NO. 413PA21 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

COMMON CAUSE

Plaintiffs-Appellants,

v.

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

Defendants-Appellees

From Wake County
No. 21 CVS 015426

REBECCA HARPER, *et al.*,

Plaintiffs-Appellants

v.

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

Defendants-Appellees.

From Wake County
No 21 CVS 500085

****

BRIEF OF NC NAACP *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC et al., COMMON CAUSE, and REBECCA HARPER[1]

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[1] No outside person or entities wrote any of this brief or contributed any money to support the brief's preparation. See N.C.R. App. P. 28(i)(2).

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INTRODUCTION

The Congressional and Legislative maps enacted in 2021 by the North Carolina General Assembly ("Legislative Defendants") ***on their face*** rise to the level of depriving Black voters in North Carolina of the constitutionally protected right to vote on equal terms as non-Black voters – a right the North Carolina NAACP has fought for valiantly for more than 80 years.[2]

This is the first redistricting cycle without the full protections of the pre-clearance provision of the Voting Rights Act and the North Carolina General Assembly has used this opportunity to adopt maps which substantially reduce the numbers of Congressional, House, and Legislative Districts where Black voters have the possibility of influence. Legislative leaders relied on a well-understood manipulation tactic with predictable results: the destruction of effective cross-over districts that previously gave Black voters the ability to elect candidates of their choice. Legislative Defendant's widespread dilution of

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[2] The North Carolina State Conference of the NC NAACP ("NC NAACP") was established in 1938 and today has over 20,000 members, the largest membership of any NAACP state conference in the South, and the second largest in the country. The NC NAACP has more than 100 active branches in urban centers and rural communities throughout the state of North Carolina with members residing in every district under consideration by this court. Its members' rights are harmed by the numerous violations of the North Carolina Constitution of the "Enacted Maps" (State House Map (H.B. 976), State Senate Map (S.B. 739), and Congressional Map (S.B. 740)), including violations of the Free Elections Clause, Equal Protection Clause, and Freedom of Speech and Freedom of Assembly Clauses guaranteed under Article I, Sections 10, 12, 14, and 19 of the North Carolina Constitution. (N.C. Const. art. I, § 10), (N.C. Const. art. I, § 12) (N.C. Const. art. I, § 14), (N.C. Const. art. I, § 19).

Black voting power violated North Carolina's equal protection and free elections guarantees and requires decisive and swift action by this Court.

The unconstitutionally Enacted Maps were constructed through a process riddled with irregularities and flawed by inadequate redistricting criteria. Over the strong objections of voters and legislators of color, Legislative Defendants first chose to adopt criteria that forbade any public consideration of race and then refused to commission Racially Polarized Voting ("RPV") studies to assist map-drawers in protecting the rights of voters of color. At the same time, Legislative leaders relied on back-room analyses and now-destroyed "concept maps", which they have admitted were constructed by aides unburdened by *any* prohibition on considering race or partisan data. In addition, Legislative leaders and advisors carried forward significant prior knowledge of racial demographics, racial voting patterns, and the racial identities of incumbent candidates. The result: a fictional "race-blind" process, producing devastatingly real racially discriminatory results.

To protect the commands of the North Carolina Constitution, this Court should order an immediate and swift remedial process that will produce fair maps. As the Court considers this case and fashions an appropriate remedial process, it is well within its rights and indeed, it is duty-bound, to consider relevant evidence before it. That evidence includes the Legislative Defendants'

recent sequence of racially discriminatory actions to entrench their political party's power by unconstitutional means. And key also to ensuring an effective remedy for the people of North Carolina is evidence showing that Legislative leaders in the last redistricting cycle sought to lengthen the duration of the harm to North Carolina voters by delaying effective cures, including through misrepresentations to the Federal court and their legislative colleagues, and by adopting remedial maps also infected by unlawful discrimination.

Ultimately, these Enacted Maps cannot stand. Without justification, they intentionally diminish Black voting power in our state. They once again defy North Carolina's Equal Protection Clause guarantee, in concert with a host of other mutually reinforcing Constitutional violations, which produce a single outcome: the denial of the fundamental right of the people of this state to govern themselves in a representative democracy. The NC NAACP respectfully submits that voters of color and all North Carolinians deserve to participate equally in an unbroken decade of elections governed by fair maps — "conducted freely and honestly to ascertain, fairly and truthfully, the will of the people." *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at *337 (N.C. Super. Ct. Sept. 3, 2019). Through a careful Court ordered remedial process this Court can safeguard both our Constitution's full

protections of the right to vote for all North Carolinians and protect voters of color from unlawful racial discrimination.

ARGUMENT

I. The North Carolina General Assembly's History of Persistent Voting Rights' Violations Targeting Black Political Power is Relevant to this Court

The legislative actions at issue in this litigation represent the most recent chapter in long-standing efforts by the North Carolina General Assembly to manipulate outcomes of elections by targeting the rights of Black voters, thus systematically subverting the will of the voters of North Carolina. The most recent history over roughly the last decade echoes the state's long, ugly history of voting discrimination and struggle for the ballot. A history that has earned the state of North Carolina the distinction of being one of the most gerrymandered states in the nation and the origin place for many of our nation's most important legal cases and struggles defining the rights of Black people and the promise of multi-racial democracy.

A. North Carolina's Racial Voting Rights Violations and Progress Toward Racial Equality from Reconstruction to 2010

As Plaintiffs-Appellants' expert Dr. James Leloudis concluded, "North Carolina has a long and cyclical history of struggle over minority voting rights and political participation, from the time of Reconstruction to the present day." (R p 3205). Prior to the infamous November 1898 Wilmington coup d'état and

the 1899 adoption of disenfranchisement amendments in the North Carolina Constitution, North Carolina experienced extremely high rates of registration and turnout by Black voters. *See* R p 3216 (noting that "turnout among registered Black voters rose from 60 to nearly 90 percent" for the 1896 election). After the adoption of North Carolina's 1868 Constitution, which enfranchised African American males and removed the property requirement to vote, newly freed Black political participation spurred a remarkable, competitive two-party system in this state. (R p 3211) "Between 1877 and 1900, forty-three Black lawmakers served in the state House of Representatives, eleven served in the state Senate and four served in the U.S. House of Representatives." (R p. 3213)

As a result of the 1900 amendments to the North Carolina Constitution, no African American was elected to any political position in the state of North Carolina until 1947, when Rev. Kenneth Williams was elected as a member of the Winston-Salem Town Council. (R p 3229). Rev. Williams was the "first Black politician in the South to defeat a white opponent at the state or local level since the Fusion era of the 1890s." *Id*. In response to this historic victory by Rev. Williams, political jurisdictions developed and adopted multi-member political districts for future electoral campaigns to prevent similar Black voting success in single-member political contests. (R p 3205). It was not until 1968,

after the passage of the 1965 Voting Rights Act that an African American, Henry Frye from Greensboro, won a seat in the North Carolina General Assembly, the first such victory since the enactment of the 1899 disfranchising Constitutional Amendments. (R p 3252).

During the period from 1900 to the 1980s, particularly in eastern counties, North Carolina created multi-member house and senate districts which had the purpose and effect of submerging large Black populations into districts with a surrounding larger White population to successfully prevent Black voters from electing representatives of their choice. (R p 3205). From 1968 through 1982, only four African Americans were elected to serve in the General Assembly: three of the 120 members of the house and one of the 50 members elected to serve in the Senate.

This practice also affected local races, as was the case in the story of NC NAACP member Dr. G.K. Butterfield Sr.'s political career. During the 1950s, Dr. G.K. Butterfield Sr. was one of seven Black candidates who "had the courage to run in Eastern North Carolina, where Jim Crow was most deeply entrenched." (R p 3234). Although Butterfield Sr. was elected to be a town commissioner in Wilson, NC for two terms, his career ended when the board approved a surprise resolution to change to an at-large form of municipal

government, where the commissioners would be chosen in a multi-candidate contest. *Id*.

This practice diluted the voting strength of African American communities statewide and relied heavily upon "racially polarized" voting by Whites to achieve its purpose. The voter suppression devices effectively controlled outcomes of elections in North Carolina until the Courts stepped in and determined the multi-member districting scheme to be unconstitutional and contrary to the dictates of the Voting Rights Act, in the landmark case *Thornburg v. Gingles*, 478 U.S. 30, 38-39 (1986) (affirming the District Court's factual conclusion that the General Assembly "had officially discriminated against its [B]lack citizens with respect to their exercise of the voting franchise from approximately 1900 to 1970 by employing, at different times, a poll tax, a literacy test, a prohibition against bullet (single-shot) voting and designated seat plans for multimember districts").

With the demise of multi-member districts, the political success of African American candidates increased. Not only did the legal protections and determinations protect the rights of African Americans to vote, but they also encouraged members of this population to compete, on an equal basis, for election to the electoral positions. As a result, by 1989, the number of African Americans who were elected to the General Assembly increased from four to

nineteen. (R p 3254). This period included the election of Milton Frederick "Toby" Fitch Jr. to the North Carolina State House of Representatives in 1985, where he served until 2001. Fitch, whose participation in the Civil Rights Movement shaped his path towards a barrier-breaking legal career as an attorney and Superior Court Judge, is currently a member of the North Carolina State Senate.

By 2001, the number of African Americans elected to the General Assembly had increased further to 25; seven in the Senate and 18 in the House – 14% of legislators at that time. Earls, Wynes, and Quatrucci, Review of Law and Social Justice 17:2, "Voting Rights in North Carolina 1982-2006" (March 2006),https://gould.usc.edu/students/journals/rlsj/issues/assets/docs/issue_17/05_North_Carolina_Macro.pdf. With the election of members for the 2020 General Assembly, African American representation in the State Legislature grew to roughly 21%. National Conference of State Legislatures, "State Legislator Demographics" (Dec. 2020), https://www.ncsl.org/research/about-state-legislatures/state-legislator-demographics.aspx.

Since 1990, two African Americans have also been regularly elected to Congressional seats from North Carolina. One of these individuals is G.K. Butterfield Jr., the son of former town commissioner G.K. Butterfield Sr., who served honorably as an Associate Justice of this Court, was elected to the U.S.

House of Representatives in 2004, and who is currently the longest serving member of North Carolina's Congressional delegation.

B. North Carolina's Voting Discrimination in the Last Decade

i. Courts Found That North Carolina's General Assembly Engaged in Multiple Unlawful Gerrymanders Since 2010 and Lied to the Court to Maintain Power

Since 2010, the N.C. General Assembly has been regularly forced to re-draw the State's legislative and Congressional districts due to both racial and partisan violations of the State Constitution, the federal Constitution and the Voting Rights Act. In 2010, the Republican Party gained a majority of seats in each house of the General Assembly, the first time they had done so since 1896. (R p 3264). From there, the leadership of the General Assembly used blatant, intentional racial discrimination in the redistricting process to entrench their own power by disadvantaging and discouraging voters of color. In both *North Carolina v. Covington* and *Cooper v. Harris,* federal courts found that the General Assembly's statewide and federal legislative districts violated the Equal Protection Clause of the United States Constitution.

In 2011, following the 2010 census, the General Assembly redrew the boundaries of North Carolina legislative districts for both the NC Senate and the NC House of Representatives. The districts were enacted in July 2011. During this process, the North Carolina General Assembly intentionally

packed Black voters into districts where African Americans already represented a large proportion of the electorate. (R pp 3264 - 65). The General Assembly, working with map-maker Thomas Hofeller,[3] created segregated majority-minority districts, using race as a predominant factor for district creation, even in those districts where Black voters' candidates of choice were regularly being elected, and where multi-racial coalitions already allowed voters of color to realize effective political strength. *Id*.

On May 19, 2015, twenty-eight plaintiffs filed a lawsuit in federal court alleging that twenty-eight districts (nine Senate districts and nineteen House of Representative districts) were unlawful racial gerrymanders in violation of the Equal Protection Clause of the Fourteen Amendment of the United States Constitution. *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016). In response to these allegations, Defendants stated that "race was not the primary factor used in the redistricting, and that even if it was, their use of

[3] Hofeller also wrote an unpublished study that concluded that using responses from a citizenship question on the Census would be "advantageous to Republicans and Non-Hispanic Whites" when voting districts are redrawn. *See* Michael Wines, "Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question," *New York Times,* May 20, 2019, https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html. *Covington v. North Carolina*, 316 F.R.D. at 128, 176*; Covington v. North Carolina* ("*Covington III*"), 283 F. Supp. 3d 410, 419—20 (M.D.N.C. 2018), aff'd in part, rev'd in part, 138 S. Ct. 2548 (2018). (Almost two- thirds of all House and Senate districts had to be redrawn to create remedial maps.)

race was necessary to serve a compelling state interest – namely, compliance with Section 2 and Section 5 of the Voting Rights Act." (R p 3272).

In August 2016, the three-judge federal district court panel in *Covington* unanimously ruled for plaintiffs, holding that "race was the predominant factor motivating the drawing of all challenged districts," and struck down all twenty-eight challenged districts as the result of an unconstitutional racial gerrymander. *See Covington,* 316 F.R.D. at 124, 176, *aff'd*, 581 U.S. ——, 137 S. Ct. 2211 (2017) (per curiam). The Court held that Republican lawmakers had "no strong basis in evidence" that their use of race was necessary to comply with Section 2 or Section 5 of the VRA. *Id*. In fact, the data showed just the opposite – for example, the plan had "cram[med] 88.39 percent of Greensboro's Black voting-age residents into three majority-minority state House districts." (R p 3273). As a result, the Court ordered that new maps be drawn that complied with both the Constitution and the Voting Rights Act. (R p 3273).

In 2017, the U.S. Supreme Court found in *Cooper v. Harris* that the General Assembly had similarly engaged in intentional racial discrimination in the construction of its U.S. House of Representative Districts 1 and 12, illegally concentrating African American voters into two districts in order to prevent their influence in a broader number of "crossover" or coalitional districts, where, for nearly 20 years, "African Americans made up less than a

majority but their preferred candidates scored consistent victories." *See Cooper v. Harris*, 137 S. Ct. 1455 (2017). As Justice Elena Kagan wrote for the majority:

> The new map (among other things) significantly altered both District 1 and District 12. The 2010 census had revealed District 1 to be substantially underpopulated: To comply with the Constitution's one-person-one-vote principle, the state needed to place almost 100,000 new people within the district's boundaries. [Republican state legislative leaders Robert Rucho and David] Lewis, and [their expert, Dr. Thomas] Hofeller chose to take most of those people from heavily Black areas of Durham, requiring a finger-like extension of the district's western line. With that addition, District 1's BVAP [Black voting-age population] rose from 48.6% to 52.7%.

Id. at 1466.

Finally, in a September 3, 2019 decision, a three-judge state court panel struck down North Carolina's 2017 state legislative plan as a partisan gerrymander in violation of the state constitution. *Common Cause v. Lewis, a*t 347. The state court found that the General Assembly had intentionally packed Democrats into districts to diminish their voting strength elsewhere and "cracked" concentrations of Democrats to submerge them in Republican-favored districts. In a particularly conspicuous example, legislators evenly split the nation's largest historically Black university, NC Agricultural & Technical State University (NC A&T), dividing the 13,000-person Greensboro campus into two congressional districts. *Id*.

Because the legislature's remedy was *also infected with racial discrimination*, the court found it necessary to construct the remedial plan itself through appointment of a special master. (R p 3273). Disturbingly, the court also found that the North Carolina legislative leadership had misrepresented its timeline for preparing remedial maps to the *Covington* court, effectively misleading both the federal court, the public and other members of the General Assembly —in an attempt to garner one last election under illegal districts and extend the length of time they could hold onto their super-majority. *Common Cause v. Lewis*, at *284 - 91.

The Court held that it was "troubled by representations made by Legislative Defendants, or attorneys working on their behalf, in briefs and arguments to the *Covington c*ourt and to General Assembly colleagues at committee meetings that affirmatively stated that no draft maps had been prepared even as late as August 4, 2017," when the evidence presented to the Court demonstrated that draft maps had in fact been substantially completed by June 2017. *Id*. at 290-91. The federal three-judge panel in *Covington II* held:

> Taken together, the effects of the racial gerrymanders identified by the Court—and affirmed by the Supreme Court—are widespread, serious, and longstanding. Beyond the immediate harms inflicted on Plaintiffs and other voters who were unjustifiably placed within and without districts based on the color of their skin, Plaintiffs—along with millions of North Carolinians of all races—have lived and

> continue to live under laws adopted by a state legislature elected from unconstitutionally drawn districts.
>
> 270 Supp. 3d at 894.

Through these dilatory litigation tactics, the legislative majority was able to keep the illegal districts in place for most of the decade, with new districts not being put in place until the 2018 election.

ii. Additional Judicial Findings of Purposeful Racial Discrimination in the Last Decade

During this same time period, both state and federal courts found that the General Assembly had passed restrictions on the right to vote that discriminated against Black voters based upon race. In 2016, the Fourth Circuit Court of Appeals held that the North Carolina legislature had enacted a photo voter identification law and four other restrictions on the right to vote in 2013 (H.B. 589) with a racially discriminatory intent in violation of the Voting Rights Act and the Equal Protection Clause of the U.S. Constitution. The Court held that, immediately following the Supreme Court's decision in *Shelby v. Holder* that struck down the pre-clearance provisions of the Voting Rights Act, the General Assembly "vastly expanded an earlier photo ID bill and rushed through the legislative process the most restrictive legislation seen in North Carolina since enactment of the Voting Rights Act of 1965." *NC NAACP v. McCrory*, 831 F.3d 204, 227 (4th Cir. 2016). The Court also ruled that the

provisions of this law "target African Americans with almost surgical precision." *Id*. at 214.

Undeterred by the Fourth Circuit's condemnation of H.B. 589, the Legislature passed a new photo voter identification law in 2018, S.B. 824, immediately after the U.S. Supreme Court declined to review the decision in *McCrory*. Legislative leaders stated that they intended to pass a new photo voter ID requirement which would survive future court challenges. Jeff Tiberii, *WUNC*, "NC Lawmakers Consider Another Voter ID Bill," (July 2017), https://www.wunc.org/politics/2017-07-13/nc-lawmakers-consider-another-voter-id-bill. Within days of this law being enacted, the NC NAACP, as well as local NAACP chapters, filed a lawsuit challenging the validity of S.B. 824 in federal court (NC *NAACP v. Cooper*, No. 1:18-cv-01083), while a different group of plaintiffs brought a challenge in state court (*Holmes v. Moore*, No. 18-cvs-15292). The federal case alleged that the law violates Section 2 of the Voting Rights Act, as well as the Fourteenth (U.S. Const. amend. XIV) and Fifteenth Amendments (U.S. Const. amend. XV), while the state case challenged this law under the North Carolina Constitution.

On December 31, 2019, the U.S. District Court for the Middle District of North Carolina issued a ruling that it would block S.B. 824 because its passage was likely motivated by racially discriminatory intent in violation of the Voting

Rights Act and the U.S. Constitution. *NC NAACP v. Cooper*, 430 F. Supp. 3d 15 (M.D.N.C. 2019).[4] *Holmes* was tried on the merits in June 2021, and on September 17, 2021, the trial court ruled in favor of Plaintiffs, finding that S.B. 824 was enacted in violation of the Equal Protection Clause of the North Carolina Constitution. *Holmes v. Moore*, No. 18-cvs-15292 (Sept. 17, 2021) (Order). The court found that the sequence of events leading to the passage of S.B. 824 was unusual, since H.B. 1092, the Voter ID Constitutional Amendment[5] was passed immediately after the Supreme Court's decision in *Covington*, "thereby allowing their racially gerrymandered legislature to implement their legislative goals" during their lame duck session. *Id*. at 17. The Court also concluded that S.B. 824's rushed process didn't allow time for legislators to consider and address concerns of minority voters, proposed

[4] The Fourth Circuit later overturned the preliminary injunction decision of the Middle District, but the law remains enjoined due to the final ruling entered in the *Holmes* case. This case awaits a full trial on the merits in federal court.

[5] The NC NAACP has also challenged two constitutional amendments in an independent case now before this Court following the non-unanimous reversal of the Superior Court's judgement in favor of Plaintiffs. *NC NAACP v. Moore*, 864 S.E.2d 736 (N.C. 2021) In that order, the Wake County Superior Court ruled that "the unconstitutional racial gerrymander tainted the three-fifths majorities required by the state constitution before an amendment proposal can be submitted to the people for a vote, breaking the requisite chain of popular sovereignty between North Carolina citizens and their representatives," and therefore "the constitutional amendments placed on the ballot in November 6, 2018, were approved by a General Assembly that did not represent the people of North Carolina." *NC NAACP v. Moore*, 18 CVS 9806, Order (Feb. 22, 2019).

amendments that could have benefitted Black voters were rejected, and that Black voters are less likely to possess a qualifying ID under S.B. 824 than white voters. *Id.*

C. Voting in North Carolina is Racially Polarized

It is well understood that North Carolina elections remain highly racially polarized, that Black voters in the state vote for Democratic candidates at a much higher rate than white voters, and that race is a better predictor even than party affiliation of a voters ultimate voting behavior. (*See, e.g.*, R p 3212.) Uncontroverted judicial findings of racially polarized voting in North Carolina have been made as recently as 2021, when the Wake County Superior Court struck down the photo voter ID law (S.B. 824) as racially discriminatory.

Here, Plaintiffs-Appellants' expert, Professor Moon Duchin analyzed North Carolina electoral history and performed an assessment of racial polarization patterns. Based on this analysis, Dr. Duchin found "a consistent pattern of polarization in statewide general elections, such that White voters are estimated to support the Republican candidate at a rate of over **61%** in every general election, and Black voters are estimated to support the Democratic candidate at a rate of over **94%** each time." (R p 2726, emphasis added). She further found that "Polarization is present in many Democratic

primary elections as well, particularly in elections in which there is a Black Democratic candidate." *Id.*

A 2019 expert report in *NAACP v. Cooper* by Professor Allan Lichtman, concluded similarly that "racial disparities in voting in North Carolina far exceed disparities for other politically salient characteristics of voters, such as sex, age, education and income" and that, in his analysis of the 2016 election, "race is **by far the greatest indicator** of the preferences of the voters of North Carolina.'" Preliminary Expert Report of Allan J. Lichtman, *NC NAACP v. Cooper*, 1:18-cv-01034, ECF 91-1, at 52 (M.D.N.C. 2019) (emphasis added). Lichtman also concludes in his report that "the waning strength of white voters in North Carolina combined with racially polarized voting provides motivation for Republicans in the General Assembly to limit the voting power of African Americans." *Id.* at 4.

Indeed, when the Wake County Superior Court panel struck down the photo voter identification law (S.B. 824) in 2021, they also found that "the facts and evidence show that race and politics in North Carolina remain closely linked, and that racially polarized voting continues to create an incentive to target African American voters when they reliably vote against the party in power." *Holmes v. Moore*, at 78. The court recounted the recent history of increased voter registration and participation by Black North Carolinians,

whose "turnout increased from 41.9 percent in 2000 to 71.5 percent in 2008," while North Carolina remained "as racially polarized as it had been at the end of the nineteenth century." *Id.* at 10. It also noted that "[I]n North Carolina, African-American race is a better predictor for voting Democratic than party registration." *Id.* at 97 (quoting *McCrory*, at 225).

Legislative Defendants understood it would put Republican power at risk to maintain opportunities for Black voters who overwhelmingly support Democratic candidates, and Legislative leaders were highly familiar with the Court findings and evidence of racially polarized voting. At trial, Defendants' own expert testimony and the testimony of Sen. Hise confirmed the link between race and party in this state. Defendants admitted to retaining knowledge of demographics, including racial demographics and geographies of the state. Defendant Hise confirmed in his deposition that "Once I know something I can't unknow it… No person could." (R. Ex 3556 Vol 1 p 3618). Defendant Hall acknowledged that, from his experience as a legislator in prior redistricting cycles he had pre-existing knowledge of partisan data and information that he cannot "remove what's...in [his] head...in drawing a given map" (R Ex 3235 Vol 1 p 3300).

II. The Enacted Maps Produce a Broad, Severe and Devastating Impact on the Ability of Black Voters to Elect Candidates of Choice

The new districts have been drawn to completely subordinate the will of Black voters across the state. The 2021 Enacted Maps will produce a significant reduction in the ability of Black voters to nominate or elect their candidates of choice, which includes but is not limited to their ability to nominate or elect their candidate of choice in Districts currently represented by Black candidates.

Presently, African Americans are 12 of the 50 members who serve in the North Carolina Senate;[6] 24 of the 120 members who are elected to serve in the North Carolina House of Representatives;[7] and two of 13 members of the North Carolina Congressional Delegation.

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[6] Sen. Sydney Batch, current SD 17; Sen. Ernestine Bazemore, current SD 3; Sen. Dan Blue, current SD 14; Sen. Ben Clark, current SD 21; Sen. Don Davis, current SD 5; Sen. Milton F. "Toby" Fitch, current SD 4; Sen. Valerie Foushee, current SD 23; Sen. Natalie Murdock, current SD 20; Sen. Gladys Robinson, current SD 28; DeAndra Salavador, current SD 39; Sen. Joyce Waddell, current SD 40; and Sen. Paul Lowe, current SD 32. Available at: https://www.ncleg.gov/Members/MemberList/S

[7] Rep. Howard Hunter, current HD 5, Rep. Kandie Smith, current HD 8, Rep. Raymond Smith, current HD 21, Rep. Shelly Willingham, current HD 23, Rep. Linda Cooper-Suggs, current HD 24, Rep. James D. Gaillard, current HD 25, Rep. Vernetta Alston, current HD 29, Rep. Zack Hawkin, current HD 31, Rep. Terry Garrison, current HD 32, Rep. Rosa U. Gill, current HD 33, Rep. Abe Jones, current HD 38, Rep. Marvin W. Lucas, current HD 42, Rep. Garland Pierce, current HD 48, Rep. Robert T. Reives, current HD 54, Rep. Amos L. Quick, III, current HD 58, Rep. Cecil Brockman, current HD 60, Rep. Amber Baker, current HD 72, Rep. Terry M. Brown,, current HD 92, Rep. Nasif Majeed, current HD 99, Rep. Carolyn Logan, current HD 101, Rep. Brandon Lofton, current HD 104, Rep. Carla Cunningham, current HD 106, Rep. Kelly Alexander, current HD 107, Available at https://www.ncleg.gov/Members/MemberList/H.

Under the Enacted Maps, in the State House there will likely be at least a 16% decrease in African American representation. African Americans will lose their ability to elect their candidates of choice in the following Districts currently represented by Black Representatives: District 21 (Raymond Smith Jr.); and African Americans could lose their ability to elect Representatives of choice in the following districts currently represented by Black Representatives: District 5 (Howard J. Hunter III), District 54 (Robert Reives II), and District 24 (Linda Cooper-Suggs). The loss of candidates of choice in these districts could result in the total African American representation in the State House decreasing from 24 House members to 20 members who are both Black candidates of choice and who identify as African American.[8]

In the State Senate, there will also likely be at least a 16% decrease in African American representation under the enacted maps. African American voters are likely to lose the ability to elect their candidate of choice in at least the following Districts currently represented by Black Senators: District 1 (currently held by Senator Earnestine Bazemore), District 4 (Milton F. "Toby"

[8] *Common Cause* Petitioners also present evidence arguing that the Enacted "House maps unnecessarily double-bunk Black Elected officials. They identify that Representative Abe Jones, and James Roberson represent District 38 and 39 respectively, are both Black and are both the candidates of choice for Black voters in their district. Under the Enacted Maps, Representative Jones and Roberson will be paired with each other and Black voters will be forced to choose between two representatives who were both previously their candidates of choice. Brief of Plaintiff-Appellant Common Cause at 71 (Jan. 21, 2022).

Fitch, Jr), and District 21 (Ben Clark). The loss of these Senate districts in which African Americans are able to elect their candidates of choice could result in African American Representation decreasing from 12 Senate members to 9 members who are both Black candidates of choice and who identify as African American (R Ex. 6844 Vol. 4 p 911-12).

Finally, the Congressional Enacted Maps produce severe disadvantages to African American voters' ability to elect their candidates of choice, including in District 1— a seat currently held by prominent Black Congressional Representative Congressman G.K. Butterfield, the longest serving African American member of the North Carolina Congressional Delegation. The Enacted Maps will likely result in a 50% reduction of the number of North Carolina's African American Congressional Representatives from two to one.

This reduction in congressional representation is particularly contradictory in light of the fact that North Carolina's population increase is primarily attributable to a disproportionate growth in the state's African American, Hispanic, and Asian populations. This population surge is the reason North Carolina gained an additional Congressional seat; bringing its total Congressional Delegation to 14. *See, e.g.,* Rebecca Tippet, *Carolina Demography*, "First Look at 2020 Census for North Carolina," (August 2021),

https://www.ncdemography.org/2021/08/12/first-look-at-2020-census-for-north-carolina.

i. *Scope of Harm Demonstrated Under Alternative Maps Analysis*

The Black voting age population (BVAP) of North Carolina currently totals 1,743,052 out of 8,155,099 or 21.4%. (R p. 2735). In her expert report, Prof. Moon Duchin sheds light on the racial vote dilution that is evident in the 2021 Enacted Maps by analyzing data detailing Black voters' opportunity to elect candidates of their choice. In doing so, she compared the legislature's 2021 Enacted Maps to alternative maps (hereinafter "NCLCV Maps") proposed by petitioners. *Id.* at 12.

The NCLCV Maps "meet or exceed the performance of the enacted plans" and "demonstrates that it is possible, without any cost to the redistricting principles in play, to select maps that are far fairer to the voters of North Carolina." *Id.* At 5. According to her analysis, the NCLCV alternative maps provide more effective opportunity-to-elect districts for Black voters than the corresponding legislatively enacted plans.[9] *Id.*

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[9] Dr. Duchin concluded that there were sufficiently large, geographically compact, and politically cohesive groups of Black voters that could form effective Black opportunity districts in the following Districts: Districts 2, 4, 9, and 11 in the NCLCV Congressional Map; Districts 1, 5, 11, 14, 18, 19, 26, 27, 32, 38, 39, and 40 in the NCLCV Senate Map; and Districts 2, 8, 9, 10, 23, 24, 25, 27, 31, 32, 33, 38, 39, 40, 42, 43, 44, 45, 48, 57, 58, 59, 60, 61,

The NCLCV Maps show a total of four effective opportunity-to-elect U.S. Congressional districts for Black voters – double the amount of the legislature's enacted maps, which preserve only two. *Id.* With regards to the 50 State Senate Districts, the 2021 Enacted Maps have only eight effective opportunity-to-elect districts for Black voters as opposed to the NCLCV Maps' total of 12. Lastly, out of 120 House Districts, the 2021 Enacted Maps identified only 24 effective opportunity-to-elect districts for Black voters while the NCLCV Maps identified a total of 36. *Id. See* Brief of Plaintiffs-Appellants North Carolina League of Conservation Voters at 88-106 (summarizing the Enacted Maps dilution of Black voting power, relying on "packing" and "cracking" districts across the state).

A. U.S. Congressional Districts

In 2016, the Court in *Harris v. McCrory*, 159 F. Supp. 3d 600, 627 (M.D.N.C. 2016) found that District 1 was an unconstitutional racial gerrymander. For decades, Congressional District 1 has been known as an area where African Americans have been able to successfully nominate and elect their preferred candidates. Even in years where majority-Black status was not achieved, Congressional District 1 still provided Black voters the opportunity

63, 66, 71, 88, 92, 99, 100, 101, 102, 106, 107, 112 in the NCLCV House Map. (R p 2727) (Table 2: Minority Electoral Opportunity in Enacted & NCLCV Plans).

to elect their candidates of choice. North Carolina Legislators, therefore, were well aware of the demographic make-up of this area of North Carolina. In 2019, the redrawn Congressional District 1[10] contained 42.38% BVAP which allowed Black voters to elect their candidates of choice including Congressman G.K. Butterfield Jr to the U.S. House of Representatives. (R Ex. 6840 Vol. 4 p. 907). Congressional District 1 has historically been a center for political power for African Americans in Eastern North Carolina. In representing this constituency, Congressman Butterfield currently serves as a senior member of the Black Legislative Caucus where he provides significant leadership, including in the fight for equal voting rights and America's democracy. G.K. Butterfield, *House of Representatives*, "Committees and Caucuses," (January 2021), https://butterfield.house.gov/about/committees-and-caucuses.

In the 2021 Enacted Maps, Greenville (a heavily Black and Democratic city) as well as a vast majority of Pitt County, one of the largest counties in the district, have been moved into Congressional District 2. This relocation grabbed thousands of Black Democratic voters out of one district and absorbed them into another, thereby diluting the voting power of Black voters in the district. Black voters in District 1 were essential to electing their preferred

[10] Christopher Dalton Ketchie is a Demographer and Data Analyst. Ketchie supplied an affidavit on behalf of Petitioners attaching several exhibits, including tables that provide Census Redistricting Data used herein. (R Ex 6425 Vol 4 pp 492, 494).

candidate, Representative G.K. Butterfield Jr., where a high level of racially polarized voting is present, and differences in BVAP have significant consequences on Black voters' ability to elect candidates of choice. Brief of Plaintiff-Appellant Common Cause at 75 (Jan. 21, 2022). It is evident that his district was directly targeted when creating the new districting plan. The changes in newly drawn districts all but ensure that neither Congressman Butterfield, nor any Black candidate of choice, can be elected and thus Black voters will lose this historic seat in Congress.

The elective will of Black voters will also be significantly diluted in the Triad, where the Sixth Congressional District was targeted in the redrawn maps with extreme disregard for communities of interest, while cracking Black voters into surrounding districts. Guilford County is both a heavily Black and heavily Democratic voting district. In the 2021 Enacted Maps, Congressional District 6 was senselessly split into three separate districts, Congressional Districts 7, 10 and 11, stretch Black voters into majority White districts out as far as Watauga and Wake County. This sporadic mapping serves as a prime example of the way the 2021 Enacted Maps divided Black voters from a cohesive community of interest where there is shared history, voting patterns, and socioeconomic realities. Brief of Plaintiff-Appellant Common Cause at 40 (Jan. 21, 2022) The Legislative Defendants ignored African American's pleas

to keep Guilford County whole. (R Ex. 6289 Vol. 4 p 356). The fact that the Legislative Defendants blatantly disregarded legitimate concerns raised by minorities, coupled with the fact that NCLCV alternative maps show an alternative to the Guilford and Forsyth mapping schemes, is important evidence that the Legislative Defendants chose to dilute Black Voting power in the Sixth District. *Id.*

B. North Carolina Senate Districts

The 2021 Enacted Senate Map will significantly reduce the number of Senators who are the candidates of choice of Black voters, thus diminishing representation of Black voters in the State's legislature. Senate Districts 4 and 21 are examples of districts impacted by the newly Enacted Senate Maps and, after both were previously determined to be a racial gerrymander in 2016. (Plaintiff's-Apellants Common Cause at 74 (Jan. 21, 2021) citing *Covington*, 316 F.R.D. at 142, 147). Under the Enacted Senate Map, Black voters lost their ability to nominate and elect their candidate of choice. **In both Senate District 1 and 4, the chances of the Black-preferred candidate winning went from 100% to 0%.** (R Ex. 9605 Vol. 5 p 2707). Legislators were well aware of the racial and demographic compositions of these areas of the state, particularly from previous litigation. Yet, the Enacted Senate Map eviscerated two functioning, effective, crossover districts. (R Ex. 9608-10 Vol. 5 p 2710-12).

As the trial court noted, Plaintiff's expert Dr. Jonathan Mattingly found that the General Assembly's state Senate cluster choices in Northeastern North Carolina "favors the Republican Party and significantly fractures Black voters in that area." *Id.* The Northeastern corner of the North Carolina State Senate has two possible clusterings; both clusterings are made of two clusters each within one district. (R. Ex. 6580 Vol. 4 p 647). When compared with other possible districting options, the enacted plan splits Black voters roughly in half. *Id.* In contrast, the other potential clusterings would have concentrated Black voters in one of the two resulting districts. *Id.* Additionally, the enacted plan creates two stable majority white Republican districts when measured across a range of historic voting patterns, whereas the alternative clustering would allow the district with the larger BVAP (42.33% BVAP) to reliably elect a candidate of choice. *Id.*

NC Senate District 4

Senate District 4, currently represented by Senator Milton F. "Toby" Fitch, is a majority-Black district located in Northeastern North Carolina. Senator Fitch, a Black member of the Democratic party, has represented District 4 since 2018 and is well-known for his advocating for African Americans and equality across the state. Over the past decade, Senate District

4 has consistently been drawn in ways that negatively impact the ability of Black voters to elect candidates of their choice. S*ee Covington*.

In 2019, the Black Voting Age Population in this District totaled 47.46% - a rate that gave Black voters in Senate District 4 the opportunity to elect the candidate of their choice. (R Ex. 6842 Vol. 4 p. 909). However, under the 2021 Enacted Maps, Senate District 4 has been redrawn in a way that locates Senator Fitch in a district that contains a BVAP of only 35.02%. (R Ex. 6844 Vol. 4 p 911). This drastic reduction in BVAP not only prevents Black voters in Senate District 4 from electing their candidate of choice, but it also results in the strong likelihood of Senator Fitch losing his seat to a candidate that is not the candidate of choice by Black voters in the district. *Id*.

Aside from the high probability of Senator Fitch losing his seat as representative for Senate District 4, the 2021 Enacted Maps further harms the district by eliminating the chances of any Black-preferred candidate's ability to win. As substantiated by Dr. Lewis, the Legislative Defendants' expert, both Senate Districts 1 and 4 had BVAP figures high enough to enable Black voters to elect candidates of their choice in the 2019 Enacted Districts, however, **neither** district now maintains a BVAP high enough to enable Black voters to continue electing candidates of their choice in the 2021 Enacted Maps. (R Ex. 9608-10 Vol. 5 p 2710-12).

NC Senate District 21

Senate District 21 is currently a majority-Black district which gets more than half of its population from the city of Fayetteville, North Carolina. *Covington*, 316 F.R.D at 146. It is represented by Senator Ben Clark who has held the seat for 9 years. Like Senate District 4, Black Voters in Senate District 21 has been negatively impacted by the district maps drawn by the North Carolina Legislature over the past decade. The 2011 enacted senate map divided traditional political boundaries on the basis of race by dividing thirty-three of forty-one precincts located in Cumberland County. In comparison, only one precinct located in Cumberland County was divided in 2000. *Id*. Additionally, the 2011 enacted maps divided three municipalities, the most prominent being the city of Fayetteville – a city containing 55.1% of Fayetteville's overall population at the time, but 75.70% of the voting-age of African Americans in the city. *Id*.

In 2019, the redrawn Senate District 21 had a BVAP of 42.15% - a rate that allows Black voters the opportunity to elect their candidates of choice, including Senator Ben Clark. (R Ex. 6842 Vol. 4 p 909). Under the 2021 Enacted Maps, Senator Ben Clark is now drawn into Senate District 24, resulting in a drastic decrease in the BVAP rate. (R Ex. 6844 Vol. 4 p 911). Newly drawn Senate District 24 contains a BVAP population of only 29.63% as

opposed to the 2019 BVAP rate of 42.15%. *Id*. Not only is there a vast reduction in BVAP percentage, Senator Clark is also double-bunked with incumbent Republican Senator Danny Earl Britt, Jr., who is White. *Id*. This curtailment of BVAP percentage will prevent Black voters in the district from continuing to elect their candidates of choice. As a result, Senator Clark will likely lose his Senate seat to a candidate who the majority of Black voters in this district will not support.

C. North Carolina House Districts

i. Widespread Vote Dilution in House Counties

The Legislative Defendants diluted Black voters voting strength in several House Counties (R pp 2727-2731). For example, in Cumberland County, Black voters are packed into one district, which dilutes the Black voting population in the two neighboring districts. (R p 2731). According to maps generated by NCLCV, Blacks in Wake County should be able to choose their preferred candidate in five out of thirteen districts in Wake County. Brief of Plaintiffs-Appellants North Carolina League of Conservation Voters at [104] (Jan. 21, 2022). Instead, the Legislative Defendants diluted Black voters power by packing them into fewer districts, resulting in only three districts where Black voters can pick their representative. (R p 2727). Black voters are also targeted in Pitt County. The NCLCV maps demonstrate that Black voters

should have a genuine opportunity to nominate and elect preferred candidates in both of Pitt's districts. *Id.* However, the adopted maps split Greenville by moving white voters into District 9 and keeping Black voters out. *Id.*

NC House Districts 21 and 10

For nearly a decade, Black voters in District 21 helped to elect Black Incumbents (R Ex. 9606 Vol. 5 p 2708). In 2019, Blacks in District 21 made up 39% of the voting age population and these Black voters relied on effective crossover coalitions to elect their candidate of choice: Representative Raymond Smith Jr. (R Ex. 6848 Vol. 4 p 913).

The Enacted House Map in 2021, however, erased Representative Smith from District 21 and redrew him into District 10. (R. Ex. 6849 Vol. 4 p 916). In doing so, Representative Smith, a Black Democrat, is double-bunked against John R. Bell, a White Republican. *Id.* District 10 is a majority Republican district where the BVAP is only 34.27% of the voting population. *Id.* This reconfiguration deals a severe blow to the BVAP's ability to elect their candidates of choice in District 10.

Turning back to District 21, the House Enacted Map moves District 21 to an area just outside of Raleigh, where the BVAP is only 11.6 %. (The Enacted Maps) (R Ex. 6849 Vol. 4 p 916). Given the scant number of Black voters in the newly created District 21, it is impossible for these Black voters to choose their

preferred candidate. This fact is substantiated by Dr. Lewis, expert for the Respondents. In his report, Dr. Lewis concedes that there is a zero percent chance of electing a Black preferred candidate in District 21 under the Enacted Maps. (R Ex. 9606 Vol. 5 p 2708). Legislative Defendants could have avoided this outcome. According to Expert Dr. Mattingly's examination of the Duplin-Wayne County cluster, (R p 3369) "it is possible to draw districts with significantly higher BVAPs." *Id.*

NC House Districts 5 and 24

Enacted District 5 and District 24 also show reductions in the BVAP. (R Ex. 6846 Vol. 4 p 913; R Ex. 6849 Vol. 4 p 916). House District 5 encompasses Gates, Pasquotank, and Hertford Counties in Eastern North Carolina. Representative Howard Hunter, who identifies as African American and Native American, is the current elected Representative for District 5. (*North Carolina General Assembly Official Website:* https://ncleg.gov/members/Biography/H692). Under the 2019 maps, Hunter's district contained a BVAP of 44.32% with a political split between 54% Democrats and 44.35% Republicans. (R Ex 6846 Vol 4 p 913).

The Enacted House Map systematically reduces the probability that District 5's Black voters will be able to choose their candidate of choice, and the Enacted House Map severely reduces Hunter's chances of being reelected.

The Enacted House Map minimizes the BVAP in District 5 from 44.32% to 38.59%. (R Ex 6849 Vol 4 p 916). Simultaneously, the Enacted House Maps spikes the majority white Republican percentage from 44.35% to 48.09% and levels out the overall Democratic percentage from 54.09% to 50.2%. *Id.*

ii. Unique Harms to Black Voters

The harms caused to Black voters through racial discrimination in voting are multifold and serious. One significant injury that will result from the drastic decrease in representation by North Carolina's Black elected candidates of choice expected under the Enacted Maps will be the harm to the ability of Black voters and multi-racial fusion coalitions to maintain elected officials responsive to Black and multi-racial constituencies.

For example, incumbent Black elected officials, who are Black voters' candidates of choice, have developed long-term relationships with constituencies in the districts they serve that make up cohesive communities of interest. Indeed, in many of the specific Districts where Black voting power was targeted, the African American Legislators serving those districts' voters have recently played high-profile leadership roles in representing the interests of African American and multi-racial voting constituencies in the General Assembly and in Congress, including by holding leadership roles in Black

Legislative Caucus and in the Black Congressional Caucus and advocating for racial equality.

As the trial court found, the Enacted Maps are likely to be "highly non-responsive to the changing opinion of the electorate." R pp 3564-65 ¶¶ 140, 142 (Judgment). This is especially true for Black voters, whose voices are disproportionately diluted in the enacted plans, which unjustifiably minimize Black voters' ability to impact elections in North Carolina.

III. The Enacted Plans Are Unconstitutionally Racially Discriminatory in Violation of the Equal Protection Clause

"It is well settled in this State that the right to vote on equal terms is a fundamental right." *Stephenson v. Bartlett,* 355 N.C. 354, 378 (N.C. 2002) (internal quotations omitted). The Equal Protection Clause of the North Carolina Constitution, Article I, Section 19, consistent with the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the federal Constitution, cries out for relief from the discriminatory results of the 2021 Enacted Maps. In every respect, this result is a prime example of what North Carolina's Equal Protection guarantee was designed to prevent. The evidence presented here, when viewed in its totality, including the irregular and highly flawed legislative process and the mountain of evidence of the detrimental

impact on African Americans, unjustified by any lawful governmental interest, violates the North Carolina Constitution.[11]

A. When the *Arlington Heights* Framework is Applied Correctly, Plaintiffs' Proof of Racial Intent is Compelling

The legal standard to determine whether an official action was motivated by discriminatory purpose is set forth in *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), which was recently embraced by the Court of Appeals in *Holmes v. Moore*, 270 N.C. App. at 16 (stating that "proof of racially discriminatory intent or purpose" shows "a violation of the Equal Protection Clause"). Plaintiffs-Appellants presented more than sufficient evidence at trial to demonstrate that Legislative Defendants acted with discriminatory purpose when they adopted the Enacted Plans under the non-exhaustive criteria of *Arlington Heights.*[12]

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[11] NC NAACP has previously argued that the use of race-blind redistricting criteria and Defendants' failure to conduct any analysis that would prevent vote dilution for voters of color contravened the requirements of the state Constitution as set forth in *Stephenson I* and *II*, and thus the legislative process in and of itself violated the Equal Protection Clause, Article I, Section 19, of the North Carolina Constitution. In short, the Legislative Defendants independently violated "the process established by [the North Carolina Supreme] Court in *Stephenson I* and its progeny [which] requires that, in establishing legislative districts, the General Assembly first must create all necessary VRA districts, single-county districts, and single counties containing multiple districts." *Dickson v. Rucho*, 368 N.C. 481, 532 (2015), *vacated on other grounds*, 137 S. Ct. 2186 (2017). This evidence is highly probative of intentional discrimination as well.

[12] *Arlington Heights* provides a non-exhaustive list of factors for courts to consider, including: (1) the law's historical background, (2) the specific procedural sequence leading to the law's enactment, including any departures from the normal procedural sequence, (3) the legislative history of the decision, and (4) the impact of the law and whether it bears more heavily on one race than another. 429 U.S. at 266–68. Petitioners here presented exactly that evidence here.

"The historical background of [a] decision is one evidentiary source [in proving intentional discrimination], particularly if it reveals a series of official actions taken for invidious purposes." *Arlington Heights*, 429 U.S. at 267. "A historical pattern of laws producing discriminatory results provides important context for determining whether the same decision-making body has also enacted a law with discriminatory purpose." *McCrory*, 831 F.3d at 223–24; *see also Holmes*, 270 N.C. App. at 20 (citing *McCrory*). The trial court erred in ignoring extensive, recent and contemporaneous history of intentional racial discrimination engaged in by these same legislative actors, improperly throwing out all of the historical evidence of racial intent.

In tossing aside this highly relevant historical and contemporaneous evidence the court failed to recognize that any presumption of good faith is rebuttable. The trial court suggested that plaintiffs had not connected the current legislative actions with the massive, recent evidence of racially motivated actions by the General Assembly. However, plaintiffs showed that virtually the same legislative actors who recently targeted African American voting rights on numerous occasions, including repeatedly in the redistricting context, engaged in similar packing and cracking here – and in many instances targeted similar districts as found in the recent cases. It is difficult to imagine what greater "connection," would meet the trial court's standard.

Moreover, Legislative Defendants' own conduct rebutted any presumption in their favor. The legislative process was anything but regular as Defendants engaged in secret off-the-record consultations, used their staff to draw extra-record "concept maps" free from even the pretense of not using race, destroyed evidence, claimed foggy memories and then implemented a hearing process that was patently not designed to obtain public input.[13]

Finally, as found by the trial court in *Common Cause*, virtually the same group of Legislative Leaders who developed the current plans misled the *Covington* court, their colleagues and the public in 2017, about when remedial plans were developed and whether racial data was available to the map drawer.[14] Even without the significant additional evidence presented by Plaintiffs-Appellants under the *Arlington Heights* framework, the extremely irregular actions of the legislators here, combined with the loss of credibility that accompanies recent intentional misrepresentations to a federal court, is much more than sufficient to overcome any presumption.

The historical background of racially motivated actions is also tied to the current enactment. The same legislators' recent involvement in creating the

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[13] Only 15 public hearings were offered for the entire state, and 13 of these took place *before* the maps had even been drawn. (R pp 56-58). Despite the fact that these hearings took place during the COVID-19 pandemic, no option was offered for residents to participate or provide comments remotely. (R p 150).

[14] *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 56, at *284 - 91 (N.C. Super. Ct. Sept. 3, 2019).

2011 racially motivated redistricting plans and the racially discriminatory proposed remedial plan demonstrates their in-depth knowledge of the relevant racial demographics. The same legislators who claim they did not use race in constructing the current maps told the federal and state courts that they did not consider race in creating the 2011 maps and falsely claimed that racial data was not available in constructing their Remedial Map proposal (the timing of which they also falsified to the court).

The impact of an action, "whether it bears more heavily on one race" is a crucial factor in assessing racial intent. *Arlington Heights*, 429 U. S. at 266. Here, as set out in detail in Section III above, the impact on African American voters is so destructive, it is unlikely to have occurred without racial intent. Indeed, in light of the Legislative Defendants' past familiarity with racial data, the blithe claim that race played no factor in the map-drawing process strains all credibility, and a series of admissions by Legislative Defendants in deposition and at trial confirm that the many admitted exceptions to the prohibition on considering race off-camera and in some instances in the room, swallowed the rule. Legislative Defendants claim on the one hand that the map drawers did not consider race in any step of the process, but on the other, admit that legislative aides tasked with drawing concept maps and advising were *never told that they* could not consider race.

This sequence of events and legislative process also supports a finding of racial intent under *Arlington Heights*. As discussed above, the process reeks with procedural irregularities. The shocking admissions of evidence destruction, which has produced a valid dispute over associated discovery sanctions in this case, also supports the determination that race indeed was a motivating factor in the drawing of maps that resulted in dilution of Black voting power.

The trial court made two errors that led to its decision that race was not a motivating factor in construction of the 2021 Enacted Maps. It gave undue deference to the defendants. It also assumed that a partisan motive precluded a racial motive when, in fact, the facts strongly point to the conclusion that both factors motivated the legislators. An adequate remedy will require that both types of discrimination be addressed in the redrawn plans.

B. In These Circumstances, the Impact of the Enacted Maps, on African Americans' Ability to Elect Candidates of Their Choice Violates the North Carolina Constitution Regardless of Racial Intent

The North Carolina Constitution provides greater protection for minority voting rights than the federal constitution. *See Stephenson v. Bartlett,* 355 N.C. 354, 376–80, 381 n.6 (2002); *Blankenship v. Bartlett*, 363 N.C. 518, 523 (2009). North Carolina's Equal Protection Clause protects the right to "substantially equal voting power." *Id.* at 379. North Carolina's

Constitution Free Elections Clause and Equal Protection Clause—provide more powerful protections than the Federal Constitution.[15] As the trial court found, North Carolina's citizens—"including its minority voters"—have "'a constitutionally protected right to participate in elections on an equal basis.'" COL 158 (quoting *White v. Pate*, 308 N.C. 759, 768, 304 S.E.2d 199, 205 (1983)).

The analysis above makes clear that the 2021 Enacted Maps are infused with illegal racial intent under the governing standards of both the U.S. Constitution and the North Carolina Constitution. In addition, under the North Carolina Constitution's greater protection for voting rights the Court should rule that in these egregious circumstances, the impact of the Enacted Maps on African American representation violates the North Carolina Constitution without the necessity of finding racial intent.

If any case cries out for the North Carolina Constitution's greater protection, it is this one. Regardless of whether the Legislature's intent was racial discrimination, partisan discrimination or both, as this brief argues, the racial impact is devastating. If allowed to go into effect these maps will destroy on decades of progress toward equal representation for African Americans in

[15] For supporing analysis of the Equal Protection Clause and Free Elections Clause under the North Carolina Constitution, *see* Brief of Plaintiff-Appellants North Carolina League of Conservation Voters, *et al*. at 109-110 (arguing that "the panel erred by requiring intent").

the State. Just as one example, a historic Congressional district created to comply with the Voting Rights Act has been dismantled. Black voters have been callously pulled out of districts where they have created crossover coalitions with voters of other races and elected champions to represent them and placed into districts where white Republican predominance means they will have no chance to elect their candidate of choice. Indeed, Black voters across the state will be deprived of representatives who are recognized in the state and nationally for their strong advocacy for racial equality and their responsiveness to Black voters, including the NC NAACP and its members, significantly diluting the voices of Black North Carolinians in every issue of concern in federal and state policy.

Achieving this level of impact points very strongly to racial intent under the *Arlington Heights* factors. Regardless of intent, this plan destroys political power that has been built up over decades, not just at the ballot box, but through organizing, coalition building and advocacy directed at the U.S. Congress and the General Assembly. If the North Carolina Constitution's greater protection of voting rights does not apply to this destruction of hard won political infrastructure, it is difficult to imagine a more egregious action to which it would apply.

IV. A Swift Remedy is Necessary and the Appointment of a Special Master by This Court is Justified

In adopting the 2021 North Carolina Enacted Maps, the General Assembly created racially discriminatory districts "altogether antithetical to our system of representative democracy." *Shaw I*, 509 U.S. at 648. (quoting Reynolds). It is now in the hands of this Court to ensure the Enacted Maps do not take effect in contravention of the North Carolina Constitution.

No right is more worthy of this Court's vigilant protection than the right to vote. As NC NAACP leaders have testified for decades, this right is a sacred one; it is the cornerstone of a healthy democracy and in the history of this state and nation, it has been won through the blood, sweat, and tears of many of the same voters whose rights are again under threat today. "[B]ecause the right to vote is 'preservative of all rights,' any infringement on that right . . . strikes at the heart of the substantive rights and privileges guaranteed by our Constitution." *Id.* (quoting *Reynolds*, 377 U.S. at 562–63). *Shaw v. Reno* ("*Shaw I*"), 509 U.S. 630, 648 (1993).

In North Carolina, "[a]ll political power is vested in and derived *from the people*; all government of right originates *from the people*, is founded *upon their will only*, and is instituted solely for the good of the whole." N.C. CONST. art. I, preamble; *id.* § 2 (emphases added). The North Carolina General Assembly is designed to be a representative body with its members serving "as the arm of

the electorate"—deriving its legitimacy from the will of the people. *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267); N.C. Const. art. I, § 2.

The actions of the General Assembly over the past 12 years have caused four of the past five Congressional elections to be held using maps that were found to be the products of an illegal gerrymander. This prior misconduct by the very same Legislative leadership that presided over the 2021 maps justifies the appointment of a special master. It is also well within this Court's authority to appoint a special master to assist it in this process, including in reviewing remedial map proposals set forth by the General Assembly. *See Stephenson*, 355 N.C. at 385 n.8, 562 S.E.2d at 398 n.8 (noting that the trial court could "consider whether a court-appointed expert would be of assistance in ensuring compliance"); *Common Cause v. Lewis*, 18-cvs-014001, 2019 NC Super. LEXIS 56, at *134 (Wake Cty. Super. Ct. Sept. 3, 2019) (appointing a third party to assist the court immediately after invalidating the initial plans).

CONCLUSION

For all of the foregoing reasons, NC NAACP respectfully requests that this Court reverse the decision of the trial court, and order a remedial process that proscribes clear timelines, and at the least, order an immediate advisory

role by a special master or court liaison to ensure that fair, constitutionally permitted maps govern the 2022 Primary and General elections.

This 31st day of January, 2022.

Electronically Submitted
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CERTIFICATE OF SERVICE

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