more, Dr. Chen's simulations—in spite of their flaws—still solidly produce at least 9 Republican-leaning districts, and in some simulations even produce 10 Republican-leaning districts. (R p 2362). Dr. Chen's algorithm drew 9 Republican-leaning districts almost 60% of the time and produced at least 30 simulated plans containing 10 Republican-leaning districts. (T pp 50:4–7; 50:13–17; 52:16–19). In other words, even where the congressional districts are drawn by computers purporting to provide a neutral baseline for comparison with the enacted congressional plan, it is possible to draw 10 Republican-leaning districts, and most simulations draw at least 9 Republican-leaning districts. Did Dr. Chen's algorithms have pro-Republican partisan intent when they simulated maps with 10 Republican-leaning districts? Certainly not.

More importantly, because Dr. Chen's simulations produce 9 Republican-leaning districts almost 60% of the time, a tenth Republican-leaning seat—which Dr. Chen's simulations were able to draw—is not an "extreme" outcome. Were the General Assembly to select from the maps drawn without partisan intent by Dr. Chen, they could still select a plan that produces 10 Republican-leaning seats. As recognized at various times by the Supreme Court of the United States, this Court, and emphasized by the Panel below, consideration of partisan advantage is constitutional. *See Rucho,* 139 S. Ct. at 2947 (explaining that "a jurisdiction may

engaged in constitutional political gerrymandering"); *Stephenson I*, 355 N.C. at 371-72, 562 S.E.2d at 390 ("The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions . . . ."). (COL ¶¶ 66–67). But Plaintiffs-Appellants' experts, including Dr. Chen, fail to control for an allowable amount of partisan advantage. (T pp 80:22–81:3).

Dr. Chen's simulations not only fail to demonstrate where partisan advantage turns from constitutional to unconstitutional, but also emphasize that the partisan makeup of the enacted congressional plans was capable of being produced without partisan intent. Accordingly, to the extent that the Panel's finding that the enacted congressional plan was the product of "intentional, pro-Republican partisan redistricting" relies on Dr. Chen's simulations, that finding is not based on competent evidence, and is contradicted by the sound, non-partisan explanations provided by the General Assembly.

b. *Dr. Pegden*. Dr. Pegden's analysis applied a number of purportedly minor "perturbations" to the enacted plan to create a comparison between the enacted plan and altered maps. Plaintiffs-Appellants claim that this comparison would reveal if the enacted plan is a "partisan outlier" compared to these altered maps. But such a comparative analysis only proves useful to a court if Dr. Pegden's altered maps could substitute for the enacted plan. Dr. Pegden's maps cannot, and he readily admits it. He was not trying to make "nice maps," (T p 278:12–16), he did not care whether his alternative maps could be passed by the legislature. (T p 280:6-15). Dr. Pegden flouted the non-partisan rules governing the General Assembly's map

drawing process including allowing his maps to split multiples of thousands in population in municipalities where the General Assembly's splits affected no one. (T pp 281:2–6, 284:1–7, 286:8–12, 288:3–8, Vol.6, Ex. p 11139). He did not even review the legislative record to understand the General Assembly's non-partisan goals in implementing the Adopted Criteria in the maps. (T p 291:9-20). He concedes that the Adopted Criteria do not contain "precise quantitative thresholds," that people can disagree "on whether the map satisfied the constraints," and that "many, many decisions" must be made to apply the criteria and create enacted plans. (T p 290:13-291:4). A statewide map can be altered in innumerable ways; why should we care that a mathematician is able to create a computer program that generates maps that flout the General Assembly's rules and cannot substitute for any enacted plan? It may be a fun school project, but it does not substitute for the General Assembly's or this Court's judgment.

Dr. Pegden never tried to run his analysis using stricter controls to more closely hew to the General Assembly's non-partisan goals (maybe he knew what would happen and avoided it altogether), (T p 297:18–22 ("I'm not dismissing the legislative process at all, except for the purpose of constraining my algorithm.")); he never tried to develop a control to measure how far off his "perturbations" were; he claims he ran "robustness checks" on his work but concedes he did not run them on his treatment of municipality splits, among other things (T p 286:3–7); and his maps would never pass the simple eye-test.

Dr. Pegden claims that his conclusions relied on "alternative maps that could be drawn in North Carolina satisfying the criteria." (T p 2505–12). But even a light review of his work shows that his alternative maps would not pass muster. For example, in the Forsyth-Stokes grouping, two House districts (indicated in magenta and black) appear to have point contiguity—meaning, they are connected with other parts of their district by a very narrow point—and the General Assembly would be hard-pressed to pass this map through a legislative body. Not to mention that it violates a criterion put forth by Senator Clark, a Democrat. *See Stephenson v. Bartlett*, 357 N.C. 301, 313, 582 S.E.2d 247, 254 (2003) (*Stephenson II*) ("This court finds that a district whose parts are "held together" by the mathematical concept of "point contiguity" does not meet the *Stephenson* criteria for contiguity . . . ."). This is just one example of "trillions" of maps drawn by Dr. Pegden; we can only guess how many other of Dr. Pegden's districts are contiguous by a point.

Forsyth-Stokes House Districts

Enacted Plan

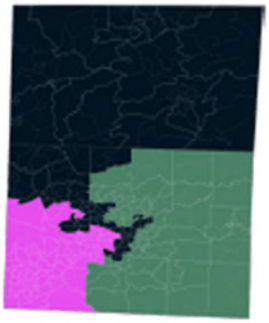
Pegden Alternative

Vol2, Ex. p 4543

In Guilford-Rockingham, one senate district stretches into a grotesquely elongated claw-like rake. Again, the General Assembly would be hard-pressed to pass this map through a legislative body.

Guilford-Rockingham Senate Districts

Enacted Plan
Vol2, Ex. p 4556



Pegden Alternative

To be sure, there are other weaknesses in Dr. Pegden's analysis—he used only one election in his county grouping analysis, (T p 289:4-19), when fellow experts espouse using many more. (T pp 207:22-208:8) ("We have very differing political climates from election to election, different elections to probe different things. So we wanted to use different elections to probe different things[.]") Dr. Pegden also argues over partial seats when no legislator is elected to anything other than a whole seat, (T pp 288:10–289:3)—but the terminal flaw in Dr. Pegden's analysis is that it does not do what he says it must: it does not create alternative districts that satisfy the General Assembly's criteria.

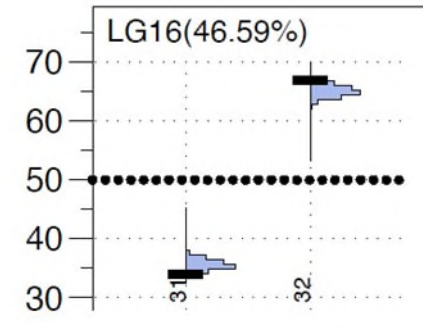
c. *Dr. Mattingly*. Dr. Mattingly's analysis fails to prove Plaintiffs-Appellants' case in a different way: it proves Legislative Defendants' case. First, like Dr. Pegden, Dr. Mattingly concedes that he did not employ the same non-partisan goals as the General Assembly, (T p 203:16-25), he did not review the public

legislative record when developing his simulated maps, (T p 196:8-197:9), and he concedes these decisions affect the results of his analyses. (*See, e.g.*, Vol.2, Ex. pp 4774–75 (showing that changing the municipal preservation rule alters the distribution of simulated plans)). Dr. Mattingly concedes that he "did not create his ensemble to comply with" any goals "not specifically enunciated in the criteria," but he also concedes that the criteria are "ambiguous" and his team "tried our best to – to interpret them as best we understood what they meant." (T p 206:108). These choices made up for a difference that was not quantified by Dr. Mattingly so if his analysis shows a difference of vote share in the 1 or 2% range between the Enacted Plan and the simulated maps, we cannot know how much of this difference is attributable to the choices of Dr. Mattingly or the purported "bias" of the General Assembly.

Dr. Mattingly also did not attempt to comply with any amendments passed during the legislative map-drawing. He conceded at trial that an amendment proposed by a Democratic legislator and adopted in the enacted plan was not protected in his analysis and, instead, registered as an extreme pro-Republican partisan outlier. (T p 198:13–203:15; Vol.5, Ex. p 7150).

But Dr. Mattingly protected certain of the General Assembly's decisions better than Dr. Pegden. For example, Dr. Mattingly accounted for population shifts in municipal splits where Dr. Pegden did not. And even though Dr. Mattingly did not protect non-partisan decisions made during the legislative process, his analysis shows that the Enacted Plan falls within the range of his simulations and rarely

changes the outcome of an election. (Vol.2, Ex. pp 4720–37). Specifically, where the enacted plan—indicated by a dash in Dr. Mattingly's graphs—falls within the distribution of simulated plans—indicated by a blue or orange box in Dr. Mattingly's graphs—that means that Dr. Mattingly's simulations created maps with the same vote share as the enacted plan. (Vol.2, Ex. pp 4721–25). A true "outlier" would be an instance where the enacted plan falls **outside** the range of the simulated plans and does not touch the blue or orange box. (*See id.*). An example from the Forsyth-Stokes Senate Grouping illustrates this issue:



(Vol.2, Ex. p 4778). In this histogram, the horizontal axis shows the districts in this county grouping and the vertical axis shows Democratic vote share in those districts for the 2016 Lieutenant Governor's race. (*Id.*). The bold dotted line represents 50%. (*Id.*). Dr. Mattingly shows the Democratic vote share in Senate Districts 31 and 32 for the enacted plan (indicated by a horizontal dash) at approximately 34% and 66% or 67%, respectively. (*Id.*). The blue boxes show the distribution of Dr. Mattingly's simulated plans; the longer the blue bar at a certain vote share the more maps in Dr. Mattingly's simulation hit that vote share for that district. (*See id.*). Here, the range of the distribution for Senate District 32 indicates that the Democratic vote share for

Dr. Mattingly's simulated plans in the most Democratic district in this county (District 32) ranged from around 53% to 70%; the Democratic vote share in the most Republican district ranged from about 32% to 45% in Dr. Mattingly's simulated plans. (*Id.*) Dr. Mattingly argues that because the Democratic vote share for District 31 is not directly on the longest bar in the distribution, the district is a partisan outlier. (*Id.*) But once a reader understands what Dr. Mattingly's histograms show it becomes clear that Dr. Mattingly bases this conclusion on the fact that District 31 would have 34% or 35% Democratic vote share in this election, and the longest bar in the distribution has 35% or 36%. (*See id.*).

This is not an isolated event. Dr. Mattingly's expert reports show that, far more often than not, Dr. Mattingly is arguing over 1 or 2 percentage points of vote share. Maybe this would matter if it changed electoral outcomes, but Dr. Mattingly's own analysis regularly shows that his simulated maps do not create a different electoral outcome in the county groupings. Using the Senate Forsyth-Stokes example, District 31 is going to elect a Republican no matter how you draw that district; District 32 will elect a Democrat (i.e., the entire distribution of simulated plans falls below or above the 50% line). (*See id.*).

That plans could have been drawn differently is a big "so what?" when Dr. Mattingly's own computer program creates maps with the same electoral make-up. And we will never know whether the Enacted Plans would more perfectly fit within Dr. Mattingly's demanding requirements if his simulated plans protected the General Assembly's non-partisan decisions.

Dr. Mattingly responds that he would "fail" any student who came to these conclusions. (T p 843:9–10). But, of course, Dr. Mattingly is not a political scientist, and politics is not a tidy math problem. (Vol.2, Ex. p 4826). What matters in political science is who won the election, not whether they won with 66% as opposed to 67% of the vote share. To be sure, there are close elections, but most of Dr. Mattingly's elections are not close.

What is clear from both Drs. Pegden and Mattingly's work is that when Plaintiffs-Appellants' experts created simulated maps that more closely hewed to the non-partisan criteria followed by the General Assembly, no surprise, the Enacted Plans fell within the range of simulated plans and rarely changed the outcome.

2. The Findings Were Fundamentally Flawed

Under N.C. Gen. Stat. § 120-2.3, a court invalidating Legislative or Congressional districts is obligated to identify districts that violate the Constitution and explain what the General Assembly must do to correct those errors. The Panel opined that certain districts were the result of "pro-Republican partisan redistricting." (See, e.g. FOF ¶140, 154). The Panel declined to define this term or explain how it reached this finding of fact. But it is telling that the language the Panel chose was not Plaintiffs-Appellants' proposed "extreme partisan gerrymander." To the extent this Court views this language as an invitation to take those findings and simply order the General Assembly to re-draw those identified districts, that's an invitation this Court should decline. First, this would violate N.C. Gen. Stat. § 120-2.3, and second, for the reasons enumerated below, these findings are not rooted in a

judicially manageable standard or equated to findings of an "extreme partisan gerrymander."

In support of this argument, Legislative Defendants submit the following analysis of the county groupings bearing the "pro-Republican partisan redistricting" label. The analysis below clearly shows how the Panel's findings would be deficient under N.C. Gen. Stat. § 120-2.3, and highlights the challenges posed to this Court in determining a judicially manageable standard for Plaintiffs-Appellants' partisan gerrymandering claims.

While the Panel identifies districts it found to be the result of "pro-Republican partisan redistricting" it did not account for its own findings that Legislative Defendants' explanation that districts found to be outliers had other non-political explanations, such as adopting districts that were previously judicially approved for the 2020 election, joining areas with common communities of interest, or respecting municipal lines. There is no explanation for the Panel's failure to account for this testimony, or how Legislative Defendants could "improve" on these districts. Nor does the opinion explain how the General Assembly can determine when a city must be divided to create more Democratic leaning districts or what percentage of a city may be permissibly maintained in one or multiple districts.

Plaintiffs-Appellants' experts 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 or a specific county group. Instead, they only offer compilations that score the maps based upon their self-selected political composite and then compare

the compilations to the enacted districts. Thus, it is impossible to evaluate whether maps drawn according to mathematics actually reflect maps that might have been selected by members of the General Assembly or whether any of the mathematical maps would make sense in the real world. For example, joining smaller cities that share a community of interest into the same district is not of act intentional extreme Republican partisan gerrymander. Time and again, the Legislative Defendants explained that many districts were based upon municipal lines or combining cities with similar communities of interest, such as Mint Hill and Matthews in Mecklenburg County or Wake Forest, Rolesville and Zebulon in Wake County. (FOF ¶108). To date, no one has offered a compelling legal reason why keeping these communities of interest together would result in impermissibly gerrymandered districts.

The Panel also failed to compare the enacted districts to the only plan offered by Plaintiffs-Appellants as a legal alternative—the NCLCV Optimized plan drawn by Mr. Hirsch and explained by Dr. Duchin. Mr. Hirsch admitted that his algorithm was specifically programmed to create Democratic districts where possible or to increase the Democrat percent in Republican districts, all in the name of symmetry. (T p 804:11-16; 807:11-24). Mr. Hirsch also testified that his algorithm was programmed to specifically consider race and to draw "effective black" districts, as he defined that term, where possible. (T p 808:9-810:23). This part of Mr. Hirsch's algorithm likely explains why his proposed map places the President Pro Tempore of the Senate, Phil Berger, a resident of rural Rockingham County, into a district with

the southern portion of Greensboro instead of more rural and unincorporated places that share obvious communities of interest with Rockingham. (T p 830:2-831:9).

Unlike Mr. Hirsch, the General Assembly did not use election data to draw a single district in the enacted plan. But under the approach followed by Mr. Hirsch, while Republicans cannot consider partisan impacts, it is perfectly permissible to require a map for the people of North Carolina based upon an algorithm that was intentionally programmed to favor Democrats.

But despite the Hirsch Algorithm being specifically programmed to favor Democrats, there are many examples where the NCLCV Plan would result in the same number of Republican leaning districts as the enacted plans in specific county groups. Typically, the only difference is the amount of the Democratic composite in a Republican district, which we know Mr. Hirsch intentionally increased in the name of symmetry. This raises the questions: under the claims alleged by Plaintiffs-Appellants, will the General Assembly not only be required to intentionally increase the number of Democratic districts, but also be required to increase the Democratic composite in Republican leaning districts? And more importantly, where is the Constitutional provision *requiring* the General Assembly to draw districts favoring a political party? And if it can be found, how can it be interpreted to only favor Democrats? And how is the General Assembly to determine the lawful percent of the Democratic or Republican vote share for any district? What elections are permissible to use? And for what years? How should this information be interpreted? These are all valid questions that no one—least of all Plaintiffs-Appellants' simulation

experts—have the answers to, as each used different elections for different years, and interpreted them in different ways.

Finally, Drs. Mattingly, Magleby and Pegden (and Dr. Chen for Congressional Districts) claim that the criteria they adopted for their algorithms is non-partisan. But that is not true. It is undisputed in the political science literature that Democratic voters tend to be more geographically concentrated than Republican voters. (T p 501; Vl. 5, Ex. pp 9514-9566). It is also undisputed that Democratic voters tend to live in urban areas at a much greater rate than Republican voters. (*Id.*). Dr. Chen has even written an article on this subject. *See* Jowei Chen and Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Quarterly Journal of Political Science 239–269 (2013), https://web.stanford.edu/~jrodden/wp/florida.pdf. Yet, none of Plaintiffs-Appellants' simulation experts even attempted to control their algorithms to account for the General Assembly's policy that cities shall be kept whole and in the same district where practicable. This is a classic example of how all algorithms may be programmed to get the result desired by the programmer, as Mr. Hirsch admitted "computers can't program themselves". (T p 803:6-10).

3. Specific Senate County Groupings

The Panel made factual findings that districts in 8 senate county groups constituted intentional, pro-Republican redistricting. For the reasons discussed below, the Court's findings for each county group are based on flawed evidence. Moreover, their findings demonstrate the wisdom of the Panel's holding that claims

for partisan gerrymandering are not justiciable under the North Carolina Constitution.

a. Wake-Granville Senate County Grouping

Wake and Granville County are combined to form Senate Districts 13, 14, 15, 16, 17 and 18. If the Court reviews an actual map of the Wake County Senate districts, all of them are geographically compact, drawn in a way that has several explanations besides politics, and simply do not look like gerrymanders. The Panel's findings of fact concerning these districts are internally contradictory. (FOF ¶ 243).

Initially in its opinion the Panel credited the contemporaneous legislative record, finding that this grouping was drawn to achieve a series of legitimate, non-partisan goals. The General Assembly "attempted to keep municipalities whole," and it maintained Granville County entirely within one district (SD 13). (FOF ¶ 108(l)). Other municipalities were maintained whole within districts: SD 13 contains Rolesville, Wake Forest, and Zebulon; SD 14 contains Garner, Knightdale, and Wendell; SD 17 contains Holly Springs and Fuquay-Varina. (FOF ¶ 108(l)(a)-(b)). Raleigh, meanwhile, is too large to be contained solely within one district. (FOF ¶ 108(l)). In the face of this challenge, the General Assembly attempted to maintain communities of interest within Raleigh: one community of interest comprising "portions of southeast and downtown Raleigh" was drawn into SD14; another comprising the "western part of Raleigh, portions of downtown Raleigh, and portions of east Cary" was drawn into SD39. (FOF ¶ 108(l)(b)-(c)). All of these are sound, non-partisan redistricting goals, and the Panel did not conclude otherwise. (*Id.*). A visual

inspection of the districts reveals them to be compact, common-sensical from a visual perspective, and the product of traditional redistricting principles. (R p 3098).

Inexplicably, the Panel, subsequently concluded that the Wake County districts represent "pro-Republican partisan redistricting." (FOF ¶ 246). In reaching this conclusion, the Panel ignored its prior findings of the non-partisan legislative goals that explain the location of the lines for the challenged districts. The Panel's failure to account for its own prior factual findings undermined its conclusion that the districts were instead the product of intentional, pro-Republican redistricting and rendered its decision internally contradictory.

For example, the Panel complained that "most of Raleigh's few Republican-leaning VTDs [are] included in Senate District 13, in the north," (FOF ¶ 273), but it failed to refer back to its own factual findings that the General Assembly had no choice but to split Raleigh and attempted to preserve communities *within* Raleigh in doing so. (FOF ¶ 108(l)). The Panel failed to consider the likelihood that communities of interest would align with partisan identity, and, in any event, its finding fault with the General Assembly's joining contiguous neighborhoods "in the north" of the city within a district is baffling: that is a sound redistricting decision. Should the General Assembly have carved up "the north" of the city in an illogical way just to avoid the accusation of partisan intent? Would that not itself have been cited as evidence of partisan intent? The Panel's failure to consider *its own findings* regarding this and other non-partisan goals rendered it incapable of reaching the finding of "pro-

Republican" redistricting, because these non-partisan goals explain the partisan impact of which Plaintiffs-Appellants complain.

The Panel relied on expert opinion sponsored by Plaintiffs-Appellants but failed to explain why their opinions supersede the General Assembly' own explanation for its redistricting—*which the court credited*. And these methodologies were all flawed.

The Panel began by referencing maps prepared by Dr. Cooper which purport to show the political lean of VTDs within a district. (FOF ¶ 234). These maps only overlay elections data from two elections: the 2020 Attorney General and Commissioner of Labor races. There is no evidence that the General Assembly looked at this data (or any partisan data), so it provided no basis from which to infer partisan intent (which Dr. Cooper admitted his analysis does not show).[23] Furthermore, these maps show partisanship *normalized by acreage*—meaning some areas of the state with strong partisan leanings that are less densely populated appear to be competitive VTDs. In reality, Dr. Cooper's maps do not differentiate between when a district is shaded lighter due to population density or due to closer to even partisan split within the VTD. From the start, the court's reliance on Dr. Cooper's report was flawed—and so was everything that followed.

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[23] Dr. Cooper in particular does not analyze or opine on the intent of the mapmakers in his report, despite his definition of partisan gerrymandering including intent. (T pp 89:19-22; 111:4-11). Dr. Cooper admitted this in deposition and was impeached with that testimony when he attempted to offer opinions as to mapmaker intent. (T pp 111:12-112:14). Accordingly, any analysis that Dr. Cooper provides that suggests he understands or opines about the intent of the mapmakers is fundamentally unsound.

Based upon this report, the Panel concluded that Republican leaning VTDs in northern Wake were included with Granville County to create a Republican leaning SD 15. (FOF ¶ 236). But combining the northern portions of Wake County to form a district with Granville County makes perfect geographic sense. And, as explained, the configuration manifests the advertised non-partisan purpose of "attempt[ing] to keep municipalities whole, while splitting as few precincts as possible," which was successfully accomplished in the enacted plan. (FOF ¶ 108(l)(e)). Indeed, it is apparent from these maps that that SD 13 was drawn to include three smaller cities with obvious communities of interest (Wake Forest, Rolesville and Zebulon), which is affirmed by the legislative record and the Panel's own findings of fact. (FOF ¶ 108(l)(e)). Similarly, Dr. Cooper and the Panel ignore that SD 17 is geographically compact and drawn to place smaller cities with similar communities of interest in the same district located in southern Wake County. (*Id.*). If the General Assembly had chosen differently, Dr. Cooper could have found *something* to criticize.

Next, the Panel relies upon Dr. Mattingly's ensemble analysis, based upon 12 elections selected by Dr. Mattingly to compare a summary of his simulations with the enacted plan.[24] (FOF ¶239). The Panel relied upon Dr. Mattingly's conclusion that Democratic voters were "cracked" out of SD 13 and SD 17 to make those districts more Republican and then packed into Democratic leaning districts. (FOF ¶ 241). Nowhere in its opinion does the Panel give a definition for either term or a standard

[24] While Dr. Mattingly uses 16 elections in his overall ensembles, he chose to analyze county groupings under 12 of those elections that he hand-picked. (Vol. 2, Ex. pp 7420-7825).

for the General Assembly to use to avoid allegedly illegal cracking or packing. Nor does the Panel explain how any alleged violation related to SD 13 and SD 17 can be remedied without cracking Republican voters out of those districts and submerging them into a more Democratic district where they have no chance to elect their candidate of choice.

As we have explained, Dr. Mattingly did not produce actual maps from which his simulated districts for Wake-Granville could be compared from a commonsense perspective. Nor did he attempt to restrict his simulations so that the General Assembly's decisions concerning the divisions of cities, or the combination of cities, would be similar to the divisions of cities made by his simulations. Again, the Panel made findings that numerous non-partisan goals were achieved, and Dr. Mattingly's method provides no basis to conclude that any alleged partisan effect of the plans is the result of anything other than these nonpartisan goals. Dr. Mattingly did attempt to control for cities after this disparity in his initial report came to light, but he constructed his own method for doing so instead of attempting to follow the criteria adopted by the General Assembly. Maps using these new controls for the division of cities, instead of the actual criteria used by the General Assembly, represents a serious flaw in Dr. Mattingly's efforts to make a proper comparison of his simulations to the enacted districts. As Plaintiffs-Appellants' own expert, Dr. Chen, testified, following the General Assembly's actual criteria is key to ensuring that the court compares apples to apples. (T pp 48:3-48:17; 55:25-56:3).

An analysis of this group also demonstrates how algorithms can be manipulated to obtain the desired result of the programmer. Dr. Mattingly cherry picks twelve elections, two from 2016 and ten from 2020. Excluded from his ensemble are the 2016 general election for Commissioner of Agriculture, won by the Republican candidate with 55.56% of the vote, or the 2016 election for Commissioner of Labor, won by the Republican candidate with 55.19% of the vote. Use of these elections in Dr. Mattingly's simulations would have likely provided two more elections where his simulations produced Republican leaning districts for SD 13 and 17.

Relying primarily on the 2020 elections also helped Dr. Mattingly reach his desired result. As a review of the Panel's decision will show, almost all of the disputed districts are located in urban areas of North Carolina. It is well known that former President Trump lost significant support in the urban and surrounding suburban areas in 2020 as compared to 2016. *See,* William H. Frey, *Biden's victory came from the suburbs*, Brookings (Nov. 23, 2020), https://www.brookings.edu/research/bidens-victory-came-from-the-suburbs/. Dr. Mattingly demonstrates this by showing a drop in the Trump voter percent by over 1% from 2016 versus 2020. Dr. Mattingly also shows that the majority of his simulations would establish both SD 13 and 17 as Republican districts under the 2016 presidential results. Thus, if Trump had received the same level of support in 2020 as he did in 2016, the compilation for Dr. Mattingly's simulations easily could have again shown SD 13 and 17 as Republican leaning. The changes in support for Trump shows that voters are not robots programmed only to vote for one party or the other. Instead, the candidate and the particular issues at

play in a specific election matter greatly to voters, and how voters in the same geographic area can change their opinion on the same candidate. This highlights just how speculative expert partisan scoring metrics are, and how, depending on the elections used, the simulation results can vary wildly.

Another problem regarding the Panel's factual findings concerns the margins predicted by Dr. Mattingly's simulations. Under the 2020 elections selected by Dr. Mattingly, five of the elections under his ensemble comparisons show the Republican-Democratic composite for SD 13 and 17 at nearly 50%. The slight differences between enacted SD 13 and 17, are further demonstrated by comparing them to the districts drawn by Mr. Hirsch. Keeping in mind that Mr. Hirsch programmed his algorithm to benefit Democrats, his map produces a senate district in northern Wake-Granville Counties that closely resembles enacted SD 13 and which has a Democratic composite of only 50%. This compares with the 48% Democratic composite in enacted SD 13. Similarly, the NCLCV SD 17, whose geography significantly overlaps enacted SD 17 in southern Wake County, has Democratic composite of 51%, as compared to the Democratic composite of enacted SD 17 (49%). (R p 3098). No one has yet to credibly find that this 2% difference is an "extreme" gerrymander. Rather it is likely that most experts would consider this district "competitive" or even "hyper competitive." *See* Michael P. McDonald, *Drawing the Line on District Competition*, 39 Political Science and Politics 1, pp. 91–94 (2006) (describing competitive districts as plus or minus five percent in a composite score, and plus or minus two as hyper-competitive); Gary C. Jacobson, *The Marginals Never Vanished: Incumbency and Competition in Elections*

to the U.S. House of Representatives, 1952-1982, 31 American Journal of Political Science 1, 129 (1987) (describing competitive districts as either 10% or 20%).

Even assuming Plaintiffs-Appellants have a justiciable claim, which they do not, the question is whether the facts demonstrate that SD 13 or 17 constitute "extreme partisan gerrymanders", not whether they slightly favor Republican candidates or are "intentionally pro-Republican districts." It is hard to imagine how SD 13 and 17 are a product of illegal pro-Republican intent when they so closely correspond to districts drawn by the Hirsch Algorithm. But if so, this further begs the question—what must the General Assembly do to fix these districts? Adopt the NCLCV Plan that was drawn according to an algorithm intentionally programmed to help Democrats? Or draw districts to exactly match the average scores for Dr. Mattingly's cherry-picked elections? How would either solution be any less partisan than the General Assembly's allegedly illegal conduct?

b. Cumberland-Moore Senate County Grouping

All the same issues with the Panel's factual findings for Wake-Granville Group apply to SD 19 and 21 in the Cumberland-Moore group. Initially the Panel credits the Republican Senators non-partisan justification for SD 19, i.e., that the district be drawn to encompass as much of Fayetteville as possible. (FOF ¶ 108(m)). It then ignores this finding in making its contradictory finding that these districts are the result of intentional, pro-Republican partisan districting. (FOF ¶¶ 247–256).

This grouping also demonstrates one of the biggest flaws in Dr. Cooper's analysis: he admittedly failed from the outset to review a fundamental indicator of legislative intent – the words of the legislators themselves contained in the legislative

record. (T p 112:16-20). If he had reviewed the legislative record, he would have seen the "detailed record of the stated purposes of the configurations of the 2021 districts" which the Panel found in its judgment. (FOF ¶¶ 103–112). Like the Panel's inconsistent factual findings, Dr. Cooper's observations in his report and testimony conflict with those stated, non-partisan objectives. (*Compare* T pp 104:10-105:4 (opining that Senate Districts 19 and 21 in the Moore-Cumberland Grouping were "split in a way that is very advantageous for the Republicans to secure victory in 21" and that "the split in 19" that splits Fayetteville "wasn't because they were somehow trying to respect municipal boundaries") *with* FOF ¶ 108(m) (explaining that SD 19 "was drawn to encompass as much of Fayetteville as possible" but that "the Committee was unable to keep all of Fayetteville together" due to Fayetteville's irregular shape")).

The rest of Plaintiffs-Appellants' experts similarly do not account for the goal of the General Assembly to keep as much of Fayetteville as possible in one district. Despite the testimony of Plaintiffs-Appellants' experts, all of Dr. Mattingly's ensemble show SD 19 as an extremely strong Democratic districts and SD 21 as an extremely strong Republican District. (FOF ¶ 252). The map generated by the Hirsch Algorithm to increase Democrat representation created two districts that are *identical* to the enacted SD 19 and SD 21. (R p 3059). It is irrational to make a factual finding that SD 21 is an intentional pro-Republican district, much less an extreme partisan gerrymander, as argued by the Plaintiffs-Appellants.

c. Guilford-Rockingham Senate County Grouping

Once again, the Panel ignores its initial factual finding that the General Assembly intended to keep as much as possible of the population of Greensboro (96%) within SD 27 and 28. (FOF ¶ 108(r); R p 3083). While the Panel acknowledges that the enacted versions of these districts are based upon an amendment sponsored by a Democrat Senator, it omits discussion of this fact when making its factual findings for this group. (FOF ¶ 109; *see also* FOF ¶¶ 257–67).

Under Dr. Barber's analysis, enacted SD 26 has a Democratic composite of only 37%. (R p 3085). But in its factual findings, the Panel ignores that almost all of Dr. Mattingly's simulations create SD 26 with a Republican majority composite that corresponds to Barber's calculations. (FOF ¶ 261). This begs yet another question regarding many of the Panel's factual findings on the legislature's intent— how is the General Assembly (or the Court) to determine when the percent Republican in a Republican leaning district represents permissible intent versus the percent Republican that is impermissible?

Also ignored by the Panel is the political composite of the NCLCV version of SD 26. The "non-partisan" Hirsch Algorithm flips SD 26 from a Republican leaning district into a 52% Democratic district. (R p 3085). The Hirsch Algorithm accomplishes this reduction of the Republican composite by ignoring the General Assembly's policy decision (made with the support of Democrat Senators) to keep 96% of Greensboro in two districts. (FOF ¶ 108(r); R p 3083). In contrast, the NCLCV Plan included 20% of southern portion of Greensboro, an area that has little if anything in common with rural Rockingham County, in its version of SD 26 (labeled SD 30 in the

NCLCV Plan). This violated the policy of the General Assembly to keep the populations of cities in as few as districts as possible. No doubt, the NCLCV version of SD 26 was the result of the Hirsch Algorithm being programed to use race to create "effective" black districts (25% BVAP and 75% Democrat win rate in statewide elections), as well as increasing Democrat percentages in the name of symmetry.[25] Using Plaintiffs-Appellants' terminology, the Hirsch Algorithm "cracks" Republican voters out of SD 26 and submerges them into heavily Democratic districts.

The evidence in Guilford County also gives an example of where Plaintiffs-Appellants' experts gave conflicting testimony, rendering it irrational for the Panel's reliance on those experts for its factual finding that the districts are the product of intentional pro-Republican districting. Only one of the twelve elections used by Dr. Mattingly (2020 Governor) produce a majority of simulations for SD 26 that lean Democrat. For the other eleven of the elections used by Dr. Mattingly, his simulations create a majority of simulated maps that create SD 26 as majority Republican. Under the test Dr. Mattingly applied to the enacted districts, the allegedly "non-partisan" NCLCV version of SD 26 would certainly be defined by Dr. Mattingly as an extreme partisan outlier.

Lastly, the Panel fails to explain how it could make a factual finding that District 26 is an intentional, pro-Republican district when it is based upon an amendment offered by Democratic Senator Ben Clark and supported by the Guilford-

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[25] In fact, intentionally drawing a district to include a targeted racial population is illegal absent proof that any such district is required by Section 2 of the Voting Rights Act. *See infra* part III.

based African-American Senator, Gladys Robinson. (FOF ¶ 76). It would be utterly irrational to conclude that the General Assembly intended to draw SD 26 as an intentional, pro-Republican district based upon the undisputed fact that a Democratic Senator is responsible for the enacted configuration. (FOF ¶ 109).

d. Forsyth-Stokes Senate County Grouping

The enacted SD 31 and 32 are drawn in a county group consisting of Forsyth and Stokes Counties. Winston-Salem is too large to be wholly included in a single district. In again recognizing the General Assembly's policy on municipalities, the Panel initially credited the legislative testimony by Republican senators that SD 32 was drawn to encompass 84% of the population of Winston-Salem, and that SD 31 was drawn to wholly encompass smaller cities located within this group. (FOF ¶ 108(t)). As discussed, none of Plaintiffs-Appellants' experts attempted to program algorithms that respected the General Assembly's policy choices for this group.

Under Dr. Barber's analysis, the Democratic composite for enacted SD 31 is 38%. (R p 2118). The composite for SD 31 under Dr. Barber's approach is very close to the Democratic composite calculated by Dr. Mattingly under all of his selected elections. (FOF ¶ 274). The Panel's reliance on Dr. Mattingly to find this group is a product of intentional, pro-Republican districting, again means that somehow the General Assembly must discern when a Republican leaning district is too heavily Republican versus when, like the porridge eaten of the three bears, the Republican percent is "just right."

The Hirsch Algorithm uses a different county group to form districts centered in Forsyth County—namely Forsyth and Yadkin. (R pp 3135–40). Under Hirsch's

algorithm, his Senate District 32 corresponds to enacted SD 31. In contrast to the Democratic composite of 38% calculated for SD 31 by Dr, Barber, the NCLCV equivalent of enacted SD 31 (NCLCV SD 32) has a Democratic composite of 49%. (R p 3139). The Hirsch Algorithm achieves his higher pro-Democrat composite by completely ignoring the General Assembly's policy on municipal lines. Instead, the two districts drawn by the Hirsch Algorithm for this group roughly contain equal portions of Winston-Salem. (R p 3136).

No doubt, the NCLCV split of Winston-Salem was the result of Mr. Hirsch programing his algorithm to draw more heavily Democratic districts in the name of symmetry. Again, using Plaintiffs-Appellants' language, the Hirsch Algorithm accomplished this result by cracking Republicans out of a district where they could elect their candidate of choice (enacted SD 31 or SD 32 under the NCLCV Plan) and submerging them in another district. Literally none of Dr. Mattingly ensemble simulations produce a majority of simulations with a 49% Democratic composite. (FOF ¶ 274). Thus, under the test used by Dr. Mattingly, the NCLCV Plan's version of SD 31 constitutes an extreme partisan gerrymander.

e. Iredell-Mecklenburg Senate County Grouping

There can be no serious contention that enacted SD 37 constitutes neither an intentional pro-Republican district, much less an extreme gerrymander. The NCLCV version of this district (NCLCV SD 34) is identical to the enacted version with both having a Democratic composite of 36%. (R p 3105). For Dr. Mattingly's simulated equivalent of SD 37, all of his simulated plans result in a majority of districts that are strongly Republican. (FOF ¶ 287).

Under the enacted plan, SDs 38, 39, 40, and 42 are all very safe Democratic districts with a Democratic composite in each of them of 65% or higher. (R p 3105). The only genuine issue concerns enacted District 41, which for Republicans is, at best, a tossup district (R p 3105).

Under Dr. Mattingly's analysis, the partisan composite for SD 41 is within the range of his simulations for four elections. The composite is an outlier of his simulations for ten of the elections he uses. (FOF ¶ 287). The Hirsch Algorithm created his version of SD 41 to have a Democratic composite of 53%. (R p 3105). The Panel initially credited the legislative testimony of Republican Senators that SD 41 was drawn for the non-political reason of joining two very similar cities, Mint Hill and Matthews, located in southeastern Mecklenburg County, in the same district. But neither Dr. Mattingly, Mr. Hirsch, or subsequently, the Panel account for this legitimate, non-partisan, policy decision of the General Assembly. (FOF ¶ 108). Anyone with knowledge of this area of Mecklenburg County would understand that these two cities overlap much in the same way as the formerly separate cities of Fuquay and Varina in Wake County or Minneapolis and St. Paul in the state of Minnesota. Because of the obvious shared community of interests between these two cities, cracking them into strong Democratic districts would provide compelling evidence that these communities were intentionally split to benefit Democrats.

Further, notwithstanding the results projected by Plaintiffs-Appellants' experts, the Mecklenburg-Iredell group provides a good example of the utterly inconsistent nature of Dr. Cooper's report. Replete in Dr. Cooper's report are

allegations that the enacted plans regularly cracks and packs Democrats, though his report never provides a definition for either term. Dr. Cooper's VTD map for Mecklenburg County, (FOF ¶ 281), shows the hypocrisy of Dr. Cooper's politically loaded rhetoric. This map indeed shows that Republican VTDs located in Mint Hill and Matthews were included in District 41. But notice how Dr. Cooper strategically places a district number over highly Republican VTDs located in the heart of Charlotte. These Republican VTDs easily could have been included in SD 41 but the General Assembly choose not to do so, and instead assigned them to the heavily Democrat SD 42. If the General Assembly really intended to draw an extreme partisan gerrymander—whatever that term means—it would have removed these VTDs from SD 42 and placed them in SD 41 to increase the Republican margin in that district. It did not do so based upon its policy decision to keep as much of Charlotte as possible in the fewest possible number of districts. (FOF ¶ 108(w)).

Of course, Dr. Cooper did not understand this because (1) he made no effort to determine legislative intent or review the legislative record to assess the intent stated by the legislature (T p 112:16–20), (2) he offers no alternative maps (T p 136:8–10), and (3) he has no suggestions for the Court on how the districts could have been drawn differently (T p 137:3-5). Moreover, under Dr. Cooper and Dr. Mattingly's theories, and using the terminology they apply to hypothetical Democratic districts, the General Assembly should have cracked the contiguous VTDs now found in SD 41 and then submerged those voters into Democratic districts.

There is no possible rational reason, much less any support in the North Carolina Constitution, to require the General Assembly to crack Republican voters based upon theories of state-wide proportional representation or symmetry.

f. Northeastern Senate County Grouping

Senate Districts 1 and 2 are based upon lawful county groups as provided by *Stephenson*. They are based upon whole counties. No neutral observer would look at these districts and describe them as gerrymanders. Initially in its opinion, the Panel credited the legislative testimony by Republican Senators that SD 1 and SD 2 were based upon several communities of interests explained to the General Assembly during public hearings. This included a request to keep as many as possible of North Carolina's "finger counties" located on the state's northeastern border with Virginia in the same district. (FOF ¶ 108(a)). Thus, the Panel credited that SD 1 and SD 2 are both based upon specific communities of interest, not on politics. The Panel subsequently made a completely inconsistent factual finding that SD 1 and 2 constituted intentional pro-Republican partisan districts. (FOF ¶ 300). The Panel inexplicably based this finding solely upon a report by Dr. Mattingly showing the Republicans would win the two districts formed by two county groups adopted in the enacted plan.

Assuming the accuracy of Dr. Mattingly's political analysis, it is irrational to find that the constitutionally legal county groups adopted by the General Assembly are intentional, pro-Republican districts, simply by comparing those two groups to a different grouping combination known to favor Democrats. Nor is it rational to remedy an intentional Republican district with an intentional Democrat district. If

Democrat voters have been injured by the two groups chosen by the General Assembly because they will both elect Republicans, then Republican voters assigned to one of the two allegedly remedial districts, preferred by Plaintiffs-Appellants and used by the Panel to support its factual findings, will suffer the exact same injury as Democrat voters who are assigned to Republican districts under the enacted districts.

g. Buncombe-Burke-McDowell Senate County Grouping

The Panel found that the two districts within this group, SD 46 and 49, are the results of intentional pro-Republican partisan redistricting. The Panel once again ignored its initial factual finding crediting the General Assembly's non-partisan explanation for these districts. (FOF ¶ 108(z)). SD 46 includes all of Burke and McDowell Counties and wholly includes many of the smaller towns in Buncombe County. SD 49 consists of the rest of Buncombe County and, in particular, the entire cities of Asheville, Biltmore Forest, and Weaverville. (FOF ¶ 108(z)). The question remains: Does the North Carolina Constitution require that these three cities be split into different districts solely because an invisible penumbra obligates the General Assembly to draw more Democratic districts at the expense of Republican voters?

A review of the VTD map offered by Dr. Cooper demonstrates that these districts made sense and that the General Assembly did not draw the most Republican district possible. (FOF ¶ 301). Dr. Cooper's VTD map shows that SD 49 is an extremely compact district which results in several Republican VTDs being submerged into this Democratic district. Using Plaintiffs-Appellants' rhetoric, Republican voters in enacted SD 49 already do not have an "equal opportunity" to elect "candidates of choice" as compared to Democratic voters who reside in that same

district. Dr. Barber's analysis also shows that his map-drawing algorithm, that respects the General Assembly's decision to keep cities in the same district to the greatest extent possible, results in simulated maps for this group with one Republican district and one Democratic district. (R p 3111).

Under Dr. Barber's analysis, SD 46 has a Democratic composite of 37% while SD 49 has a Democratic composite of 65%. The "non-partisan" NCLCV Plan uses a different county group for Buncombe which includes Henderson and Polk Counties. (R p 3123). Under the NCLCV Plan, the Republican leaning district (NCLCV SD 48) includes Henderson, Polk, and parts of Buncombe. The enacted SD 48 leans Republican, like enacted SD 46, but has a greatly increased Democratic composite of 49%. No doubt, this result was the product of Mr. Hirsch's symmetry function which was intentionally designed to favor Democrats. To either flip districts from Republican to Democrat, or to significantly increase the Democrat composite, Mr. Hirsch's algorithm dictated that Asheville be split roughly in half between his two proposed alternative districts. (R p 3127). The question remains, if a policy decision to keep cities wholly or mostly with the same districts is an indication of political intent, how is the intentional decision to split cities to obtain symmetry for Democrats not equally intentionally partisan?

4. Specific House County Groupings

a. Guilford House County Grouping

The Panel's findings on enacted House districts, including Guilford County House districts, are just as contradictory as the Panel's findings regarding Senate groups. It its initial findings of fact, the Panel credited the testimony of Republican

House leaders finding that the House made every effort to keep the previous districts recently approved by the Panel in 2020. (FOF ¶ 111(e)). The Panel also credited the testimony of Republican House leaders that every effort would be made to keep municipalities wholly within the fewest number of districts. (FOF ¶ 111(e)). The Panel also credited the testimony by Republican Representatives that the 2020 versions of districts in Guilford County would be almost wholly retained with the only required modification involving the exchange of a few number of precincts to maintain equal population. (FOF ¶ 112(c)).

The Panel subsequently completely ignored its initial findings in making a ruling that House districts in Guilford were intentional, pro-Republican districts. (FOF ¶¶ 310–21). The court cites to opinion testimony by Dr. Cooper that Greensboro and High Point were divided in order to keep "most" Democrat VTDs out of enacted House HD 59 and 62, both of which lean Republican. (FOF ¶ 313; R p 3028). Of course, all that Dr. Cooper is actually observing is proof of the General Assembly's non-partisan criteria to respect municipal lines and to keep cities wholly within the fewest number of districts as possible. (FOF ¶ 111(e)).

Because the General Assembly followed its criteria on municipal lines, a visual review of the Guilford County enacted House plan shows that the shapes of the districts make sense. Greensboro is located roughly in the center of Guilford County. As a consequence, basing districts on municipal lines inevitably will result in the remaining districts being drawn on the periphery of Guilford. (FOF ¶ 313; R p 3028).

In this portion of its decision below, the Panel ignored its prior factual finding crediting the testimony by Republican House members that the Guilford districts were left alone because of past litigation. (FOF ¶ 112(c)). The evidence before the Panel conclusively demonstrated that the lines for 2021 districts in Guilford are almost identical to the House districts approved by the Panel and then used in the 2020 general election. (FOF ¶ 112(c); R pp 3027-28). If the General Assembly was guilty of intentional pro-Republican partisan redistricting, then the courts that previously approved these districts is equally culpable. It belies reason that districts that were acceptable for legal remedial plans are now suddenly invidious gerrymanders.

Both Dr. Barber's simulations and the Hirsch Algorithm call for the drawing of at least one Republican district in Guilford County. (*See* R p 3029). Under Barber's analysis, the Guilford County configuration of the enacted House plan creates four Democrat seats and two Republican seats. (R p 3030). Only a very few of Barber's simulated plans for Guilford create two Republican leaning seats. Barber explains that this one seat disparity between the enacted plan and his simulations is the result of the General Assembly re-adopting the court approved districts. (R pp 3027–28).

But this difference between the number of simulated verses actual districts, raises another serious question about the justiciability of Plaintiffs-Appellants' claims and the arbitrary and partisan nature of Plaintiffs-Appellants proposed standard. If proportionality or symmetry are invisible penumbras of the North Carolina Constitution, then why should those concepts be applied only on a statewide

basis? As explained by Dr. Barber, 39% of the voters in Guilford are Republican. (R p 3026). Therefore, under the same standards advocated by Plaintiffs-Appellants to test state-wide districting plans, 39% of the six districts in Guilford House Districts (or two districts) should be drawn to favor Republicans.

There is only one logical explanation for applying symmetry or proportionality statewide but not within groups. Mandating state-wide symmetry will increase the number of Democratic districts. The only reason for not applying these standards within county groups is that doing so would protect Republican voters in urban counties like Guilford. Requiring symmetry statewide to benefit Democrats without also requiring the same test within county groups cannot possibly pass muster under the federal or state equal protection standards.

b. Buncombe House County Grouping

In its initial finding on Buncombe County House districts, the Panel credited the testimony by Republican Representatives that districts in Buncombe were drawn to keep the highest percentage of Ashville as possible in the fewest number of districts. (FOF ¶ 112(e)). The Panel ignored that factual finding when it found that the House districts in Buncombe were the product of intentional, pro-Republican districting. (FOF ¶¶ 322–33).

The Panel relies on Dr. Cooper's opinion of what constitutes cracking or packing of Democratic voters to conclude that the Buncombe House districts are the product of intentional pro-Republican partisan redistricting. (FOF ¶ 333). The court adopted this position without considering the corollary—does the remedy sought by

Plaintiffs-Appellants require that Republican voters in Buncombe be cracked out of a district where they can elect a candidate of choice?

This question is clearly answered by Cooper's VTD map. (FOF ¶ 322). First, the enacted districts make geographic sense. All three districts are compact. No neutral observer would describe these three districts as gerrymandered based upon a visual review of them. In the enacted plan, the General Assembly placed over 86% of Asheville in House Districts 114 and 115. In contrast, in the name of symmetry, Hirsch's algorithm once again divides Asheville in a way to benefit Democrats. He accomplishes his goal by dividing Asheville into all three districts at nearly equal proportions. (R p 2966). This is a classic example of the "pizza pie" technique to establish Democratic gerrymanders. It is standard practice for Democrats to divide equal parts of a city into different districts to submerge Republican voters residing in suburban or rural areas. This approach fails to consider municipalities as valid communities of interest—an approach that belies all logic. As clearly shown by Dr. Cooper's VTD map, to create all three House districts as Democratic districts would require the cracking of Republican voters in more rural areas—under the same definition of cracking used by Plaintiffs-Appellants.

The results of Mr. Hirsch's "non-partisan" algorithm again demonstrates how Plaintiffs-Appellants have conveniently ignored Committee's criterion that municipalities be kept wholly a district or the fewest number of districts. (R p 2966).

c. Mecklenburg House County Grouping

In its initial factual findings, the Panel credited the testimony of Republican House leaders that an effort was made to keep the same House districts in

Mecklenburg as those that were approved by the Panel in 2020. (FOF ¶ 112(b)). The Panel also credited testimony that the cities of Mint Hill and Matthews were combined in the same district, as had been done by the Senate for SD 41. (FOF ¶¶ 108(w)(e), 112(b)). The Panel once again ignored these initial findings when it ruled that House districts in Mecklenburg were the result of intentional, pro-Republican districting. (FOF ¶¶ 334–44).

The enacted House plan for Mecklenburg creates two districts that slightly lean Republican with a Democratic composite of 47%. (R p 3039). Like the enacted map, Dr. Barber's study demonstrates that controlling for municipal boundaries results in two Republican Mecklenburg districts in the majority of his simulations. (R p 3040). Further, the two Republican House districts in the enacted plan have Republican composites almost identical to two similar Republican districts created by the NCLCV "non-partisan" plan. (R p 3039). The NCLCV Plan's two Republican districts, validate Dr. Barber's study, despite the fact that the Hirsch Algorithm was programmed to draw Democratic districts wherever possible in the name of state-wide symmetry

Next, the court below ignores obvious conclusions that must be drawn from Dr. Cooper's VTD map. (FOF ¶ 334). One of the Republican leaning districts, HD 98, is located in northern Mecklenburg. A visual inspection of Dr. Cooper's maps shows that the General Assembly could have replaced a Democratic leaning VTD in HD 98 with a more neutral VTD that is adjacent to the enacted district. A similar pattern is easily observed by a visual assessment of HD 103, the only other Republican district

in Mecklenburg. This district is located in southeastern Mecklenburg and was not drawn to include adjacent Republican VTDs located in two Democratic performing districts, HD 104 and 105. (FOF ¶ 334; R p 3039). The General Assembly could have drawn both of these districts to be stronger Republican districts but chose not to do so because of its criteria regarding municipal lines.

d. Pitt County House Grouping

Once again, the Panel initially credited the testimony of Republican House members that two House districts in Pitt County were drawn so that one of the districts would include as much of Greenville as possible. (FOF ¶ 112(d)). Once again, the Panel ignored this finding when ruling that the two districts in Pitt County are the product of intentional, pro-Republican districting. (FOF ¶¶ 345–54). This ultimate finding by the Panel is not supported by competent evidence.

Pitt County contains two House districts: HD 8 and HD 9. The House districts for Pitt County adopted in 2020 could not be maintained in 2021 because Pitt was formerly joined in a county group with Lenoir County. (FOF ¶ 112(d)). Ninety-one (91%) percent of Dr. Barber's simulations, all of which control for city boundaries, result in one Republican district and one Democrat district. (R p 2915). Moreover, in all twelve elections used by Dr. Mattingly, his simulations result in one Republican districts. (FOF ¶ 350). Looking at nine of his twelve elections, a majority of his simulations resulted in one Republican district.

Dr. Mattingly's evidence on Pitt County highlights the utterly arbitrary nature of any newly created justiciable standard that is not grounded in the actual text of the North Carolina Constitution. Once again, how does the General Assembly

determine the size of a gap that is permitted and what is illegal? What elections or composite must be used by the General Assembly to determine whether the gap between Republicans and Democrats in a specific district is acceptable or too large? Do these same standards apply to Democrat leaning districts or are they exempt because the statewide simulations result in a majority of Republican seats?

None of these questions can be answered by reviewing the text of the Constitution. And to answer them, the Court would have to make political policy decisions on what it thinks constitutes a fair map instead of upholding the Constitution to leave that discretion with the General Assembly.

Unlike Dr. Barber and Dr. Mattingly's ensemble, the NCLCV map results in two Democratic districts in Pitt. (R p 2914). Only 9% of Dr. Barber's simulations result in two Democratic districts. When measured against either Dr. Mattingly's or Dr. Barber's analysis, the NCLCV Plan for Pitt County represents an intentional, pro-Democratic gerrymander.

Finally, a visual review of the enacted House districts located in Pitt County, like a review of any of the other districts analyzed by the Panel, show that they make sense. No neutral observer would look at these districts and conclude that they are gerrymanders. The two districts are created by drawing a line roughly on an east-west axis that appears to evenly divide Pitt into two districts. Enacted District 8 is located in northern Pitt and leans Democratic. (R p 2914). Enacted District 9 is located in southern Pitt and leans Republican. (*Id.*). Dr. Cooper's VTD map shows that the northern portion of Pitt has more Democrat VTDs while the southern portion

has more Republican VTDs. (FOF ¶ 345). To create HD 9 as a more Democratic district, the General Assembly clearly would be required to crack Republican VTDs out of HD 9 and submerge those voters in the highly Democratic HD 8. (FOF ¶ 345). In either the name of symmetry, or because his algorithm was programed to use race to create effective black districts at racially targeted percentages well below 50%, the Hirsch Algorithm almost certainly ignored the General Assembly's attempt to keep as much of Greenville in the same district as possible. (FOF ¶ 112(d)).

e. Durham-Person House County Grouping

It is somewhat baffling for the Panel or any of Plaintiffs-Appellants' experts to describe districts in Durham as products of intentional, pro-Republican redistricting. As demonstrated by Dr. Barber, under the enacted plan, three of the four enacted districts are strongly Democratic (HD 29, 30, 31). The fourth district has a Democratic composite of 52%. (R p 3002). A review of Dr. Cooper's VTD maps shows that the districts make sense in the way they are drawn. (FOF ¶ 355). No neutral observer would look at these districts and conclude that they are gerrymanders. Under Plaintiffs-Appellants' theory, is the General Assembly also required to make all Democratic districts as Democratic as possible? Is the General Assembly, in the name of statewide fairness, precluded from drawing districts that are competitive? Or is it only obligated to draw Republican districts as competitive while simultaneously making Democrat seats as safe as possible?

Once again, the Panel relies upon Dr. Cooper without regard to the inconsistency of his analysis. This is laid bare by Dr. Cooper's treatment on Pitt County districts as opposed to Durham County districts. In his Pitt County Grouping,

Dr. Cooper emphasizes, as the Court repeated, that "[s]ome students at East Carolina University will take classes in House District 9, while living in residence halls that are located in House District 8." (FOF ¶ 348). In contrast, even though Dr. Cooper knows that Duke is not split into different Durham based districts, he makes no mention of this fact in his analysis as a potential non-partisan explanation for the district lines therein. (T p 124:22–125:20). Such inconsistencies are the mark of unreliable expert testimony, and Dr. Cooper engages in this sort of cherry-picking throughout his report.

f. Forsyth-Stokes House County Grouping

The Forsyth-Stokes County Group is a classic example of Democratic districts being created because Democratic voters are concentrated in cities and not because of intentional, pro-Republican redistricting. (FOF ¶ 112(h)). A review of Dr. Cooper's VTD map clearly shows that the Panel's finding that Forsyth-Stokes districts are intentional, pro-Republican district is inconsistent with the Panel's factual findings that House districts were drawn to honor city lines.

Democratic voters in this group are concentrated in a very compact district encompassing the boundaries of Winston Salem. (*See* FOF ¶ 365). This fully explains the partisan lean of the five house districts in this group. The political lean of all of the districts in this group is a function of where voters live, and not because of tortured district lines drawn by the General Assembly to pack geographically dispersed areas of Democratic voters into bizarre looking districts that have no other possible explanation besides politics.

Under Dr. Mattingly's ensemble, in each of his twelve elections, a majority of his simulated maps result in two Republican districts. In several instances, a third Republican district is well within his range of outcomes. (FOF ¶ 370). Dr. Barber found that in the Forsyth -Stokes group, 33% of the simulations he retained resulted in three Republican leaning districts. (R p 3014). Under both the enacted House plan and the NCLCV Plan, three of the five districts lean Republican. (R p 3013).

A comparison of the enacted plan and the NCLCV plan shows that both maps have nearly identical Democratic composites for each of the five districts. (R p 3013). A finding that the enacted house plan for Forsyth-Stoke constitutes intentional pro-Republican redistricting would necessarily require a finding that the NCLCV Plan intentionally favors Republicans, even though it was programmed to increase the number of Democratic districts in the name of symmetry. Any such finding is completely irrational.

g. Wake County House Grouping

In its initial findings on the Wake County House districts, the Panel once again credits the testimony of Republican Representatives. (FOF ¶ 112(a)). The Panel credited their testimony that changes in the district configurations were required because Wake County gained two districts, that towns like Wake Forest, Rolesville and Fuquay-Varina were sought to be kept whole, and that the population of Raleigh was kept in the fewest number of districts possible. (FOF ¶ 112(a)). Yet again, the Panel ignored these findings when it concluded that Wake County districts were the product of intentional, pro-Republican districting. (FOF ¶¶ 376-86).

The two Republican districts in Wake County are HD 35 and HD 37. (R p 3044). A visual review of the lines for these districts does not demonstrate an intent to fabricate a Republican district by connecting geographically dispersed pockets of Republicans. Instead, a visual review shows that these two districts make sense. Both are geographically compact. (*See* FOF ¶ 376). Moreover, both HD 35 and HD 37 could have been drawn to include several adjacent Republican leaning VTDs that were instead placed in high performing Democratic districts. (*Id.*). Absent the testimony of professors of election law and mathematicians hired by the Plaintiffs-Appellants to be experts in support of their claims, no neutral observer would conclude that either of these districts constitutes a gerrymander.

Despite failing to control for the criteria as adopted by the General Assembly regarding municipalities, in four of the twelve elections used by Dr. Mattingly, a majority of his simulations would result in two Republican districts in Wake County. (FOF ¶ 382). Like the enacted plan, the NCLCV Plan would create two Republican leaning districts largely in the same areas of Wake County (northwest and southeast). (R p 3044). The Democratic composite for the enacted Republican districts (HD 35 and 37) are only slightly lower than the Democratic composites for Mr. Hirsch's versions of these districts (NCLCV Plan HD 37 and 40). (*Id.*). Out of the middle range of 50% of simulations retained by Barber for his study, 32% would create two Republican districts in Wake County. (R p 3045). In totality, this evidence does not show intentional, pro Republican partisan redistricting, much less extreme partisan gerrymandering.

h. Cumberland House County Grouping

For Cumberland County House districts, the Panel initially credited the testimony by Republican Representatives that districts in Cumberland were changed as little as possible considering past litigation and that any changes were done for population purposes. (FOF ¶ 112(g)). Once again, the Panel ignored these findings when ruling that the House districts in Cumberland are intentional, pro-Republican districts. (FOF ¶¶ 387-99).

While the Panel found that the enacted districts in Cumberland "lowered" mathematical compactness scores, it does not identify any specific compactness test, does not say how much the scores were lowered, and does not compare the scores of the enacted plans to any other specific plan for Cumberland County. (FOF ¶ 389). As in Wake County, no neutral observer could visibly review these districts and conclude that any of them lack compactness or constitute gerrymanders. (FOF ¶ 390). Enacted House District 43 has a Democratic composite of 50% while HD 45 has a Democratic composite of 49%. (R p 2986). Neither of these districts is drawn by using tortured lines, similar to the 1992 12th Congressional District, to bypass Democratic voters and to connect geographically dispersed Republicans. (*See* FOF ¶ 390). While HD 43 and 45 are the only possible Republican districts in Cumberland, they both are obviously highly competitive and could be won by either party. This again begs the question—does the Constitution bar the General Assembly from drawing compact and competitive districts only because it is required to make up for the natural disadvantage in the number of Democratic districts elsewhere in the state?

The Hirsch Algorithm draws all four districts in Cumberland to be Democratic districts. (R p 2986). Mr. Hirsch's algorithm accomplishes this partisan objective by programming the algorithm to "crack" Republicans out of the two most Republican districts and placing them in Democratic districts. Similar to the NCLCV Plan in other areas of the state, in Cumberland the Hirsch Algorithm did not control for the Committee's criterion policy on municipal lines. The enacted plan put 92.7% of the population of Fayetteville in only three districts. In contrast, the NCLCV Plan places only 81.7% of Fayetteville in three districts. (R p 2985).

Dr. Mattingly's simulations regularly show that at least one district in Cumberland should be Republican. (FOF ¶ 395). None of Dr. Mattingly's ensembles predict a majority of simulations resulting in four Democrat Cumberland districts. (FOF ¶ 395). Thus, under Dr. Mattingly's analysis, the NCLCV Plan for Cumberland is an extreme political outlier.

i. Brunswick-New Hanover House County Grouping

The Brunswick-New Hanover House group is the final house group in which the Panel found evidence of intentional pro-Republican redistricting. (FOF ¶ 410). No neutral observer would conclude from a visual inspection that any of these districts are gerrymandered. (FOF ¶ 403). Dr. Cooper even strained to claim this was a gerrymander. He said District 19 "ensnared" a VTD which only means the same thing as "included." (T p 134:1–8). Dr. Cooper also admitted that he did not observe any splitting of communities of interest in this grouping. (T p 133:13–25). There are no tortured or bizarre lines drawn to connect dispersed Democratic areas to create a "packed" Democratic district. Nor are there tortured lines used to bypass Democratic

concentrations to connect geographically dispersed Republican areas to create a bizarre Republican district. House District 18 was based upon the Committee's criterion that of keeping cities like Wilmington should be kept wholly within a district to the extent possible. (FOF ¶¶ 112(f), 403).

Despite Dr. Mattingly's failure to adopt the Committee's criterion on cities, his ensemble predicts that three Republican districts are always within the range of his simulations. Four of the elections selected by Dr. Mattingly show a majority of his simulations creating three Republican districts. (FOF ¶ 406).

One hundred percent of Dr. Barber's simulations result in three Republican districts for this group. (R p 3008). Unlike Dr. Mattingly, Dr. Barber's algorithm adopted the Committee's criterion regarding city lines. The NCLCV Plan results in two Republican districts and two Democratic districts. Again, using the same standards the Panel applied to Republican districts, the Hirsch Algorithm accomplished this result by "cracking" Republican voters out of House District 19 and packing them in House Districts 17 and 20. Once again, the Hirsch Algorithm did not attempt to control for the General Assembly's policy on cities.

5. Congressional Districts

Troublingly, the Panel credited the contemporaneous legislative record and the legitimate, non-partisan goals expressed therein, (FOF ¶ 104), yet later determined that the districts were the result of intentional, pro-Republican partisan redistricting, (FOF ¶ 482). And it does so by focusing on election data, something that the Panel acknowledged was not considered in drawing the map. (FOF ¶ 106).

a. Congressional District 1

The Panel's findings of fact concerning this district is internally contradictory. The Panel, crediting the contemporaneous legislative record, found that this district was drawn to achieve a series of legitimate, non-partisan goals. The General Assembly drew this district "to take in the Outer Banks and most of the State's shoreline and to keep the finger counties of northeastern North Carolina together" along with "most of the counties that run along the State's border with Virginia." (FOF ¶ 104(a)). No municipalities are split and VTDs only split for purpose of equalizing population. (Vol. 5, Ex. p 8345). These are sound, non-partisan redistricting goals in line with the Adopted Criteria, and the Panel did not conclude otherwise. However, the Court later found that this district is the result of "pro-Republican partisan redistricting." (FOF ¶ 488). In reaching this conclusion, the Panel ignored its prior findings of legislative purpose, which undermine its conclusion and render its decision internally contradictory. The Panel's findings supporting its conclusion are tellingly thin: the Panel merely states that Pitt County was included in CD1, "allowing for a greater Republican advantage in bordering CD2, to the west," and that "CD1 is likely to elect a Republican candidate based on a calculation of the two-party vote differential in the 2020 Secretary of Labor and Attorney General elections in the VTDs that are included within CD1, as well as other measures" that are not specified in the opinion. (FOF ¶¶ 486–87). The Panel found more non-partisan goals defining the shape of this district than partisan goals, making its conclusion that this a pro-Republican partisan intent is evident in this district internally contradictory.

b. Congressional District 2

The Panel's findings of fact concerning this district, once again, are internally inconsistent. The Panel credited the contemporaneous legislative record in finding that this grouping "was configured to contain most of rural northeastern North Carolina, to maintain whole counties (16 of 18 are whole), and to avoid splitting municipalities (none are split)." (FOF ¶ 104(b)). Again, the General Assembly provided, and the Panel credited, these legitimate, non-partisan explanations for the shape of this district. Yet again, however, the Court found that this district was "the result of intentional, pro-Republican partisan redistricting," based on a few sparse findings that lack any causal connection to partisan intent: that two of the eighteen counties in this district "have never been paired together in a congressional map in North Carolina's history, no matter which political party was in charge." (FOF ¶ 491). Of course, the Panel fails to note the converse: 16 of the 18 counties have been paired together before. If it is a sign of partisan intent that counties have never been paired together before, it should also be a sign of nonpartisan intent that the vast majority of counties in this district have been paired together before. The Panel also observes that this district formerly included Pitt County, and that Representative G.K. Butterfield who formerly represented this district "announced that he will not seek re-election after the 2021 Congressional Plan was enacted." (FOF ¶¶ 492, 494), but there is no evidence in the record that Representative Butterfield is retiring because of any changes to his district.

c. Congressional District 3

Yet again, the Panel entered contradictory findings regarding this district. The legitimate, non-partisan explanation for these district lines provided by the General Assembly and credited by the Panel was that the district, "was configured to keep mostly rural counties in southeastern North Carolina near the coast within the same district," "to improve the compactness of the prior district," and to incorporate certain communities of interest identified by participants in the public hearings: namely, to keep the Cape Fear River Basin in one district, to keep New Hanover and Brunswick counties together, and to keep Bladen and Columbus counties in one district. (FOF ¶ 104). The General Assembly again split no municipalities in this district and only split one VTD to equalize population. (Vol. 5, Ex. p 8346-47).

Again, the Panel later relies on thin findings to conclude that this district is "the result of intentional, pro-Republican redistricting": here, it appears the only finding supporting this conclusion is that "CD3 is likely to elect a Republican candidate. . . ." (FOF ¶¶ 499-500). The Panel's findings of the legitimate, non-partisan explanations provided by the General Assembly are far more robust explanations of legislative intent in this district than the paltry fact that this district "is likely to elect a Republican candidate."

d. Congressional District 4

As with Congressional District 3, the Panel's sparse findings later in its opinion are no match for the nonpartisan, contemporaneous explanations offered by the General Assembly and credited by the Panel. In this district, "configured to be a four-county district south of Raleigh," the General Assembly joined together counties with

"similar geography, industry, and proximity to population base in the region in Fayetteville and Raleigh." (FOF ¶ 104(d)). This district incorporated online feedback requesting that "Cumberland, Harnett, and Sampson counties be kept together in a congressional district," which "was accomplished by adding population in Johnston and one precinct in Wayne County." (*Id.*). And this "district is highly compact and splits no municipalities." (*Id.*). Contrary to the intent evidenced by these stated nonpartisan goals, the Panel later found that this district is "the result of intentional, pro-Republican partisan redistricting" because it is "likely to elect a Republican candidate" and "combine[s] the Democratic-leaning areas in Fayetteville with Republican-leaning areas that were in the former CD7 and CD8." (FOF ¶¶ 503–505). This analysis completely ignores the prior testimony credited by the Panel, however, which explains that there is a stated nonpartisan objective of keeping the communities of interest identified in public comment together. These inconsistencies indicate that the Panel was yet again clearly erroneous in concluding that this district is "the result of intentional, pro-Republican partisan redistricting."

e. Congressional District 5

This district, contained solely within Wake County, further demonstrates the extent to which the Panel's findings are in conflict. The Panel noted that this district includes all of "Garner, Knightdale, Raleigh, Rolesville, Wake Forest, Wendell, and Zebulon" which "are viewed as sharing common interest, given that people live and work and commute within these municipalities." (FOF ¶ 104(e)). Once again, there were no municipalities split here, and VTD splits were only for purposes of maintaining municipal boundaries or equalizing population. (*Id.*). Yet the Panel

found this district to be "the result of intentional, pro-Republican partisan redistricting" because it "packs the Democratic voters in these heavily-Democratic areas into one district, increasing the probability that Republican candidates will win in the adjacent districts." (FOF ¶¶ 508–10). Since this district contains all of the City of Raleigh, a naturally densely packed Democratic-leaning area, of course this district will be heavily Democratic. This is the natural result of North Carolina's political geography. Moreover, looking at Dr. Cooper's map of this district, it is hard to determine where else this district could have been drawn to have lower Democratic percentage, as there are many Republican-leaning and less-dense Democratic-leaning VTDs in this district.

The Panel also discusses Dr. Chen's "regional" analysis of the districts in the Research Triangle, in which he states that this district is "more heavily packed with Democrats than almost 100% of the simulated districts containing Raleigh" and "less geographically compact than nearly 100% of the computer-simulated districts containing Raleigh . . . ." (FOF ¶ 474). But, because these simulations fail to effectively control the variables of county splits, municipality splits, and VTD splits in the same way the General Assembly interpreted those criteria, Dr. Chen's simulations will more readily split municipalities like Raleigh, ignoring the stated non-partisan goal of keeping the municipalities in this district together.

f. Congressional District 6

As noted by the Panel and the General Assembly, "the configuration of this district . . . has existed in this region, in roughly the same form, for decades." (FOF ¶ 104(f)). This district "was configured to include Durham and Orange Counties and a

portion of Wake County that contains Apex, Cary, and Morrisville, which were all viewed as a coherent community of interest[.]" (*Id.*). Once again, "[n]o municipalities were split." (*Id.*).

Despite finding these non-partisan goals expressed by the General Assembly, the Panel describes this district as "a really good example of packing Democratic voters across multiple counties" since it "adds a greater proportion of Democratic voters into a single district than any district from the former congressional plan, increasing the probability that Republicans can win in adjacent districts." (FOF ¶ 514). But as with Congressional District 5, this configuration is not the result of a desire to "pack" Democratic voters, but rather to keep together Orange and Durham Counties—naturally dense Democrat-leaning counties—and certain municipalities within Wake County that are viewed as sharing common interests. This is not a "really good example" of intentional pro-Republican partisan redistricting; it is a "really good example" of the natural packing of Democratic voters in North Carolina, generally, and in these areas in particular.

g. Congressional District 7

The Panel found that this district was "drawn to include several heavily Republican counties while carefully avoiding concentrations of Democratic voters." (FOF ¶ 521). This finding illustrates the fundamental problem presented by Plaintiffs-Appellants' experts' fixation on partisanship. They are so focused on partisanship that they entirely miss the non-partisan goals informing the creation of these districts. Here, the General Assembly expressed, and the Panel credited, an intention "to bring together rural areas and smaller cities and towns," while only

splitting VTDs "for the purpose of equalizing population or keeping cities together." (FOF ¶ 104(g)). If this district included the "concentrations of Democratic voters" that the Panel claimed this district avoided, then it would be bringing together urban areas with rural areas rather than the stated intention of "bring[ing] together rural areas and smaller cities and towns."

The Panel also concluded that this district was the result of "packing in Congressional District 6, and cracking in Guilford County[.]" (FOF ¶ 522). But how is the General Assembly to remedy this? By cracking in Congressional District 6 and packing in Guilford County? Such intentional pro-Democratic partisan redistricting would run afoul of the same constitutional violations fabricated by the Plaintiff-Appellants here.

h. Congressional District 8

Once again, the Panel relies on flawed evidence to conclude that this district is an "intentional, pro-Republican partisan redistricting" in the face of clear indications elsewhere in the Findings of Fact that this district is the result of legitimate, non-partisan motives. This district was a direct response to requests in the public hearings, including by the Chair of the Moore County Democratic Party, "that Sandhills counties including Moore, Scotland, and Hoke to be kept together in a Sandhills District." (FOF ¶ 104(h)). The only findings made by the Panel regarding this district was simply that its "western boundary splits Mecklenburg County in such a way that the most Democratic-leaning VTDs within that county fall outside of CD8." (FOF ¶ 526). This finding fails to note, however, that to capture those "most Democratic-leaning VTDs" along the western border of this district would require

Charlotte to be split, contrary to the stated non-partisan goal of limiting municipality splits.

i. Congressional District 9

Similar to Congressional District 5, the configuration of this district is the result of "the General Assembly's effort to keep the City of Charlotte together in one district, given its cohesive community." (FOF ¶ 104(i)). As the General Assembly and Panel indicated keeping Charlotte whole in a district "was not strictly possible, given that Charlotte is too large for one congressional district, but the adopted configuration succeeded in keeping 83% of Charlotte in one district that, in turn, is 97% composed of Charlotte." (*Id.*). Even though the Panel acknowledged, and did not question, the non-partisan motives expressed in the legislative record, the Panel later claimed that this district was "the result of intentional, pro-Republican partisan redistricting" because it "packs the most-Democratic VTDs in Mecklenburg County within one district, while most Republican-leaning and competitive VTDs are placed outside its boundaries[.]" (FOF ¶ 531). Due to the Panel being blinded by Plaintiff-Appellants' focus on partisanship, the Panel failed to acknowledge that the non-partisan goal of keeping as much of Charlotte in one district as possible will be naturally "packed" with Democrats based on their natural clustering within that city. Put differently, the "most-Democratic VTDs in Mecklenburg County" are contained within Charlotte, "while most Republican-leaning and competitive VTDs" within Mecklenburg County "are placed outside its boundaries[.]" The Panel failed to account for these non-partisan goals in concluding that this district is the result of intentional, pro-Republican partisan redistricting.

j. Congressional District 10

The Panel found that this district "is composed of suburban and exurban areas that stretch between the population centers of Charlotte and the Triad region, which constitute a community of interest." (FOF ¶ 104(j)). "This district keeps all of the City of High Point in a single district, based on a comment at a public hearing in Forsyth." (*Id.*). There is only one split municipality in this district. (*Id.*). Later ignoring these findings, the Panel concluded this district was "the result of intentional, pro-Republican partisan redistricting" because the "Piedmont Triad" which "was previously kept together in one district," it is now "split across three districts[.]" (FOF ¶ 531). But this alone is not evidence of an intentional partisan redistricting; rather, it is the result of the competing non-partisan goals expressed by the General Assembly contemporaneously with the adoption of the enacted congressional plan. The Panel's contradictory findings undermine its conclusion regarding this district.

k. Congressional District 11

The Panel's findings of fact regarding this district, as with the others, are also contradictory and fail to support its conclusions. In particular, this district was created "out of a desire to maintain the incumbent in the district" and to keep "Greensboro as much as possible in the district." (FOF ¶ 104(k)). This "goal was achieved with more than 90% of Greensboro included." (*Id.*). After crediting these two clear non-partisan objectives, the Panel later found that this district was "the result of intentional, pro-Republican partisan redistricting" for various reasons relating to the partisanship of the district, while ignoring the non-partisan goals stated by the

General Assembly. (FOF ¶ 551). This is clearly incompatible with their earlier findings.

l. Congressional District 12

As with numerous other districts, the Panel ignored the non-partisan goals it credits earlier in its opinion to baldly conclude that this district is "the result of intentional, pro-Republican partisan redistricting." (FOF ¶ 556). The General Assembly stated, and the Panel did not doubt, that the district "was configured to join suburbs outside Charlotte to an area in and around Winston-Salem, which was achieved by incorporating four whole counties and one partial county" and without splitting any municipalities. (FOF ¶ 104(l)). The Panel does not provide any solid explanation supporting its later conclusion that this district was drawn with partisan intent; instead, it simply describes the shape of the district and notes that it is "likely to elect a Republican." (FOF ¶¶ 554–55). These threadbare conclusions lack any support in the record, and the Panel's conclusion of partisan intent in this district is incorrect.

m. Congressional District 13

This district was drawn "based on an online comment suggesting that towns in North Mecklenburg, including Cornelius, Huntersville, and Davidson, be joined in a single district." (FOF ¶ 104(m)). Charlotte is the only municipality split in this district "because it must be" due to equal population constraints. (Vol. 5, Ex. p 8353). However, the Panel later concluded that this district was "the result of intentional, pro-Republican partisan redistricting" because "Polk County and Mecklenburg County have never been included in the same congressional district." (FOF ¶¶ 559–

560). But the Panel fails to credit the General Assembly for the fact that five of the seven districts apparently have been in the same district in the past. Moreover, the thin allegations of partisan intent in this district are not sufficient to overcome the stated non-partisan intent and the presumption of constitutionality courts are required to give to acts of General Assembly.

n. Congressional District 14

The Panel's conclusion that Congressional District 14 was an "intentional, pro-Republican partisan redistricting" is obviously incorrect. This district was drawn to be "anchored in western North Carolina to take in the mountain counties up to the westernmost tip of the State," and to account for a public comment at a Jackson County public hearing "asking that McDowell and Polk Counties be removed from the district and that it be drawn into Watauga County." (FOF ¶ 104(n)). This district does not split any municipalities, and it only splits one VTD in Watauga County to avoid double-bunking two incumbents. (Vol.5, Ex. p 8353). Yet the Panel later apparently ascribes partisan intent to this public comment, claiming that the removal of the "Republican strongholds" of Polk and McDowell Counties and the fact that "Watauga County has not been in the same congressional district with the southwestern end of the state since 1871" signify the existence of "intentional, pro-Republican partisan redistricting." (FOF ¶ 564). And the Panel ignores the fact that any district including the western part of the state will almost certainly elect a Republican candidate.

II. PLAINTIFFS-APPELLANTS LACK STANDING TO PROSECUTE POLITICAL CLAIMS AGAINST A POLITICAL BODY

The Panel correctly concluded that Plaintiffs-Appellants lack standing to challenge a political body's political discretion. This Court recently held that "[t]he North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right," which means standing exists where there is "a cause of action." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 608, 853 S.E.2d 698, 733 (2021). Because there is no cause of action for individual citizens to challenge the political discretion of the North Carolina General Assembly, there is no standing to bring the claim.

Further, even if such a cause of action did exist, Plaintiffs-Appellants' assertion that "every North Carolinian" has standing to allege gerrymandering is overbroad. Harper Br. 76. "[I]n directly attacking the validity of a statute under the constitution, a party must show they suffered a 'direct injury,'" *Comm. to Elect Dan Forest*, 376 N.C. at 607, 853 S.E.2d at 733, and federal courts construing this standard have for generations required residency in a challenged district as a predicate requirement to show standing. *See, e.g.*, *Gill v. Whitford,*, 138 S. Ct. 1916, 1930 (2018). And further, there is no North Carolina appellate decision that disturbs the decades of precedent requiring that a plaintiff's "injury" for standing purposes is district specific and cannot be made on a statewide basis. In addition, the direct-injury showing necessarily requires a plaintiff to establish that the harm of gerrymandering flows directly from that voter's district, and a voter whose district either that enables the voter to elect that voter's preferred candidates (as in the case of a "packed" district)

or a voter's whose district would be of a roughly similar partisan composition in all events cannot claim a direct injury. *See id.* at 1932. Individual Plaintiffs-Appellants do not reside in every challenged district, and many Plaintiffs-Appellants oddly complain that their districts render it too *easy* for them to elect their preferred candidates, a claim that has historically been circumspect in standing analysis because the nature of "wasted votes" relies on a statewide claim. *See Gill at.* 1930-1932. And how could it? How are any of these Plaintiffs-Appellants injured by getting exactly that they want? What Plaintiffs-Appellants don't want to admit is that the proper parties to challenge those districts would be Republicans, not Democrats. But this only underscores the nonjusticiable nature of Plaintiffs-Appellants' claims.

Finally, there is no merit to the assertion that organizations can assert voting rights on behalf of their members. An organization may only assert the rights of its members where neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *State Emps. Ass'n of N. Carolina, Inc. v. State*, 357 N.C. 239, 580 S.E.2d 693 (2003) (per curiam). That standard cannot be met where voting rights are at stake. The right to vote is personal to each individual voter, and each individual may choose, in any given election, to cast a ballot for a member of any party or no party. It is improper for organizations—especially non-partisan organizations—to stand in for their members and assert that their members uniformly and without exception prefer Democratic candidates and would be better served by representatives from the Democratic Party over representatives from any other party or no party.

III. PLAINTIFFS-APPELLANTS' RACIAL GERRYMANDERING CLAIMS LACK MERIT

The trial court correctly rejected the *Common Cause* and NCLCV Plaintiffs-Appellants' racial claims. The claims fail because Plaintiffs-Appellants are unable to demonstrate either intent to discriminate on behalf of the General Assembly or that the Enacted Maps have a discriminatory effect.

A. The Standard

The North Carolina Constitution's Equal Protection Clause prohibits the State from denying any person equal protection of laws.[26] Courts first must determine what level of scrutiny to apply when evaluating an equal protection claim. Strict scrutiny applies only when the "classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class." *Stephenson I*, 355 N.C. at 377, 562 S.E.2d at 393 (quoting *White*, 308 N.C. at 766, 304 S.E.2d at 204). "'Race is unquestionably a 'suspect class,'" *Phelps v. Phelps*, 337 N.C. 344, 353, 446 S.E.2d 17, 23 (1994), but in the redistricting context strict scrutiny is only triggered "if a court finds that race is the 'predominant, overriding factor' behind the General Assembly's plans.'" *Dickson v. Rucho,* 368 N.C. 481, 505, 781 S.E.2d, 404 422 (2015) (quoting *Miller*, 515 U.S. at 920).[27] "If, on the other hand, the

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[26] NCLCV Plaintiffs also ground their claims in the Free Election Clause of the North Carolina Constitution. As demonstrated above, that Clause does not speak to redistricting at all. It is not a backdoor through which Plaintiffs can launder their race-based claims without having to prove intent.

[27] *Common Cause* Plaintiff-Appellant brings a racial gerrymandering claim, R 1331-1334, whereas *NCLCV* Plaintiffs also advance a claim of unconstitutional vote dilution. *See NCLCV* Br. at 111. While analytically distinct, *Shaw v. Reno*, 509 U.S. 630, 652 (1993), this Court's inquiry is effectively the same: did Defendants act with a discriminatory purpose to achieve a discriminatory effect? *Compare Dickson*, 368

plans are not predominantly motivated by improper racial considerations, the court applies the rational basis test" *Id.* (citing *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). A plaintiff alleging racial discrimination "has the burden of establishing that race with the predominant motive behind the state legislature's action." *Id.* at 505, 781 S.E.2d 404 at 422 (2015). The North Carolina courts have adopted the framework laid out by the Supreme Court in *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977) to guide this analysis. *See Holmes v. Moore*, 270 N.C. App. at 16, 840 S.E.2d at 254-55. When considering whether discriminatory intent motivates a facially neutral law, a court must undertake a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights,* 429 U.S. at 266.

This Court has laid out three additional principles to keep in mind when evaluating these claims: (1) The General Assembly can adhere to its traditional districting principles "without being subject to strict scrutiny so long as those principles are not subordinated to race." (2) "[T]he existence of legislative consciousness of race while redistricting does not automatically render redistricting plans unconstitutional." And (3) "some degree of deference" is due the General

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N.C. 481 at 505, 781 S.E.2d at 422 (race as "predominant, overriding factor"); *Miller*, 515 U.S. at 916 (citing *Personnel Admin'r of Mass v. Feeney*, 442 U.S. 256, 279 (1979); *with Holmes v. Moore*, 270 N.C. App. 7, 17, 840 S.E.2d 244, 255 (2020) ("[T]he ultimate question remains: did the legislature enact a law 'because of,' and not 'in spite of,' it's discriminatory effect." (quoting *Feeney*, 442 U.S. at 279)). Plaintiffs fail to satisfy either test.

Assembly "in light of the difficulties facing state legislatures when reconciling conflicting legal responsibilities." *Dickson,* 368 N.C. at 506, 781 S.E.2d at 423.

B. Plaintiffs-Appellants' Failure To Meet the Standard

Plaintiffs-Appellants proffered neither direct nor indirect evidence that race was the predominant motivating factor in the decisions behind the plans drafted by the General Assembly.

Absence of Direct Evidence. Plaintiffs-Appellants presented no direct evidence of racial motivation. Indeed, Plaintiffs-Appellants failed to even establish *awareness* by the General Assembly of any adverse racial impact of the Enacted Plans—let alone purpose. The Adopted Criteria made clear that "[d]ata identifying the race of individuals or voters *shall not* be used in the construction or consideration of districts in the 2021 Congressional, House, and Senate Plans." (R p 823–24). No racial data was loaded onto the computer terminals in the hearing rooms where the only maps considered by the General Assembly were drawn. And the primary map drawers for both the House and Senate testified that racial considerations were not a factor in the drawing of the maps.[28]

Even if awareness had been shown, though, that would still fall short of intent. A plaintiff alleging racial discrimination must show that the legislature enacted the law "because of," and not "in spite of," its effect on race. *Holmes*, 270 N.C. App. at 17,

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[28] Plaintiffs may point to the letters submitted to the redistricting committees, but neither communication provided convincing evidence of racially polarized voting. (Vol.4, Ex. pp 6854–64). Furthermore these communications were limited to only 4 county groups. This clearly does not meet the threshold of showing awareness, much less in all the districts challenged on racial grounds by the Common Cause and NCLCV Plaintiffs.

840 S.E.2d at 255 (*quoting Feeney*, 442 U.S. at 279). As it stands, though, Plaintiffs-Appellants have no direct evidence of intent.

Absence of Circumstantial Evidence. Plaintiffs-Appellants' attempts to prove racial intent through circumstantial evidence similarly fail. To succeed on this path, Plaintiffs-Appellants would have had to "show a clear pattern, unexplainable on grounds other than" unlawful intent. *Arlington Heights.*, 429 U.S. at 266. In the "absence of a pattern as stark as those in *Yick Wo [v. Hopkins*] or *Gomillion [v. Lightfoot]*, "impact alone" will not be determinative." *Miller*, 515 U.S. at 913. They cannot meet this heavy burden.

Plaintiffs-Appellants' reliance on North Carolina history—as introduced into evidence at trial through the testimony of Dr. James Leloudis—is misplaced. Common Cause Br. 62-65; NCLCV Br. 117-18. At trial, Dr. Leloudis testified to the long, tragic history of racial discrimination in North Carolina. But Plaintiffs-Appellants have failed to tie this history—most of which occurred under one-party rule in North Carolina by Democrats and the bulk of which occurred before the end of the Jim Crow Era—to the current General Assembly. The trial court correctly concluded that there was no evidence to "link past, impermissible race-based redistricting to the current legislature." (COL ¶ 169). Because "a legislature's past acts do not condemn acts of later legislature, which [courts] must presume act in good faith," *N.C. State Conference of the NAACP v. Raymond*, 981 F.3d 295, 303 (4th Cir. 2020) (citing *Abbot v. Perez*, 138 S. Ct. at 2324), this gets Plaintiffs-Appellants nowhere.

Second, Plaintiffs-Appellants rely on "the sequence of events" surrounding and the "legislative history" of the drawing of the Enacted Plans to demonstrate that race was a predominant factor in the drawing of maps. Common Cause Br. 66; *see also* NCLCV Br. 114–17. Their argument starts from a flawed legal premise, that the General Assembly is required to conduct a racially polarized voting analysis, and goes downhill from there.

Stephenson and its progeny do not require the General Assembly to automatically conduct a racially polarized voting analysis as part of its redistricting responsibilities. In *Stephenson*, this Court sought to harmonize the State Constitution's Whole County Provisions, N.C. Const. art. II, §§ 3, 5, which together mandate "[n]o county shall be divided in the formation of a senate or representative district," with the federal one-person, one-vote rule and the VRA, which require district lines to divide counties in some instances. *See id.* at 369, 382, 562 S.E.2d at 388, 396. The State Supreme Court resolved this tension by interpreting the Whole County Provisions to forbid county lines from being transgressed "for reasons unrelated to compliance with federal law." *Id.* at 371, 562 S.E.2d at 389. In the context of resolving this tension, at the time *Stephenson* was decided, North Carolina districting plans were subject to pre-clearance by the Federal Department of Justice. This is no longer the case.

Stephenson, therefore, directs that "legislative districts required by the VRA" be "formed prior to creation of non-VRA districts"—*but only when necessary*. *See id.* at 383, 562 S.E.2d at 396–97. But Plaintiffs-Appellants read this opinion to inversely

require the General Assembly to invoke the VRA in every redistricting, or at least "to ascertain what districts are compelled by the VRA." (R p 1330). Nothing in *Stephenson* says that. The necessary implication of the principle that, "first, any and all districts that are required by the VRA . . . must be drawn"—which is Plaintiffs-Appellants' characterization of *Stephenson*, R p 1274—is that, if the General Assembly does not draw VRA districts, the General Assembly must adhere to a county-grouping system that makes no exception for VRA. *Stephenson* does not require the General Assembly to make every effort, or any effort, to invoke the VRA as a justification to depart from county lines.[29] Nor would such a reading of *Stephenson* be tenable: as noted, the case interpreted the Whole County Provisions' requirement that ""[n]o county shall be divided in the formation of a senate or representative district." *Stephenson I*, 355 N.C. at 363, 562 S.E.2d at 384. That text does not speak to racial considerations.[30]

Third, that Democratic legislators and Common Cause's counsel requested a racially polarized voting analysis, *see* Common Cause Br. 67–68; NCLCV Br. 114-117, is of no matter. Legislative Defendants determined, based on their prior

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[29] Importantly, when *Stephenson* was decided, Section 5 of the VRA applied to North Carolina, which required the State to avoid retrogression in voting districts by comparison to previously existing districts under "a functional analysis." *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 276 (2015) (citation omitted). It was therefore inevitable that VRA districts would exist in every plan in the State. But Section 5 no longer applies, *Shelby County v. Holder*, 570 U.S. 529 (2013), and it is not inevitable that Section 2 districts will be compelled in every plan, *see Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017).

[30] For these reasons, *Common Cause*'s request for a declaration that the General Assembly must conduct a racially polarized voting analysis prior to drawing state legislative maps also fails. Common Cause Br. 79-86.

experience and previous litigation, that no VRA districts were required. (They were right: the Panel found that "in no district, enacted or in 2020, does it appear that a majority of BVAP is needed for the district to regularly generate majority support for minority-preferred candidates." (FOF ¶ 595).) Nevertheless, Legislative Defendants remained open to persuasion and offered to consider any evidence of the need for a racially polarized voting analysis that was provided. They received none. Instead, they received self-serving statements from partisan actors and activists—advancing the same incorrect reading of *Stephenson* that Plaintiffs-Appellants press here. But this is not evidence of the need for VRA districts or for a racially polarized voting analysis and did not "contradict[] the Legislative Defendant's perception of the need, or lack thereof, for VRA districts." (COL ¶ 183). Legislators are not required to respond to and follow dictates of every suggestion from their colleagues or letter from a public interest group—especially when the information is flawed and when they anticipate that group will be filing suit against them in short order regardless of whether they do what they say.

Fourth, Plaintiffs-Appellants call into question Legislative Defendants' claims that they endeavored to draw race-blind maps—despite the complete crediting of this testimony by the Panel—because legislators have some knowledge of the racial demographic and geographic information of the State. Plaintiffs-Appellants' argument requires a massive leap of logic: Plaintiffs-Appellants would have this Court 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 black voters. This argument is so replete with assumptions, and contradicted by the record, that to state it is to refute it.

C. Effect

Plaintiffs-Appellants also failed to demonstrate that the Enacted Plans have the effect of discriminating on the basis of race in any way recognized by law. As the trial court found, North Carolina does not have legally significant racially polarized voting and "in no district" is "a majority of BVAP . . . needed for that district to regularly generate majority support for minority-preferred candidates." (FOF ¶ 595). Plaintiffs-Appellants' inability to overcome that fact dooms their arguments.

None of the Common Cause Plaintiff-Appellant's contrived, scattershot arguments demonstrate that the Enacted Plans diminish the ability of Black voters to elect candidates of choice. They can be dispatched of quickly and in turn: (1) That the Enacted Plans lower the BVAPs of several non-majority-minority districts by a handful of points is legally irrelevant. These were not majority-minority districts, and by lowering the BVAP in these districts, the legislature necessarily raised the BVAP in others. (2) The same goes for the General Assembly's selecting a Senate grouping in the Northeastern part of the State that balanced BVAP more evenly than a proposed grouping which would have included a district with a higher percentage, but still not a majority, of Black voters. Given the lack of legally significant racially polarized voting in North Carolina, there is no indication that these decisions will make it more difficult for minorities to elect candidates of choice. (3) That certain

Black representatives were double-bunked with other members is also legally irrelevant. Double-bunking is an inevitability in redistricting, and Plaintiffs-Appellants can point to no caselaw implying that it is an effect of a racial gerrymander or dilutes the votes of minority voters. And (4) the dissolution of supposed "crossover districts" is also irrelevant. Neither the North Carolina Constitution, nor the VRA, "require[s] the creation of influence" or "crossover districts." *Bartlett*, 556 U.S. at 13.

The NCLCV Plaintiffs-Appellants take a different tack. Despite that this case involves no cause of action under the Voting Rights Act,[31] NCLCV Plaintiffs-Appellants invoke the VRA as allegedly incorporated into various provisions of North Carolina law. Even if that incorporation theory is correct, Plaintiffs-Appellants contort the law and create a novel state law claim governed by Justice Souter's dissent in *Bartlett*. This Court has previously rejected this approach and should do so again.

VRA Section 2 forbids states from implementing any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). The U.S. Supreme Court has identified independent "intent" and "effects" tests in this provision. *Gingles*, 478 U.S. at 66, 71–72; *see also Cano v. Davis*, 211 F. Supp. 2d 1208, 1230–31 (C.D. Cal. 2002), *aff'd*, 537 U.S. 1100

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[31] As the trial court observed, "either for strategic reasons or lack of evidence, Plaintiffs have repeatedly informed the Court that they are not pursuing a Voting Rights Act claim, but rather, are only pursuing a State Constitutional claim for racial gerrymandering." (COL ¶ 154).

(2003). The intent test is coextensive with the Fifteenth Amendment and is triggered if a redistricting authority's "purpose" in enacting redistricting legislation is "to minimize or cancel out the voting potential of racial or ethnic minorities." *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 66 (1980).

Under the effects test, a redistricting plan can violate Section 2 without any showing of discriminatory intent, if a plaintiff can establish the "*Gingles* preconditions": (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district," (2) "the minority group must be able to show that it is politically cohesive," and (3) "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50–51.[32] "If these preconditions are met, the court must then determine under the 'totality of circumstances' whether there has been a violation of Section 2." *Lewis v. Alamance County, N.C.*, 99 F.3d 600, 604 (4th Cir. 1996) (citation omitted).

Because there is no evidence that North Carolina meets Step 1 of *Gingles*, (COL ¶ 176), NCLCV Plaintiffs-Appellants ask this Court to create a new rule based on Justice Souter's dissent in *Strickland* and hold that the General Assembly must create a certain number of districts, roughly proportional to minority population, in which Black voters can be "effective." NCLCV Br. 107. This suggestion though, is

[32] In fact, Dr. Duchin testified she did not conduct a *Gingles* analysis. (T p 479:18-25).

"flawed" and has been previously rejected by this Court as contrary to the meaning of the North Carolina Equal Protection Clause. Further, adopting this test would "adversely affect the first step of the process required by *Stephenson*" by requiring the creation of districts *not* required by the VRA. *Dickson*, 368 N.C. at 533. This Court should again reject this attempt to adopt this legal theory.

What's more, though, NCLCV Plaintiffs-Appellants failed to even show that the Enacted Plans did not create a sufficient number of effective minority districts. The only evidence *NCLCV* Plaintiffs-Appellants provided on that score is the testimony and report of Dr. Moon Duchin. Dr. Duchin concluded that, if "at least 25% of the voting age population is Black" that the district is effective for Black voters." (Vol.1, Ex. p 3911). (Nevertheless, Dr. Duchin excludes "House-sized districts with 35-39% BVAP" on an ad hoc and undisclosed basis because "they fall short of the standard of inclining to the Black candidate of choice in at least six out of the eight chosen elections." (*Id.)* Under this approach, Dr. Duchin concludes that the NCLCV Plaintiffs-Appellants "optimized" plans have more "effective districts" than the 2021 Plans.[33] (Vol.1, Ex. p 3912).

This is not so. Legislative Defendants' expert Dr. Lewis's analysis shows in no district in 2020 does it appear that a majority Black VAP is needed for that district

[33] In insisting on comparison to their "optimized," computer drawn maps, *NCLCV* Plaintiffs effectively ask this Court to turn the redistricting process over to the computers. If any map the General Assembly creates can be struck down because a supercomputer is able to draw it "better," then the redistricting process will always be settled in litigation over whose computer code is more appropriate. This is not what the North Carolina Constitution contemplates.

to regularly generate majority support for minority-preferred candidates in the reconstituted elections. (Vol 5, Ex. p 9589). Even under Dr. Duchin's definition of an effective district, Dr. Lewis's comprehensive and reliable dataset shows that over 24% of State House seats and 24% of State Senate seats are Black opportunity districts, whereas the Black community constitutes just under 20% of the State's voting-age population. (*See* Vol.5, Ex. pp 9588–89). And those numbers increase markedly as the standard for what makes a district "effective" is altered to correct for the unnecessarily restrictions that Dr. Duchin's analysis relied on. (Vol.5, Ex. p 9588). In short, the 2021 Plans afford the Black community a number of effective districts equal to, or greater than, the Black community's overall share of the voting-age population.[34]

D. The Fourteenth Amendment

Under the circumstances of this case, requiring the General Assembly to use race to draw districts to achieve a racial target would violate the Fourteenth Amendment of the United States Constitution.

Any districting scheme that classifies citizens on the basis of race is "constitutionally suspect." *Miller v. Johnson*, 515 U.S. 900, 904–05 (1995). "A plaintiff pursuing a racial gerrymandering claim must show that 'race was the

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[34] Indeed, under the districting plans used in the 2020 elections, 12 Black Senators were elected to the North Carolina Senate, representing 24% of the legislative body; and 24 Black Representatives were elected to the North Carolina House or Representatives, representing 20% of that legislative body. 155th Session, 2021-2022, House of Representatives, https://ncleg.gov/DocumentSites/HouseDocuments/2021-2022%20Session/2021%20Demographics.pdf; North Carolina General Assembly 2021 Senate Demographics, https://ncleg.gov/DocumentSites/SenateDocuments/2021-2022%20Session/2021%20Senate%20Demographics.pdf.

predominant factor motivating the legislature's decision to place a significant number of voters within or without of a particular district.'" *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 272 (2015) (citing *Miller*, 515 U.S. at 916). State legislatures can defend the use of race in the drawing of districts if "its redistricting plan was in pursuit of a compelling state interest" and provided "its districting legislation is narrowly tailored to achieve [that] compelling interest." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (citing *Miller*, 515 U.S. at 920). The United States Supreme Court has "long assumed that one compelling interest "that can justify the predominant use of race in the drawing of districts is complying with operative provisions of the Voting Rights of 1965 (VRA or Act)." *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (citing *Shaw*, 517 U.S. at 908).

At the time of the decision in *Stephenson*, two different sections of the VRA applied to North Carolina. Forty counties in North Carolina were covered by Section 5 of the VRA, which required the State to submit new redistricting plans for preclearance either by the Department of Justice or the United States District Court for the District of Columbia. Section 5 no longer applies to North Carolina or any other jurisdiction in the United States. *See supra* 29.

When *Stephenson* was decided and continuing to the present, Section 2 of the VRA applied to North Carolina and all other jurisdictions. In order to prove a violation of Section 2 for racial vote dilution, a plaintiff is obligated to prove the following three "threshold" conditions: (1) that a "'minority group'" is 'sufficiently large and geographically compact to constitute a majority' in some reasonably

configured legislative district"; (2) that "the minority group must be 'politically cohesive'"; and (3) that a "district's white majority must vote 'sufficiently as a bloc' to usually 'defeat the minority's preferred candidate.'" *Cooper*, 137 S.Ct. at 1470 (citing *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986)).

Proof of the *Gingles* threshold conditions show that "'the minority group has the potential to elect a representative of its own choice' in a possible district, but that racially polarized voting prevents it from doing so in the district as actually drawn because it is 'submerge[ed] in a larger white voting population'" *Id.* (citing *Growe v. Emison*, 507 U.S. 25, 40 (1993)). Only when a legislature has evidence showing it has "good reason to think that all the 'Gingles preconditions' are met" does the legislature have "good reason to believe that Section 2 requires drawing a majority-minority district. But if not, then not." *Id.* (citing *Bush v. Vera*, 517 U.S. 952, 978 (1996)).

The United States Supreme Court has provided guidance on the first of the *Gingles* threshold conditions in two important cases, *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006), and *Bartlett v. Strickland*, 556 U.S. 1 (2009). There are at least three different terms used to describe election districts "in relation to the requirements of the Voting Rights Act." *Bartlett*, 665 U.S. at 13. In "majority-minority" districts the minority group comprises a numerical, working majority of the voting age population. There is no dispute that Section 2 can require the creation of this type of district." *Id.* "At the other end of the spectrum" are "influence" districts in which the minority group can influence the outcome of an election. *Id.* In *LULAC*, the Court held that Section 2 cannot require a state to use

race to create influence districts. *LULAC*, 548 U.S. at 445. Finally, "crossover" districts are districts in which the minority group is less than a majority of the population but is potentially large enough to elect its candidate of choice with the help of voters who are members of the white majority and who crossover to support the minority's preferred candidate. *Bartlett*, 556 U.S. at 13.

The Plaintiffs-Appellants in *Bartlett* argued that while crossover districts do not include a numerical majority of minority voters, they still satisfy the first *Gingles* condition because they are "'effective minority districts.'" *Id.* at 14.[35] The *Bartlett* Court rejected this proposition holding that Section 2 only required the use of race to draw districts where a geographically compact minority group constitutes an actual majority of the voters. *Id.* at 14–18. Therefore, using race to draw either influence or crossover districts cannot advance a compelling interest under Section 2 of the VRA. Instead, using race to draw crossover or influence districts "would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions" under the Fourteenth Amendment. *LULAC*, 548 U.S. at 445-46.

The Supreme Court has also provided guidance on the third *Gingles* condition that the state cannot draw districts on the basis of race unless it has evidence that the white majority is voting sufficiently in a bloc to usually defeat the minority's preferred candidate. This concept is called "legally significant racially polarized voting." *Gingles*, 478 U.S. at 52-55. "Racially polarized voting" occurs whenever

[35] This is the same term used by Dr. Duchin to describe districts she believes should be drawn with a 25% BVAP. (Vol.1, Ex. p 3911).

"there is a 'consistent relationship between [the] race of the voter and the way in which the voter votes.'" *Gingles*, 478 U.S. at 53 n.21. The mere existence of a correlation between a person's race and how they vote is not enough to satisfy the third threshold condition. Instead, the legislature must have evidence of "legally significant racially polarized voting." *Id.* at 55. This occurs only when "less than 50% of white voters cast a ballot for the black candidate.'" *Id.* Thus, the legislature can only draw a majority black district under Section 2 where there is proof that the white majority usually votes as a bloc to defeat the minority's preferred candidate. *Cooper*, 137 U.S. at 1470; *Covington v. North Carolina*, 316 F.R.D. 117, 167 (M.D. N.C. 2016), aff'd, 137 S.Ct. 2211 (2017).

The evidence before the legislature and also presented to the Panel shows that there was no basis for the General Assembly to use race to draw either congressional or legislative districts in 2021. The North Carolina General Assembly defended and lost the cases in *Harris* and *Cooper*. Several of Plaintiffs-Appellants' attorneys represented the Plaintiffs-Appellants in those cases. The General Assembly was acutely aware of these decisions when it performed its 2020 redistricting. Then, during the 2021 cycle now before the Court, the General Assembly did not consider race in drawing legislative districts or congressional districts. Under the congressional plan used in 2020, two African Americans were elected to Congress, the same number that has been elected since at least 1992. (Vol 6, Ex. pp 11606-11622). Under the legislative plans used in the 2020 elections, 24 African Americans were elected to house districts and 12 African American were elected in senate districts.

See supra n. 34. The number of African Americans elected to the General Assembly in 2020, under a plan that did not use race to draw districts, is roughly proportional to the percentage of North Carolina's voting age population of 20%. See *Estimates of the Voting Age Population for 2020,* 86 Fed. Reg. 24379, 24379-80 (May 6, 2021); *see also Johnson v. DeGrandy*, 512 U.S. 997, 1013–15 (1993) (plan did not dilute vote of racial minority where it obtained proportionality in the number of districts in which it could elect its candidate of choice). Moreover, the evidence at trial demonstrated that African Americans have an equal opportunity to win a similar number of districts under the 2021 plans. (T p 579:10-580:3). Even the expert offered by Plaintiffs-Appellants admitted that an African American candidate could win districts with as low as 25% black voting age population and that a majority black district was not needed anywhere in North Carolina to establish an effective black district. (Vol 1, Ex. 9 3911).

No one presented any evidence to the General Assembly or at trial that demonstrated locations of the state where African Americans had been submerged into a majority white single member district or that legally significant racially polarized voting existed anywhere in North Carolina. Common Cause's attempts to make much of two letters submitted by their counsel during the legislative process. (Vol.2, Ex. pp 6854–64). Neither letter contains an expert racial polarization analysis showing the existence of legally significant racially polarized voting. Nor do the letters indicate an area of the state where a compact majority black population has been submerged or cracked into majority white districts. Nor do the letters complain

that the proposed districts would eliminate a majority black district because none existed under the 2020 legislative plan. In fact, a review of the letters shows that the Southern Coalition for Social Justice complained about the legislature's failure to ignore the Whole County Provisions to revise alleged black crossover districts with a slightly higher level of black voting age population ("BVAP") than the BVAP found in corresponding enacted districts. But the Fourteenth Amendment prohibits the State from using any racial target (including less than 50%) to draw a district where there is no evidence of the *Gingles* threshold conditions. The position taken by the Plaintiffs-Appellants that the 2021 plans violate the North Carolina Constitution, if adopted by this Court, will violate the Fourteenth Amendment of the United States Constitution.

IV. PLAINTIFFS-APPELLANTS' WHOLE COUNTY PROVISION CLAIMS LACK MERIT

Plaintiffs-Appellants contend that the 2021 House and Senate Plans violate the Whole County Provisions because they contain more traversals than could be drawn on a hypothetical map. This claim, like the others, fails.

The State's Whole County Provisions do not mandate that the General Assembly create districts with the mathematically minimum number of traversals. The Whole County Provisions, N.C. Const. art. II, §§ 3, 5, as interpreted by *Stephenson* and *Dickson*, require that the General Assembly draw maps with no unnecessary traversals of county lines within county groupings and with reasonably compact districts. These standards are satisfied.

Stephenson I and its progeny contain a number of requirements regarding traversals: (1) Districts may not cross or traverse the exterior geographic lines of a county in counties with population sufficient to support the formation of one district. (2) In counties where two or more districts may be created, single-member districts shall be compact and not traverse the county's geographic lines. And (3) for those counties that cannot support a legislative district on their own or counties with a population pool that could not comply with one-person, one-vote requirements only if divided into multiple legislative districts, the General Assembly is required to group the minimum number of whole, contiguous counties necessary to comply with the equal-population rule and, within that grouping, form compact districts whose boundary lines do not traverse the exterior line of the multi-county grouping. *See Dickson,* 367 N.C. at 571–72, 766 S.E.2d at 258. The resulting interior county lines in each grouping may be crossed or traversed in the creation of districts within the grouping, but only to the extent necessary to comply with the equal-population rule. *Id.*

Stephenson I and its progeny also require that the smallest number of county groupings necessary to comply with the one-person, one-vote standard be selected. *Id.* Put another way, "the General Assembly must create all necessary single-county districts and single counties containing multiple districts, and then the General Assembly must ensure that the maximum number of groupings containing two whole, contiguous counties are established before resorting to groupings containing three whole, contiguous counties, and so on." *Id.* at 573, 766 S.E.2d at 259.

There is no dispute that the 2021 House and Senate Plans comply with these principles. The county groupings chosen were selected from an academic paper prepared by recognized experts who identified the proper county grouping options under *Stephenson I*. The General Assembly worked off of the county grouping created by scholars from Duke University, who applied *Stephenson I* and its progeny to the 2020 Census data to create the only "possible optimum groupings." (Vol.1, Ex. p 1019). Those grouping options were confirmed by the General Assembly's non-partisan central staff. These maps minimized the number of counties grouped to meet the one-person, one-vote standards and within each county grouping, the minimum number of traversals were achieved. There is no evidence, and no allegation, that the groupings selected violate the above-stated rules. Further, there is no evidence that any district line traversing any county line within any of the county groupings was unnecessary for purposes of the equal-population rule.

Plaintiffs-Appellants, however, seek to add additional rules that this Court affirmatively rejected in *Dickson*. *Stephenson I* contains no requirement that the entire map be drawn to minimize the number of traversals as measured on a statewide basis. The analysis focuses on counties and groupings of counties, and that analysis follows from the Whole County Provisions, which also focus on counties, not on an abstract statewide standard. *See id.* at 572, 766 S.E.2d at 258–59 (rejecting argument that map that resulted in fewer county line traversals was required under *Stephenson I*).

Nor does *Stephenson I* contain a requirement that districts must be maximally compact as measured on an average basis at the statewide level as compared to an allegedly "neutral" map allegedly created by a computer algorithm. Again, the North Carolina Supreme Court rejected this sort of analysis in *Dickson*. *Id.* at 574, 766 S.E.2d at 260 (finding that purported lack of compactness is not an independent basis to find violation). The law requires only that the General Assembly draw reasonably compact districts. *See, e.g.*, *id.* at 384, 562 S.E.2d at 397. The General Assembly did so, and there is no competent evidence to the contrary.

V. THE FEDERAL CONSTITUTION BARS PLAINTIFFS-APPELLANTS' CLAIMS AGAINST THE CONGRESSIONAL PLAN

Plaintiffs-Appellants challenge the 2021 Congressional Plan solely under the State Constitution. But the federal Constitution provides that the North Carolina General Assembly is responsible for establishing congressional districts. "The Framers addressed the election of Representatives to Congress in the Elections Clause." *Rucho*, 139 S. Ct. at 2495. It provides that "[t]he Times, Places and Manner" of congressional elections "shall be prescribed in each State by the Legislature thereof" unless "Congress" should "make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1. The Elections Clause harbors no ambiguity; the word "Legislature" was "not one 'of uncertain meaning when incorporated into the Constitution.'" *Smiley v. Holm*, 285 U.S. 355, 365 (1932) (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). Here, it refers undisputedly to the General Assembly, not the North Carolina courts.

Thus, "[t]he only provision in the Constitution that specifically addresses" politics in congressional redistricting plans "assigns [the matter] to the political

branches," not to judges. *Rucho*, 139 S. Ct. at 2506. What's more, the Elections Clause is the *sole* source of state authority over congressional elections; regulating elections to federal office is not an inherent state power. *Cook v. Gralike*, 531 U.S. 510, 522 (2001); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995). Thus, for a court applying state law to have any authority to address Plaintiffs-Appellants' claims, it must derive from the Elections Clause. Any other exercise of power is *ultra vires* as a matter of federal law.

This case is in all material respects like *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020), where the Eighth Circuit rejected a state court's effort to alter state legislation on the ground that the state constitution required that change. In *Carson*, the Minnesota Secretary of State "agreed" with private Plaintiffs-Appellants "to *not* enforce the ballot receipt deadline" codified by Minnesota statute, and a "state court entered the consent decree order" against such enforcement on state constitutional grounds. *Id.* at 1056. The Eighth Circuit found that this likely violated the federal Constitution, reasoning "that the Secretary's actions in altering the deadline for mail-in ballots likely violates the Electors Clause of Article II, Section 1 of the United States Constitution," which, like the Elections Clause, delegates power over presidential elections to state legislatures. *Id.* at 1059. "Simply put, the Secretary has no power to override the Minnesota Legislature." *Id.* at 1060. So too here.

VI. PLAINTIFFS-APPELLANTS' SPOLIATION CLAIM IS MERITLESS

A. The Spoliation Claim Is Not Properly Before This Court

The North Carolina Rules of Appellate Procedure provide that proper notice of appeal requires that a party "designate the judgment or order from which appeal is

taken[.]" N.C. R. App. P. 3(d). Without proper notice under Rule 3(d), the appellate court does not acquire jurisdiction. *See Brooks, Com'r of Labor v. Gooden*, 69 N.C. App. 701, 707, 318 S.E.2d 348, 352 (1984) ("Without proper notice of appeal, this Court acquires no jurisdiction."). This jurisdictional requirement necessitates specificity. *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) ("Notice of appeal from denial of a motion to set aside a judgment which does not also **specifically** appeal the underlying judgment does not properly present the underlying judgment for our review.") (emphasis added, citation omitted).

In this case, Plaintiff-Appellant Common Cause appeals with specificity one of the Panel's orders and then adds a blanket statement alleging to appeal "all interlocutory orders that merged with the final judgment" without specifically mentioning which orders – if any – this broad catch-all appeal is meant to cover. (R pp 3776–78). This not only fails to give Legislative Defendants proper notice of what, precisely, is being appealed, but it also fails to grant this Court jurisdiction over the same, *see Brooks,* 69 N.C. App. at 707, 318 S.E.2d at 352, due to its failure to "designate the judgment or order from which appeal is taken[.]" N.C. R. App. P. 3(d). Accordingly, Plaintiff-Appellant Common Cause's 12 January 2022 Notice of Appeal is insufficient to appeal the trial court's order denying Plaintiff-Appellant Common Cause's Motion for Discovery Sanctions.[36] (*See* R pp 3776–78).

[36] Harper Plaintiffs-Appellants joined Plaintiff-Appellant Common Cause's Motion for Discovery Sanctions at the trial court level. However, it appears that Harper Plaintiffs-Appellants have abandoned this issue on appeal.

B. The Panel Correctly Rejected the Spoliation Argument

Assuming *arguendo* that Plaintiff-Appellant Common Cause's Notice of Appeal is sufficient, the Panel did not err in denying Common Cause's Motion for Discovery Sanctions. Furthermore, Legislative Defendants did not "admit" to spoliation as Plaintiff-Appellant Common Cause claims. *See* Common Cause Br. 17, 23, 25.

Pursuant to a limited individual waiver of legislative privilege, Representative Hall was deposed on 27 December 2021. (Vol.1, Ex. p 3235). In light of Representative Hall's deposition testimony regarding a former general counsel's creation of general "concept maps" for five or less county groupings, Harper Plaintiffs-Appellants filed a Motion to Compel on 28 December 2021. (R pp 1679–92; Vol.1, Ex. p 3457). On 29 December 2021, the trial court granted Harper Plaintiffs-Appellants' Motion and entered an Order requiring Legislative Defendants to, *inter alia,* request documents and data relating to the concept maps from the former staffer, Dylan Reel, by 9:00 a.m. the next day and, should any related information be lost or destroyed, "identify the lost or destroyed material with specificity and certify to that loss or destruction." (R pp 2171–78). In compliance with the 29 December 2021 Order, Representative Hall called Mr. Reel and was informed that the concept maps "were not saved, are currently lost and no longer exist." (R p 2259). Representative Hall certified to the loss or destruction in supplemental discovery responses. (R pp 2256–63).

Instead of issuing a subpoena to Mr. Reel or attempting to meet and confer with Legislative Defendants on this issue, Plaintiff-Appellant Common Cause and Harper Plaintiffs-Appellants then filed a Joint Motion for Discovery Sanctions accusing Legislative Defendants of spoliation and violation of North Carolina public

records laws on 31 December 2021. (R pp 2243–54). The Joint Motion also sought an adverse inference against Legislative Defendants as to *all* Enacted Plans, despite Representative Hall's testimony that at most only five House clusters were at issue. (*Id.*; Vol.1, Ex. p 3457). Legislative Defendants timely filed their expedited response by 5:00 p.m. on 31 December 2021. (R pp 2286–96). From the bench on 3 January 2022 and by written order entered 4 January 2022, the trial court denied the Joint Motion for Discovery Sanctions. (R pp 2699–2709). Specifically, the trial court's 4 January 2022 Order provided that:

> This Court is not persuaded that Legislative Defendants' actions failed to comply with this Court's December 29, 2021, Order on the Motion to Compel in the short time allotted. While 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 (i.*e.*, Representative Hall) any different than any other non-legislative witness. Furthermore, although Harper Plaintiffs-Appellants and Plaintiff Common Cause contend that Legislative Defendants should have asked additional questions of Mr. Reel, these Plaintiffs-Appellants also had the opportunity to seek this same information from Mr. Reel by way of subpoena for his testimony, a subpoena *duces tecum*, or both.
>
> Moreover, the record before the Court at this time does not demonstrate that Legislative Defendants' actions definitively amount to spoliation necessitating an adverse inference. While this Court will not order an adverse inference, Plaintiffs-Appellants remain able to ask the Court to make any reasonable inference from the evidence presented.

(R pp 2702–03). Based on the record before it, the trial court reasonably determined that Legislative Defendants did not engage in spoliation of the "concept maps" and that no adverse inference was warranted under the circumstances.

Standard of Review. "The sanction for failure to make discovery when required is within the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion." *State v. Herring*, 322 N.C. 733, 747-48, 370 S.E.2d 363, 372 (1988); *see also Bumgarner v. Reneau*, 332 N.C. 624, 630, 422 S.E.2d 686, 690 (1992). An abuse of discretion occurs when the trial court's ruling "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

Plaintiffs-Appellants' Failed Showing. Plaintiff-Appellant Common Cause's representations that "Legislative Defendants admitted to spoliation of key evidence" are wildly inaccurate. Common Cause Br. pp 17, 23, 25. Legislative Defendants did not fail to preserve, destroy, or instruct Mr. Reel to destroy the concept maps, and the trial court made no such finding. (*See* R pp 2702–03).

To establish a prima facie case of spoliation, a party must show that the spoliator (1) intentionally destroyed or failed to preserve; (2) potentially relevant materials; (3) while aware of the possibility of future litigation. *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 528, 613 S.E.2d 274, 281 (2005). Redistricting is not, without more, done in anticipation of litigation. *Baldus v. Brennan*, No. 11-CV-1011 JPS-DPW, 2011 WL 6385645, at *2 (E.D. Wis. Dec. 20, 2011). The trial court properly found that Plaintiff-Appellant Common Cause failed to meet its burden of proof that Legislative Defendants engaged in spoliation or otherwise failed to comply with the Panel's 29 December 2021 Order.

Neither Representative Hall, nor any other Legislative Defendant, intentionally destroyed or knowingly failed to preserve potentially relevant materials in anticipation of litigation. Representative Hall had no personal or actual knowledge about the status or location of the concept maps, as he testified to under oath. (Vol.1, Ex. pp 3360–61, 3384–85). Representative Hall did not copy the maps and only viewed them to consider options for how to draw complicated areas of five county groupings in the compressed timeframe. (Vol.1, Ex. pp 3357–60, 3457). Further, at the time that Representative Hall viewed the concept maps, even if saved, the documents and/or electronically stored information were not yet part of the public record. N.C. Gen. Stat. §120-133 (providing that redistricting documents only "become public records upon the act establishing the relevant district plan becoming law").[37] Therefore, the Panel reasonably determined that Legislative Defendants did not engage in spoliation of the "concept maps."

The Trial Court's Proper Exercise of Discretion. An adverse inference may be drawn against a party that withholds evidence in his or her possession under a spoliation theory. *Yarborough v. Hughes*, 139 N.C. 199, 209, 51 S.E. 904, 907–08 (1905) ("[W]here a party fails to introduce in evidence documents that are relevant to

[37] Notably, N.C. Gen. Stat. § 120-133(b) expressly provides that the provision on public disclosure of redistricting communications does not waive the common law attorney-client privilege with respect to legislators. To the extent that Mr. Reel was acting as general counsel to Representative Hall and providing legal advice, those communications are subject to the attorney-client privilege. See In re Miller, 357 N.C. 306 , 584 S.E.2d 772 (2003) ("[W]hen the relationship of attorney and client exists, all confidential communications made by the client to his attorney on the faith of such relationship are privileged and may not be disclosed.") (quotation omitted) (alteration in original).

the matter in question and within his control . . . there is a presumption or at least an inference that the evidence withheld, if forthcoming, would injure his case."). The inference is permissive and is wholly within the discretion of the factfinder. *McLain v. Taco Bell Corp.*, 137 N.C. App. 179, 185, 527 S.E.2d 712, 717 (2000) (quotation omitted); *see Sunset Beach Dev., LLC v. AMEC, Inc.*, 196 N.C. App. 202, 220, 675 S.E.2d 46, 58 (2009) ("[I]t is improper to base the grant or denial of a motion for summary judgment on evidence of spoliation. It is not an issue to be decided as a matter of law, and cannot, by its mere existence, be determinative of a claim.").

For an adverse inference to apply, the requesting party "must ordinarily show that the spoliator was on notice of the claim or potential claim at the time of destruction." *Arndt v. First Union Nat'l Bank*, 170 N.C. App. 518, 528, 613 S.E.2d 274, 281 (2005) (quoting *McLain*, 137 N.C. App. at 185, 527 S.E.2d at 517). Even if the spoliator was on notice, the factfinder may determine that "the documents were destroyed accidentally or for an innocent reason and reject the inference." *Id.* As such, a trial court may determine that an adverse inference does not apply "[i]f the evidence alleged to be withheld or destroyed is shown to be . . . equally accessible to both parties" or "there is a fair, frank and satisfactory explanation" for the nonproduction. *Gudger v. Hensley*, 82 N.C. 481, 486 (1880), *Yarborough*, 139 N.C. at 211, 51 S.E. at 908; *Raleigh Radiology LLC v. N.C. Dept' Health & Human Servs.*, 266 N.C. App. 504, 511, 833 S.E.2d 15, 21 (2019) (holding consultant's destruction of relevant discovery was "consistent with most consultants in th[e] field" and thus amounted "to a fair, frank and satisfactory explanation") (internal quotation omitted).

Assuming *arguendo* that the facts on the record are sufficient to support a finding of spoliation, which they are not, the trial court reasonably determined that an adverse inference was not warranted under the circumstances. To the extent possible, within the less than 24 hours afforded to them, Legislative Defendants provided a frank and satisfactory explanation for nonproduction in compliance with the Panel's 29 December 2021 Order. (*See* R pp 2702–03). Specifically, Representative Hall certified that he "called Dylan Reel and Mr. Reel stated that the concept maps that were created were not saved, are currently lost and no longer exist." (R p 2259). As emphasized by the trial court's order, Plaintiffs-Appellants had the opportunity to subpoena Mr. Reel, but failed to do so. (R p 2703). The Panel properly found that Legislative Defendants gave a frank and satisfactory explanation under the circumstances.

Limits of Any Arguable Adverse Inference. The adverse interest test "does not take the place of evidence of material facts and does not shift the burden of proof so as to relieve the party upon whom it rests of the necessity of establishing a prima facie case, although it may turn the scale when the evidence is closely balanced." *McLain*, 137 N.C. App. at 185, 527 S.E.2d at 517. Even if an adverse inference were appropriate, such an inference could only apply to the House map and only for the five groupings where Representative Hall testified that the concept maps may have been prepared. (Vol.1, Ex. pp 3357–60, 3367–75). The Senate and Congressional Maps were drawn separately from the House map. The Senate and Congressional Maps were drawn by a different legislative committee, in a different committee room,

on different public terminals, on different days of the week and at different times of the day. The Senate plan and the Congressional plan were first presented to the Senate committee and first passed on the Senate floor before they were sent to the House for a vote. There is no evidence on the record suggesting otherwise. (*See, e.g.,* Vol.1, Ex. pp 3367–75; Vol. 1, Ex. pp 3674–75).

VII. PLAINTIFFS-APPELLANTS' REMEDIAL ARGUMENTS CONFIRM THAT THEY INVITE THIS COURT TO ACT AS POLITICAL BODY, NOT A COURT OF LAW

The Court need not, and should not, address Plaintiffs-Appellants' remedial arguments because no remedy is necessary, justified, or appropriate. If the Court disagrees, it must reject the path Plaintiffs-Appellants propose.

There is no lawful possibility for this Court to proceed to hire a special master and direct remedial redistricting processes itself. The State Constitution forecloses this possibility in providing, in no uncertain terms, that "[t]he General Assembly . . . shall revise the . . . districts." N.C. Const. art. II, § 3; *see also id.* art. II, § 5. The Court's obligation to direct any remedial process to the General Assembly in the first instance is not a self-imposed prudential restraint this Court may discard within its discretion. This obligation, instead, flows from the constitutional text and non-negotiable limits on this Court's authority. Any other course of action would declare a constitutional crisis.

The obligation stands doubly confirmed in state statute, which commands that "in no event may a court impose its own substitute plan unless the court first gives the General Assembly a period of time to remedy any defects identified by the court in its findings of fact and conclusions of law." N.C. Gen. Stat. § 120-2.4(a). This is a

legitimate exercise of legislative power that correctly honors the State's separation of powers. It is also eminently reasonable in providing that, if the General Assembly is unable to enact a remedy, the judiciary may fashion a remedial plan "for use in the next general election only." *Id.* § 120-2.4(a1). The statute further clarifies "that "interim districting plan may differ from the districting plan enacted by the General Assembly only to the extent necessary to remedy any defects identified by the court." *Id.* It would be wholly improper for this Court to chart a different remedial course when the law of this State, which has been followed consistently in all redistricting litigation, already provides a path and binds this Court's discretion.

The Court's discretion would also best be served by remanding the case to the Panel because additional fact-finding would be essential to inform any remedial process. As an initial matter, it is doubtful that the fact-finding is sufficient to make a liability determination in the event this Court finds partisan claims justiciable and identifies a standard to govern such claims. The Panel findings, as shown, were not informed by such a standard and in no place did that court conclude that the predicate facts are proven beyond "reasonable doubt." *Wayne Cnty.*, 328 N.C. at 29, 399 S.E.2d at 315. Nor could any such determination have been made in a legal vacuum. The correct approach would be remand and retrial under the correct standard. Nor did the panel find that any of the challenged districts constituted extreme political gerrymanders. This is not surprising because no court, including this one, has defined that term.

In any event, the findings of fact of the Panel are insufficient to govern a remedial phase. As explained above, state statute demands that "[e]very order or judgment declaring unconstitutional or otherwise invalid . . . any act of the General Assembly that apportions or redistricts State legislative or congressional districts shall find with specificity all facts supporting that declaration, shall state separately and with specificity the court's conclusions of law on that declaration, and shall, with specific reference to those findings of fact and conclusions of law, identify every defect found by the court, both as to the plan as a whole and as to individual districts." N.C. Gen. Stat. § 120-2.3. As detailed above, the Panel's order does not satisfy this standard. Given the fact-laden nature of this question, the Panel, in the first instance, should make these findings. If the Court were to reject that step, it would be obligated to make findings of fact identifying the defects of every district invalidated, on a district-by-district basis, and the defects of the plans on a statewide basis.

It is also imperative that the General Assembly understand the precise scope of its legal obligations. This Court owes the General Assembly a "*standard*" and "*rule*" befitting an exercise of judicial power. *Vieth*, 541 U.S. at 278 (plurality). It would not be enough simply to require a redistricting without partisan data or considerations: it remains the General Assembly's position that this *already occurred*. To order it again, based on information wholly exterior to the General Assembly, would command futility and amount to no standard at all.

***

The General Assembly is not the constitutional stepchild Plaintiffs-Appellants believe it to be. It exercises the "sovereign power" of the state. *State ex rel. Ewart v. Jones*, 116 N.C. 570, 21 S.E. 787, 787 (1895); *see also In re Spivey*, 345 N.C. 404, 413, 480 S.E.2d 693, 698 (1997); *Smith v. Mecklenburg County*, 280 N.C. 497, 512, 187 S.E.2d 67, 77 (1972). For this Court to invalidate its redistricting plans based on its exercise of political discretion would be unprecedented. The Court should not take this step. If it does, it must do so in a manner befitting to a court of law and exude proper respect for its co-equal branch of government. The path Plaintiffs-Appellants demand does none of this and would itself work a constitutional infirmity.

CONCLUSION

The Court should affirm the Panel's judgment.

Respectfully submitted, this the 28th day of January, 2022.

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