STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 21 CVS 015426
NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, et al., 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.	*Consolidated with* 21 CVS 500085

[PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case comes before the Court after trial in the consolidated matters *North Carolina League of Conservation Voters, et al. v. Hall et al.*, No. 21 CVS 015426, *Harper et al. v. Hall et al.*, No. 21 CVS 500085, and *Common Cause v. Hall*. Three sets of Plaintiffs (the *NCLCV* Plaintiffs, the *Harper* Plaintiffs, and the *Common Cause* Plaintiff) challenge the North Carolina State House, Senate, and congressional redistricting plans (collectively, the "2021 Plans") on various theories under the North Carolina Constitution. The Plaintiffs who are individuals ("Individual Plaintiffs") assert that they are registered Democrats who prefer Democratic candidates. The organizational Plaintiffs (the "Entity Plaintiffs") assert that they are non-partisan. There are two sets of Defendants, one consisting of Republican legislative leaders ("Legislative Defendants") and the other consisting of state executive officials composing a body (the "State

Board of Elections") controlled by Democratic appointees. The State Board of Elections neither contested nor defended the constitutionality of the 2021 Plans.

The principal claims address so-called "partisan gerrymandering" and posit a theory that redistricting conducted with partisan intent and effect violates provisions of the State Constitution guaranteeing equal protection, free elections, and free speech. The *NCLCV* Plaintiffs and the *Common Cause* Plaintiff also challenge the 2021 Plans under theories of racial vote dilution and racial discrimination, and the *NCLCV* Plaintiffs contend that the 2021 Plans contravene provisions of the State Constitution limiting county-line crossings.

So-called "partisan gerrymandering" claims were never recognized under North Carolina law or political tradition until 2019, when a three-judge Superior Court panel purported to discover judicially manageable standards for adjudicating such claims in a prior challenge to North Carolina redistricting plans (in what is sometimes called in these findings the "*Common Cause* case"). Prior to that, redistricting was routinely conducted in a partisan manner, behind closed doors, and for the transparent benefit of the majority party. In every redistricting from 1870 to 2010, that majority party was the Democratic Party. In this case, Democratic constituents, after more than a century of benefitting from a political tradition that tolerated partisan redistricting, have argued the virtues of what they called "non-partisan" redistricting.

But scrutiny of their claims reveals that their suit is not "non-partisan." *NCLCV* Plaintiffs, for instance, have centered their claims around so-called "Optimized Plans", drawn in secret behind closed doors. The *NCLCV* Plaintiffs resisted discovery concerning these plans and, only after an order from this Court, did the public have the chance to know that the maps *NCLCV* Plaintiffs proposed as *the* constitutional standard were created at the direction of their own counsel.

Yet they ask this Court to impose the Optimized Plans on the public without scrutiny. The evidence shows that the only things that the Optimized Plans optimized for was Democratic Party gain.

The Court will not, through the guise of neutrality, impose a Democratic gerrymander on North Carolina, this time without the benefit of majority control of the General Assembly and with the benefit of the Courts. Plaintiffs are not asking for non-partisan redistricting. Plaintiffs are asking for the Democratic Party to be engrafted into the State Constitution as the political party with control over redistricting, with or without a majority of the General Assembly. Plaintiffs believe the State Courts are favorably inclined to their political tastes and will satisfy them in a court action thinly veiled as a political proceeding.

Courts exist to adjudicate claims of law, not to pick partisan favorites. And this case is a poor vehcile for courts to intervene under the proffered theories. The General Assembly—unlike in every redistricting in history—made exceptional strides towards transparency and openness, choosing to draw the 2021 Plans in public rooms with multiple live stream video and audio recordings. Plaintiffs quarrel with this proceeding at the margins and show, at most, that it was not perfectly executed. But they cannot and do not cite any legislative redistricting in North Carolina history even remotely approaching the openness of this proceeding. If the 2021 Plans are unconstitutionally partisan, then no plan in State history has ever been constitutional. That is an unacceptable conclusion, and this Court declines to render it. The law and factual record compel the Court to enter judgment on all claims in favor of Legislative Defendants.

[PROPOSED] FINDINGS OF FACT

I. Historical Background

A. Redistricting in North Carolina from 1870 Through 2000

1. After each decennial census, "[s]tates 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.

2. The State Constitution specifically enumerates four limitations upon the redistricting and reapportionment authority of the General Assembly, including that:

a. Each Senator and Representative shall represent, as nearly as possible, an equal number of inhabitants;

b. Each senate and representative district shall at all times consist of contiguous territory;

c. No county shall be divided in the formation of senator or representative districts (the "Whole County Provisions"); and

d. Once established, the senate and representative districts and the apportionment of Senators and Representatives shall remain unaltered until the next decennial census of population taken by order of Congress.

3. The State Constitution contains no textually demonstrable limitation on partisan considerations in redistricting.

4. No constitutional limitations have been understood to exist on partisan redistricting in North Carolina's political history.

5. Between 1870 and 2010, the Democratic Party at all times controlled one or both houses of the General Assembly. The Democratic Party controlled every redistricting process from 1870 until 2010. In that capacity, the Democratic Party was responsible for "an extensive history of problematic redistricting efforts." *Dean v. Leake*, 550 F. Supp. 2d 594, 597 (E.D.N.C. 2008). In the first redistricting after the Supreme Court of the United States announced the one-person, one-

vote rule, the controlled General Assembly drew districts that "were as distorted as could be found in any state in the country." D. Orr, Jr., The Persistence of the Gerrymander in North Carolina Congressional Redistricting, 9 Southeastern Geographer 46 (1969). When a court invalidated that plan under the newly announced one-person, one-vote rule, the Democratic-controlled legislature enacted a district that was publicly described as "a dinosaur or a left-handed monkey wrench" that was "'packed' with a projected vote favorable to" a Republican member "far in excess of that needed to win." *Id.* at 49.

6. After the 1980 census, the Democratic Party-controlled General Assembly again engaged in what was widely regarded as egregious gerrymandering. Beeman C. Patterson, The Three Rs Revisited: Redistricting, Race and Representation in North Carolina, 44 Phylon 232, 233 (1983).

7. After the 1990 census, the Democratic Party-controlled General Assembly enacted some of the most infamous districts in history, including the "freeway" district invalidated in *Shaw v. Reno*, 509 U.S. 630, 635–36 (1993). 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.*

8. After the Supreme Court invalidated some of these districts as racial gerrymanders, the Democratic-controlled General Assembly, led by then-Chair of the Senate Redistricting Committee Roy Cooper, enacted a new congressional plan containing a new bizarrely shaped district, which "retain[ed] the basic 'snakelike' shape and continue[d] to track Interstate 85." *Hunt v. Cromartie*, 526 U.S. 541, 544 (1999) (*Cromartie I*). The General Assembly asserted that it "drew its district lines with the intent to make District 12 a strong Democratic district." *Id.* at 549.

9. 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*).

10. At no point in the Democratic Party's more than 100 years' control of redistricting, did the redistricting process involve an enacted plan that was drawn in a public room with public access and opportunities for live viewing by members of the public.

11. At no point in the Democratic Party's more than 100 years' control of redistricting did any court conclude that the Democratic Party's partisan intent created a constitutional problem.

B. The 2010 Redistricting Cycle

12. In 2011, the Republican Party controlled both chambers of the General Assembly for the first time since 1870—control gained by winning seats created by House and Senate redistricting plans drawn and passed by a Democratic-controlled legislature. The Republican majority gained under Democrat-drawn and Democrat-favored maps occurred without court intervention.

13. 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 28 majority-minority house and senate districts in the 2011 legislative plans and two additional majority-minority districts in the congressional plan. Lawsuits were subsequently filed challenging the legislative plans and the congressional plan under the federal Equal Protection Clause. *See Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016) (challenging legislative plans); *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016) (challenging congressional plan).

14. The State defended some districts on the ground that they were drawn for predominantly political, not racial, reasons. *Cooper v. Harris*, 137 S. Ct. 1455, 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.[1] 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

[1] 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, at *20 (2016).

played a primary role in the drawing of the challenged districts."). The Supreme Court affirmed both decisions. *Cooper*, 137 S. Ct. 1455; *North Carolina v. Covington*, 137 S. Ct. 2211 (2017).

15. In the subsequent redistricting, 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 the General Assembly *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.

16. Plaintiffs, represented by the same lawyers as in this case, sued. First, in November 2018, they challenged the legislative plans in this Court. *Common Cause v. Lewis*, 18-cvs-014001 (filed Nov. 13, 2018). After a year of discovery and a two-week trial, 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. 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. 2487, 2521 (2019) (Kagan, J., dissenting)). The finding of partisan motive was not 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.

17. In the subsequent redistricting, the General Assembly did not rely on political or racial data. The *Common Cause* court approved the resulting redistricting plans.

18. Those plans were used in the 2020 elections. In those elections, the Republican Party again won control of the General Assembly.

II. The 2021 Redistricting Process

19. 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. North Carolina did not receive the census data necessary to redistrict until August 12, 2021. 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.

20. On August 12, 2021, the House Committee on Redistricting and the Senate Committee on Redistricting and Elections (collectively, the "Committees") met before the census data was released, and enacted Joint Criteria for redistricting. The criteria, as adopted,[2] were as follows:

- **Equal Population.** The Committees will use the 2020 federal decennial census data as the sole basis of population for the establishment of districts in the 2021 Congressional, House, and Senate plans. The number of persons in each legislative district shall be within plus or minus 5% of the ideal district population, as determined under the most recent federal decennial census. The number of persons in each congressional district shall be as nearly as equal as practicable, as determined under the most recent federal decennial census.

- **Contiguity.** No point contiguity shall be permitted in any 2021 Congressional, House, and Senate plan. Congressional, House, and Senate districts shall be compromised of contiguous territory. Contiguity by water is sufficient.

[2] The Adopted Criteria can be found at LDTX15.

- **Counties, Groupings, and Traversals.** The Committees shall draw legislative districts within county groupings as required by *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*), *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*), *Dickson v. Rucho*, 367 N.C. 542, 766 S.E.2d 238 (2014) (*Dickson I*) and *Dickson v. Rucho*, 368 N.C. 481, 781 S.E. 2d 460 (2015) (*Dickson II*). Within county groupings, county lines shall not be traversed except as authorized by *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*.

  Division of counties in the 2021 Congressional plan shall only be made for reasons of equalizing population and consideration of double bunking. If a county is of sufficient population size to contain an entire congressional district within the county's boundaries, the Committees shall construct a district entirely within that county.

- **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.

- **VTDs.** Voting districts ("VTDs") should be split only when necessary.

- **Compactness.** The Committees shall make reasonable efforts to draw legislative districts in the 2021 Congressional, House and Senate plans that are compact. In doing so, the Committee may use as a guide the minimum Reock ("dispersion") and Polsby-Popper ("permiter") scores identified by Richard H. Pildes and Richard G. Neimi in *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election- District Appearances After Shaw v. Reno*, 92 Mich. L. Rev. 483 (1993).

- **Municipal Boundaries.** The Committees may consider municipal boundaries when drawing districts in the 2021 Congressional, House, and Senate plans.

- **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.

- **Member Residence.** Member residence may be considered in the formation of legislative and congressional districts.

- **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.

21. The legislative record establishes an overriding goal of making the redistricting process as transparent as possible. The Committees required that the map-drawing occur in public rooms monitored by a live stream and live audio broadcasts of the map-drawing. House Tr. 5:6–10 (Oct. 5, 2021). The stated goal was for the process to be "as transparent as we

humanly can do." *Id.* The Committees clarified that, "if a map is not drawn on one of these four stations, in this committee room, during those committee hours that the committee is open, then those maps will not be considered . . . ." House Tr. 4:19–23 (Oct. 5, 2021).

22. Because of the delay in receiving census data and the desire to have a pre-drawing public comment period, the General Assembly had to work quickly to ensure the maps were drawn in enough time for the Board of Elections to act and potential candidates to consider whether they wanted to run. House Tr. 6:5–19 (Oct. 5, 2021).

23. According to the *Stephenson* decisions cited in the criteria, State House and Senate districts must be drawn within a county-grouping system, which is a formulaic system ensuring minimization of county splits within the confines of the one-person, one-vote rule and other federal laws that preempt and limit state law.

24. The Committees adopted *Stephenson* groupings first publicized from Duke University and then verified by non-partisan staff. House Tr. 8:2–4 (Oct. 5, 2021). The groupings were from a paper entitled "North Carolina General Assembly County Clusterings from the 2020 Census," authored by Christopher Cooper, Blake Esselstyn, Gregory Herschlag, Jonathan Matingly, and Rebecca Tippet from Duke University. House Tr. 8:18–9:1 (Oct. 5, 2021).

25. The House was working off of 9 different maps. House Tr. 9:24–10:3 (Oct. 5, 2021). 33 clusters, containing 107 of the 120 districts, were fixed and members had no discretion to alter them. House Tr. 10:10–12 (Oct. 5, 2021). The Senate was working of 16 different maps. Senate Tr. 9:1-3 (Oct. 5, 2021).[3] 17 clusters, containing 36 of the 50 districts, were fixed and members had no discretion to alter them. Senate Tr. 6:11-14 (Oct. 5, 2021).

[3] LDTX82.

26. The General Assembly's members were tasked with creating State House districts containing between 82,645 and 91,345 people; that is 86,995 plus or minus 5% from the ideal population. House Tr. 12:25–13:4 (Oct. 5, 2021). Members were tasked with creating Senate districts containing between 198,348 and 219,227 people; that is 208,788 people plus or minus 5% from the ideal population. Senate Tr. 6:5–10 (Oct. 5, 2021).

27. Each one of the terminals that members were drawing maps on were directly fed to a livestream, as well as audio from that terminal. *See, e.g.,* House Tr. 20:19–21 (Oct. 5, 2021). Also, video of the Hearing Room was livestreamed for the public to view. *See, e.g.,* House Tr. 20:21:23 (Oct. 5, 2021); *see also* Senate Tr. 39:8-13 (Oct. 5, 2021).

28. The Committees chose to draw maps out in the open, not to use consultants to draw the maps, and not to use election data to draw the maps on their own accord—not because the law required them to. *See, e.g.,* House Tr. 34:17–35:4 (Oct. 5, 2021). The Committees took "the unprecedented step of being as transparent" as they possible could. House Tr. 35:21–24 (Oct. 5, 2021).

29. The Committees chose not to take racial data into account in selecting county groupings because they did not take into account in 2017 and 2019, and courts approved the 2017 and 2019 plans. House Tr. 37:17–25 (Oct. 5, 2021). This gave them "confidence that, without using racial data, [they would] comply with the Voting Rights Act." House Tr. 39:3–5 (Oct. 5, 2021). Further, they took into account the fact plaintiffs' experts in previous cases "all said that there is no legally significant racially polarized voting in North Carolina." House Tr. 37:5–7 (Oct. 5, 2021); *see also* Senate Tr. 26:3-15 (Oct. 5, 2021).

30. Although the *Common Cause* opinion is not biding precedent, the Committee took "a lot of language out of that opinion and put it into [its] criteria." House Tr. 40:3–4 (Oct. 5, 2021).

31. The Committees kept an online comment portal open throughout the map-drawing process so that "an individual sitting anywhere" in the State or, indeed, "anywhere in the world" could comment on the map-drawing in real-time. House Tr. 42:24–43:6(Oct. 5, 2021). This real-time commentary was in addition to public comment ahead of time and at the end of the process. House Tr. 43:15–20 (Oct. 5, 2021).

32. The Committees "ensure[d] that [it had] the most transparent process in the history of" the State. House Tr. 44:15–18 (Oct. 5, 2021).

33. The Committees were able to ensure that no political or racial data was used in drawing the maps because only a map drawn in the Committee room would be considered and there was no racial data or election data on those computers. House Tr. 52:3–8 (Oct. 5, 2021); Senate Tr. 40:15-19 (Oct. 5, 2021).

34. There was a public terminal in the Legislative Office Building at which members of the public could draw maps. House Tr. 53:19–22 (Oct. 5, 2021).

35. All General Assembly members, not just those on the Committees, had the ability to draw maps in the Committee rooms for consideration**.** House Tr. 60:1–3 (Oct. 5, 2021).

36. Both the unprecedent transparency and lack of political and racial data on the computers were the utmost that could be done to ensure that no outside influence implicitly took over the map-drawing process. *See, e.g.*, House Tr. 67:17–24 (Oct. 5, 2021).

37. In early November, redistricting plans for the North Carolina House, Senate, and congressional delegation were proposed, and all three were ratified and enacted on November 4 .

III. Recorded Goals Achieved by the 2021 Plans

38. 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.

39. The General Assembly established a detailed record of the purposes of the configurations of the districts.

A. The 2021 Congressional Plan

40. The legislative record shows that goals achieved by the 2021 Congressional Plan included the following:

- CD1 is anchored in northeastern North Carolina to incorporate suggestions from a public hearing in Pasquotank that this region be maintained as a community of interest. The district was configured to take in the Outer Banks and most of the State's shoreline and to keep the finger counties of northeastern North Carolina together, as well as most of the counties that run along the State's border with Virginia. Senate Tr. 3:7–4:3 (Nov. 1, 2021).[4]

- CD2 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). Senate Tr. 4:4–15 (Nov. 1, 2021).

- CD3 was configured to keep mostly rural counties in southeastern North Carolina near the coast within the same district and to improve the compactness of the prior district. Extensive input from a public hearing in New Hanover was incorporated, including that Cape Fear River Basin be kept in one district, that New Hanover and Brunswick Counties be kept together, and that Bladen and Columbus Counties be maintained in single district. Senate Tr. 4:16–5:11 (Nov. 1, 2021).

- CD4 was configured to be a four-county district south of Raleigh. These counties were chosen because they have similar geography, industry, and proximity to population base in the region in Fayetteville and Raleigh. An online comment requested that Cumberland, Harnett, and Sampson Counties be kept together in a congressional district, and this was accomplished by adding population in Johnston and one precinct in Wayne County. The district is highly compact and splits no municipalities. Senate Tr. 5:12–6:7 (Nov. 1, 2021).

- CD5 was configured to be based entirely in Wake County, comprising Garner, Knightdale, Raleigh, Rolesville, Wake Forest, Wendell, and Zebulon. These municipalities are viewed

[4] LDTX78.

as sharing common interests, given that people live and work and commute within these municipalities; no municipalities were split. Senate Tr. 6:8–20 (Nov. 1, 2021).

- CD6 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, and to match the configuration of this district that has existed in this region, in roughly the same form, for decades. No municipalities were split. Senate Tr. 6:21–7:11 (Nov. 1, 2021).

- CD7 runs from the Triangle west through the Central Piedmont region encompassing Davidson, Guilford, and Harnett Counties and a portion of Wake County to bring together rural areas and smaller cities and towns. Senate Tr. 7:12–25 (Nov. 1, 2021).

- CD8 is rooted in the Sandhill region of North Carolina including eight whole counties and a portion of Mecklenburg County. The configuration was created in part based on a comment by the Moore County Democratic Chair, who suggested that Sandhills counties including Moore, Scotland, and Hoke to be kept together in a Sandhills district. Senate Tr. 8:3–22 (Nov. 1, 2021).

- CD9 constitutes the General Assembly's effort to keep the City of Charlotte together in one district, given its cohesive community. This 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. Senate Tr. 8:23–9:5 (Nov. 1, 2021).

- CD10 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. The district keeps all of the City of High Point in a single district, based on a comment at a public hearing in Forsyth. Senate Tr. 9:6–20 (Nov. 1, 2021).

- CD11 is based in the northwest corner of North Carolina, containing eight whole counties and two partial counties. This was done out of a desire to maintain the incumbent in the district. Another key goal was maintaining Greensboro as much as possible in the district, and the goal was achieved with more than 90% of Greensboro included. Senate Tr. 9:21–10:6 (Nov. 1, 2021).

- CD12 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. No municipalities were split. Senate Tr. 10:7–16 (Nov. 1, 2021).

- CD13 contains municipalities and towns to the west and north of Charlotte based on an online comment suggesting that towns in North Mecklenburg, including Cornelius, Huntersville, and Davidson, be joined into a single district. Senate Tr. 10:17–11:5 (Nov. 1, 2021).

- Finally, CD14 is anchored in western North Carolina to take in the mountain counties up to the westernmost tip of the State; the General Assembly implemented a 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. Senate Tr. 11:6–21 (Nov. 1, 2021).

41. The Committees concluded that the congressional map satisfies the adopted criteria. Senate Tr. 11:22–12:16 (Nov. 1, 2021). All districts were drawn to zero population deviation or to one person less than ideal. There was no point contiguity used in the map and districts are compact. Senate Tr. 11:22–24 (Nov. 1, 2021). County, VTD, and community of interest divisions were minimized. The 2021 Congressional Plan divided 11 counties solely to equalize population. VTDs were split only when necessary to balance population or keep municipalities whole, and a total of 24 VTDs were split. And there are districts wholly within Mecklenberg and Wake Counties, the only two counties of sufficient population to contain a whole Congressional district. Only two municipalities were split in the entire State, and community consideration was considered to keep cities and towns together. Senate Tr. 11:22–12:16 (Nov. 1, 2021).

42. The Committee concluded that no racial or political data was used in drawing the map. Member residence was considered. Senate Tr. 11:22–12:16 (Nov. 1, 2021). Senator Daniel explained that, due to the political geography of the state—with Democrats congregated in the urban areas—the only way to accomplish a roughly equal Republican-Democratic split is with an extreme partisan gerrymander in favor of Democrats. Senate Tr. 18:7–21 (Nov. 1, 2021). Indeed, the largest counties had to be split to satisfy one-person, one-vote standards. *See, e.g.*, Senate Tr. 24:13–17 (Nov. 1, 2021).

43. One Senator noted that when metropolitan areas are split (as many have to be because of the population size), the metropolitan areas get more representatives in Congress who are able to advocate for the municipality as a whole. Senate Tr. 33:21–34:12 (Nov. 1, 2021). The

online portal received over 4,000 comments between when they opened at November 1, 2021. Senate Tr. 39:5–14 (Nov. 1, 2021).

B. The 2021 Senate Plan

The legislative record shows that goals achieved by the 2021 Senate Plan included the following:

- SD1 was created out of county groupings in the northeastern corner of the State. The district includes 4 of the 5 "Finger Counties" together and combines them with the Northern Outer Banks, a suggestion made by persons at public hearings. About 70% of the counties and 81% of the population are in the Norfolk media market, with the others in the Greenville and Raleigh market. This district does not split VTDs or municipalities within the counties, as it comprises only whole counties. Senate Tr. 3:15–25 (Nov. 2, 2021).[5]

- SD2 follows the Roanoke River from Warren County to Albemarle Sound in Washington County. This comprises many of the counties on the Sound, including Chowan County, Hyde County, and Pamlico County. Five of the eight included counties are in the Greenville media market, with the others split between the Raleigh and Norfolk media markets. Two-third of the population of the district is within the Greenville media market. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. Senate Tr. 4:7–24 (Nov. 2, 2021).

- SD3 was created by the base county grouping map. It includes Beaufort, Craven, and Lenoir Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. Senate Tr. 4:25–5:4 (Nov. 2, 2021).

- SD4 was created by the base county grouping map. It includes Green, Wayne, and Wilson Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. Senate Tr. 5:5–10 (Nov. 2, 2021).

- SD5 was created by the base county grouping map. It includes Edgecombe and Pitt Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. Senate Tr. 5:11–5:16 (Nov. 2, 2021).

- SD6 is a single-county district containing only Onslow County. It was created by the base county grouping map and, as a single and whole county district, contains no split VTDs or municipalities. Senate Tr. 5:17–20 (Nov. 2, 2021).

- SD7 contains the majority of New Hanover County in the southeast corner of the State. Because New Hanover County's population was slightly larger than the maximum

[5] LDTX80.

allowable population in a single district, the Committee carved out three precincts and included them in SD7. These three precincts were selected to keep all municipalities in New Hanover County whole and to keep as much population as possible in SD7. SD7 contains no split VTDs or municipalities. Senate Tr. 5:21–6:14 (Nov. 2, 2021).

- SD8 contains Brunswick and Columbus Counties, in addition to three precincts of New Hanover County. It contains no split VTDs or municipalities. Senate Tr. 6:15–20 (Nov. 2, 2021).

- SD9 and SD12 comprise a two district, seven county cluster created by the base county groupings in the southeastern part of the State. SD9 contains all of Bladen, Jones, Duplin, and Pender Counties, as well as the majority of Sampson County. SD12 contains a small portion of Sampson County, as well as all of Harnet and Lee Counties. The Committee endeavored to keep as much of Sampson County as possible in SD9. The Committee considered moving a single precinct from northern Sampson County into SD12, but that would have split two municipalities and placed more Sampson County residents in SD12 than the chosen route: splitting two precincts, but leaving Spivey's Corner intact in SD9 and Plainview whole in SD12. Both SD9 and SD12 contain two split VTDs, but no split municipalities. Senate Tr. 6:21–7:25 (Nov. 2, 2021).

- SD10 is a single-county district containing only Johnson County. It was created by the base county grouping map and, as a single and whole county district, contains no split VTDs or municipalities. Senate Tr. 8:1–4 (Nov. 2, 2021).

- SD11 was created by the base county grouping map. It includes Franklin, Nash, and Vance Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. Senate Tr. 8:5–9:13 (Nov. 2, 2021).

- SD13, SD14, SD15, SD16, SD17, and SD18 were created out of the two-county grouping of Granville and Wake Counties. The Committee attempted to keep municipalities whole, while splitting as few precincts as possible. Some VTDs had to be split, however, to comply with one-person, one-vote standards. Raleigh has to be split between multiple districts; 98% of Raleigh is within 3 Senate districts, though. Further, Cary and Apex were unable to be contained within a single district due to their populations and geographic constraints. All other municipalities (Fuquay-Varina, Holly Springs, Garner, Knightdale, Morrisville, Rolesville, Wake Forest, Wendell, and Zebulon) were kept whole. All in all, 10 VTDS were split to keep the municipalities whole and to balance out population.

    - SD13 contains all of Granville County, unincorporated areas in northern Wake County, as well as Rolesville, Wake Forest, Zebulon, and 2% of the population of Raleigh. Senate Tr. 9:14–23 (Nov. 2, 2021).

- SD14 contains all of Garner, Knightdale, Wendell, and 21% of the population of Raleigh, including portions of southeast and downtown Raleigh. Senate Tr. 10:8–23 (Nov. 2, 2021).

- SD15 contains the western part of Raleigh, portions of downtown Raleigh, and portions of east Cary. 36% of the population of Raleigh resides within the district. The majority of the district's population is from Raleigh (85%), with 12% from Cary. Senate Tr. 10:24–11:7 (Nov. 2, 2021).

- SD16 is centered in Cary and contains western Wake County, including portions of Apex and all of Morrisville. 80% of Cary's population is in the District, as well as 45% of Apex's population. 69% of the district's population is from Cary, 15% from Morrisville, and 13% from Apex. Senate Tr. 11:8–11:19 (Nov. 2, 2021).

- SD17 contains Holly Springs and Fuquay-Varina, as well as most of Apex and a small part of Cary. Senate Tr. 11:20–11:10 (Nov. 2, 2021).

- SD18 comprises the remainder of Wake County.

- SD19 and SD21 were created out of Cumberland and Moore Counites. SD19 is contained entirely within Cumberland County and was drawn to encompass as much of Fayetteville as possible, although Fayetteville has an irregular shape and many satellite annexations; indeed, it shares some precincts with other municipalities, such as Hope Mills. Ultimately, the Committee was unable to keep all of Fayetteville together, but created a district that includes 88% of Fayetteville's population and includes nearly 15% of the population of Hope Mills. The district has no split VTDs. SD21 includes all of Moore County and remainder of Cumberland County, including the remainder of Fayetteville and Hope Mills' population. Senate Tr. 12:11–13:11 (Nov. 2, 2021).

- SD20 and SD22 were created out of Chatham and Durham Counties. SD20 includes all of Chatham County, most of incorporated Durham County—including the portions of Chapel Hill in Durham County—and several peripheral Durham City precincts. The bulk of Durham City (70% of its population), which is too large to comprise its own Senate District, is within SD22. No VTDs were split in either district. Senate Tr. 13:14–14:8 (Nov. 2, 2021).

- SD23 was created by the base county grouping map. It includes Caswell, Orange, and Person Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. Senate Tr. 14:9–14 (Nov. 2, 2021).

- SD24 was created by the base county grouping map. It includes Hoke, Robinson, and Scotland Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. Senate Tr. 14:15–15:8 (Nov. 2, 2021).

- SD25, SD29, SD34, and SD35 were created out of a seven-county grouping in the center of the State, including Alamance, Randolph, Cabarrus, Anson, Montgomery, Richmond, and Union Counties. Due to population disparities, Randolph, Cabarrus, and Union Counties were split between districts; the remainder were left whole. Senate Tr. 14:22–15:7 (Nov. 2, 2021).

    - SD25 contains all of Alamance County and eastern Randolph County. Faced with a choice between splitting VTDs and splitting municipalities, the Committee chose the former. One precinct was split, then, to keep all of Randleman in SD25. Senate Tr. 15:8–15:18 (Nov. 2, 2021).

    - SD29 includes all of Anson, Montgomery, and Richmond Counties; the remainder of Randolph County, including Asheboro; and the eastern half of Union County. Union County was split so as to keep all precincts whole. Senate Tr. 15:25–16:12 (Nov. 2, 2021).

    - SD34 contains most of Cabarrus County, minus the southern precincts which are in SD35. The Committee aimed to keep as much of the population of the county together as possible, which required splitting a precinct to avoid the District having a higher-than-allowable population. Another precinct was split so that all of Midland was kept in the same district. Senate Tr. 17:14–17:19 (Nov. 2, 2021).

    - SD35 contains the remaining portions of Cabarrus and Union Counties. Senate Tr. 16:13–16:15 (Nov. 2, 2021).

- SD26, SD27, and SD28 are comprised of Guilford and Rockingham Counties. Each contains part of Greensboro, which is itself too large to comprise its own district. SD26 contains all of Rockingham County, as well as some unincorporated portions of Guilford County and some of Greensboro's bedroom communities. While it does not contain any Greensboro precincts, it includes 4% of the city's population. SD26 contains one VTD split, to keep the entire population of Kernersville in the district. SD27 includes southern parts of Greensboro, as well as High Point. SD28 contains the northern portion (about 2/3) of Greensboro and the majority (68%) of its population. Senate Tr. 17:20–19:4 (Nov. 2, 2021).

- SD30 was created by the base county grouping map. It includes Davie and Davidson Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. Senate Tr. 19:5–19:9 (Nov. 2, 2021).

- SD31 and SD32 are comprised of Stokes and Forsyth Counties. The Committee paired Forsyth with Stokes County, rather than with Yadkin County, because this pairing led to more compact districts and minimized municipality splitting; Germantown and King span the Stokes/Forsyth county line. SD31 includes all of Stokes County as well as suburban municipalities on the outskirts of Winston-Salem, such as Bethania, Clemons,

Germantown, Kernersville, King, Lewis, Rural Hall, Tobaccoville, and Walkertown. Given that Winston-Salem is too large for one district, SD31 also contains 16% of the city's population. SD32 contains the vast majority of the population of Winston-Salem (84%). Neither district contains split VTDs. Senate Tr. 19:22–21:4 (Nov. 2, 2021).

- SD33 was created by the base county grouping map. It includes Rowan and Stanly Counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. Senate Tr. 21:19–21:24 (Nov. 2, 2021).

- SD36 is made up of Alexander, Surry, and Yadkin Counties and is the remainder of the grouping stemming from the combination of Stokes and Forsyth counties. This district does not split VTDs or municipalities within the counties, as it is comprised only of whole counties. Senate Tr. 21:5–21:18 (Nov. 2, 2021).

- SD37, SD38, SD39, SD40, SD41, and SD42 were created out of the two-county grouping of Iredell and Mecklenburg Counties. Naturally, Charlotte—the largest city in the State—is split between 5 of these Mecklenburg-based districts. Senate Tr. 21:25–22:4 (Nov. 2, 2021).

    - SD37 includes all of Iredell County and the northmost parts of Mecklenburg County, including Davidson (which spans both counties). SD37 also contains 33% of the population of Cornelius, which is too large to fit in SD37 alone; it is the only split municipality in the district. There are no split VTDs. Senate Tr. 22:5–23:2 (Nov. 2, 2021).

    - SD38 includes much of northern Mecklenburg County, including the remainder of Cornelius, Huntersville and 14% of Charlotte. There are no split VTDs. Senate Tr. 23:3–23:14 (Nov. 2, 2021).

    - SD39 includes portions of western Mecklenburg County, including unincorporated territory along the Gaston County line and border with South Carolina. It also includes portions of Uptown, Still Creek, and West Charlotte. Indeed 81% of the district's population is in Charlotte and the district contains 20% of the population of Charlotte. There are no split VTDs in the district. Senate Tr. 23:15–24:4 (Nov. 2, 2021).

    - SD40 includes northeastern Charlotte and unincorporated portions of Mecklenburg County running along the border with Cabarrus County. 24% of Charlotte's population resides in the district. The district contains no split VTDs. Senate Tr. 24:5–24:13 (Nov. 2, 2021).

    - SD41 includes south Charlotte, Matthews, and Mint Hill, as well as some unincorporated territory. 18% of Charlotte's population is in this district, comprising about 71% of the district's population. The district contains no split VTDs. Senate Tr. 24:14–24:25 (Nov. 2, 2021).

- SD42 includes portions of Uptown Charlotte, south Charlotte, and east Charlotte. No other portions of Mecklenburg County are included. 25% of Charlotte's population lives in this district no split VTDs. Senate Tr. 25:1–25:18 (Nov. 2, 2021).

- SD43 and SD44 include Gaston, Cleveland, and Lincoln Counties. (While other groupings were available in southwest North Carolina, this presented the most compact districts.). SD43 contains most of Gaston County, although 5 VTDs (in Cherryville, Landers Chapel, and Tryon) were placed in SD44 to even out population. SD44 includes these VTDs, as well as all of Gaston and Cleveland Counties. Senate Tr. 25:19–26:6 (Nov. 2, 2021).

- SD45, SD47, and SD50 are drawn from a grouping of 17 western North Carolina counties. Given the counties' geographic locations and populations, two of the 17 counties (Caldwell and Haywood) were required to be split. SD45 includes all of Catawba County, as well as the southeast portion of Caldwell County. SD47 contains the remainder of Caldwell County, including Lenoir. (Two VTDs were split between SD45 and SD47 to keep Lenoir whole.) SD47 also contains portions of Haywood County, including Canton, and all of Alleghany, Ashe, Avery, Madison, Mitchell, Watauga, and Yancey Counties. SD50 includes the remainder of Haywood County, and all of Cherokee, Clay, Graham, Jackson, Macon, Swain, and Transylvania Counties. SD50 contains no split precincts or municipalities. Senate Tr. 27:3–28:18 (Nov. 2, 2021).

- SD46 includes all of Burke and McDowell Counties, as well as some unincorporated portions and small towns in Buncombe County. Senate Tr. 26:13–16 (Nov. 2, 2021). One VTD is split with SD49 to keep all of Woodfin within that district. SD49 contains the remainder of Buncombe County, including Asheville, Biltmore Forest, and Weaverville. Senate Tr. 26:21–26:2 (Nov. 2, 2021).

- SD48 includes the whole of Henderson, Polk, and Rutherford Counties. Senate Tr. 26:7–26:12 (Nov. 2, 2021).

44. Ultimately, two amendments were accepted in the Senate Committee: (1) An amendment offered by Senator Clark changing the Guilford/Rockingham County grouping (SD26, SD27, and SD28). Of note, Senator Robinson, a Democratic member from Guilford, attested in Committee that she saw no VRA-type issues with the amendment and believed it to be a fair draw. Senate Tr. 104:3–105:4 (Nov. 2, 2021). (2) An amendment offered by Senator Marcus changing the Durham/Chatham County grouping (SD20 and SD22). Senator Murdock, a Democratic member

from Durham, attested in Committee that she saw no VRA-type issues with the amendment and believed it to be a fair draw. Senate Tr. 98-100 (Nov. 2, 2021).

45. The Committee concluded that the 2021 Senate Plan complies with the adopted criteria. The Committee determined that the Senate map successfully balances the criteria considered by Senators, including compliance with *Stephenson,* refusal to consider racial and political data, and minimizing the division of municipalities and VTDs. Senate Tr. 72:21–73:15 (Nov. 2, 2021).

C. The 2021 House Plan

46. The legislative record shows that goals achieved by the 2021 House Plan included the following:

- The mapmakers made every effort to keep previous districts intact. House Tr. 9:12–15 (Nov. 1, 2021).[6]

- Rural areas lost immense population in the 2010s and, therefore, changes were necessary. For instance, House District 23 previously included only Edgecombe and Martin Counties. But Bertie County had to be added to meet population requirements. House Tr. 8:14–23 (Nov. 1, 2021).

- The House Committee Chair endeavored to keep counties whole whenever it was possible. For instance, although Chatham, Lee, and Polk Counties could have been split, they were not. House Tr. 9:20–10:4 (Nov. 1, 2021).

- The Chair also sought to minimize the splitting of VTDs. While the 2011 map had hundreds of split VTDs, the proposed map had only 6 VTD splits. House Tr. 10:5–11 (Nov. 1, 2021).

- The Chair honored municipal boundaries and made every effort to keep municipalities whole. To the extent splits were necessary, the majority of them were in areas with little to no population. House Tr. 10:12–19 (Nov. 1, 2021).

- Every district in the map proposed by the Chair is contiguous. House Tr. 10:20–21 (Nov. 1, 2021).

- The bare minimum number of incumbents were "double-bunked" into the same districts. House Tr. 10:22–10:25 (Nov. 1, 2021).

[6] LDTX76.

- The Chair did not use consultants or any sort of computer algorithm to draw the maps. Nor did he look at racial or political data when he drew the maps. House Tr. 11:6–17 (Nov. 1, 2021).

47. No simulated redistricting analysis was presented during the 2021 redistricting. None of the innumerable alternative redistricting plans on the record before this Court was presented to the General Assembly during the 2021 redistricting.

IV. Plaintiffs' Efforts To Establish Partisan and Racial Intent Lack an Evidentiary Basis

48. A contested question of fact in this case is whether the General Assembly and its members crafted and enacted the 2021 Plans with racial or partisan intent, notwithstanding the prohibition on such considerations in the adopted criteria. The parties' trial presentations focused on this question, providing the Court with a full record founded primarily on live witness testimony in open court and the contemporaneous legislative record. The record undercuts Plaintiffs' intent-based assertions and supports Legislative Defendants' counter-assertions.

A. Alleged Partisan Intent

49. Plaintiffs failed to present competent and credible evidence tending to establish partisan intent on the part of the General Assembly or its members.

50. As noted, the adopted criteria placed a strict prohibition on "[p]artisan considerations" and the use of "election results data" "in the drawing of districts in the 2021 Congressional, House, and Senate plans." There is no basis for the Court to assume that the General Assembly or its members violated this criterion, as Plaintiffs have alleged.

1. Direct Evidence

51. Plaintiffs presented no direct evidence purporting to show that the General Assembly or its members violated this criterion.

52. Two members of the General Assembly with direct personal knowledge of the line-drawing, Representative Hall and Senator Hise, waived legislative privilege and testified at trial, and they denied that they used partisan data or employed partisan considerations in the line drawing. Their testimony was credible.

53. No competing direct evidence was presented. No member of the legislature came forward with any assertion amounting to direct percipient testimony that partisan data or considerations were employed. Nor does any such assertion appear on the contemporaneous legislative record. The absence of such evidence is itself significant.

54. The legislative record further undermines Plaintiffs' claim of partisan intent. As described above, the redistricting process was conducted via live stream "so that the process will be . . . just about as transparent as we humanly can do." House Tr. 5:5–8 (Oct. 5, 2021). The legislative record explored at length the live-stream redistricting process and strictures, which were largely implemented by non-partisan legislative staff members. House Tr. 7–10 (Oct. 5, 2021). The live-feed process had never before been used in a North Carolina redistricting conducted without court supervision, and the General Assembly can credibly claim to have conducted the most transparent legislative redistricting process in the State's history. That the General Assembly voluntarily adopted core features of the *Common Cause* remedial order and took unprecedented steps towards transparency and towards eliminating partisan considerations in redistricting are facts tending to show the absence of partisan intent on the part of the General Assembly or its members.

55. The fact-witness testimony Plaintiffs presented on the issue of intent amounted, at best, to speculation, and much of it merely expressed disagreement of various witnesses with the General Assembly's redistricting choices or processes. At most, it shows that further steps towards

transparency could have been made, not that the steps the General Assembly asserts it made did not actually occur.

56. Remarkably, Plaintiffs sponsored witness testimony complaining of too much transparency in the redistricting process. For example, one witness complained that "there were at least 10 streams (one for each station, and one of the whole room in each chamber) to monitor for approximately 40 hours per week." Anticipated Testimony of Daye (based on Daye Decl. ¶ 8). This, of course, is the natural and probable consequence of transparency: redistricting is complicated and tedious, requiring time and many participants, so thorough transparency required many computer monitors and many hours of live feed.

57. None of that would have been possible in prior redistricting processes—most notably, those controlled by the Democratic Party—where the process was done in full behind closed doors. Likewise, the complaint that following the process "was incredibly time-consuming," Daye Decl. ¶ 11, ignores that redistricting is time-consuming. Plaintiffs' sponsored witnesses complain, in effect, that the General Assembly was unable to transform the nature of redistricting itself to make it less tedious.

58. Plaintiffs also sponsored testimony of witnesses complaining that more could have been done to make the live-feed and public-streaming opportunities easier to follow or view. Whatever may be said of the merits of such complaints in terms of public policy, when viewed against the backdrop of prior redistricting processes and against the absence of any legal requirement calling for the transparency afforded, these ring hollow. The Court cannot infer anything informative from such testimony.

59. A central focus of Plaintiffs' sponsored testimony was the alleged absence of a means by which the Redistricting Committee Chairs could police members' circumvention of the

criteria barring partisan and racial considerations. Plaintiffs point to an exchange between Chairman Hall and Representative Harrison in which Chairman Hall declined to "search every member who comes into this committee room." House Tr. 52:25–53:1 (Oct. 5, 2021). Plaintiffs contend that this is tantamount to an admission that legislators accessed partisan data outside the Committee drawing room and even brought that information into the room.

60. This is not a credible inference from the evidence. Chairman Hall represented unmistakably that "[e]verybody will be bound by the same criteria," including the prohibition on partisan considerations, and that "[i]t's not that a member that's not on the committee can go draw whatever map they want to and sort of get around our rules because they're not on the committee. They must follow the criteria." House Tr. 52:10 (Oct. 5, 2021). Chairman Hall's rejection of a system to "search every member who comes into this committee room" was not an invitation to smuggle partisan data into the room or otherwise violate the criteria. It was an acknowledgment that each member is "elected by [the member's] constituents to come up here and do a job," House Tr. 53:5–6 (Oct. 5, 2021), and that it would be improper and unprofessional for a committee to exercise intrusive surveillance and search methods against co-equal members of a legislative body. That the Committees trusted the members vested with the trust of their respective constituents to follow clear and binding criteria is not evidence that those members breached that trust by purposefully and pervasively violating those criteria.

61. A similar problem undermines the testimony of witnesses that, for example, "[t]here would be no way for the public to know" if "map-drawers were communicating on their phones with others watching the livestream and were receiving feedback or additional information during the process from others." Anticipated Testimony of Mr. Daye (Daye Decl. ¶ 16); *see also* Anticipated Testimony of Rep. Harrison (based on Harrison Decl. ¶ 17 ("[T]hese procedures

would be insufficient to prevent the drawing of maps using political data[.]")). Even if it is true that some legislators and observers "saw nothing that would have prevented" legislators "from communicating with others who might be observing the process outside the room and applying this information while they drew maps," Anticipated Testimony of Sen. Marcus (based on Marcus Decl. ¶ 13), that is not a basis by which this Court may conclude that legislators were in fact making such communications or otherwise violating the criteria.

62. Plaintiffs also attempted to raise the inference that legislators funneled partisan information into the redistricting by working suspiciously with staff members, through the testimony of Tyler Daye, a 2017 graduate of the University of North Carolina Greensboro, who serves at Common Cause as the "Redistricting Community Engagement Specialist," a role he has held only as of May 2021. Anticipated Testimony of Daye (based on Daye Decl. ¶ 2). Mr. Daye attests that "unidentified aides," i.e., individuals he did not recognize, accompanied legislators, including Senator Newton and Representative Hall, as they worked on redistricting plans. *See, e.g.*, Daye Decl. ¶¶ 17–19, 31. The testimony reflects lack of knowledge on Mr. Daye's part, not malfeasance on the General Assembly's part. Mr. Daye was looking at individuals well-known in the General Assembly and their identify would be no mystery, except to someone without a sufficient basis of knowledge about the process. Mr. Daye apparently had little idea what he was seeing in purporting to monitor the redistricting process. His testimony is devoid of credibility and is discredited.

63. Some witnesses testified that proposed redistricting procedures and some proposed substantive redistricting configurations were rejected by the Committees. *See* Anticipated

Testimony of Rep. Harrison (based on Harrison Decl. ¶¶ 7–12, ¶¶ 22–26)[7]; Anticipated Testimony of Rep. Hawkins (based on Hawkins Decl. ¶¶ 6–7, 14, 18–22); Anticipated Testimony of Sen. Marcus (based on Marcus Decl. ¶¶ 16–18, 24–25); Anticipated Testimony of Daye (based on Daye Decl. ¶¶ 65–67). This testimony establishes, at best, that members of the General Assembly and members of the public had disagreements about redistricting. Such disagreements are inevitable. It is difficult to imagine a redistricting occurring without disagreements about which communities to recognize and maintain within one district. *See, e.g.*, Harrison Decl. ¶ 22; Hawkins Decl. ¶¶ 7, 14, 18; Marcus Decl. ¶ 15. The fact that disagreements occurred is no basis from which to infer partisan intent on the part of the General Assembly or its members.

64. The fact remains that suggestions of Democratic members and public comments were incorporated into the enacted plans. *See, e.g.*, Sen. Tr. 8:3–22; 10:17–11:5; 11:22–12:16 (Nov. 1, 2021). Moreover, the purposes behind the configurations were clearly set forth on the legislative record. The Court cannot infer anything problematic from attestations that more proposals of Democratic members or public comments were not implemented.

65. Besides, Plaintiffs' witnesses themselves gave a good indication of why disagreements occurred: Democratic members were not always reasonable. For example, Senator Marcus attests that she complained that "the only double-bunk in the entire Senate map was mine" (i.e., that the only two incumbents paired in the plan were herself and a Republican colleague). Marcus Decl. ¶ 23. But she admits that Republican Senator Newton offered to reconfigure her district to avoid the pairing in order to obtain her support for the plan, *id.* ¶ 24, just as had occurred

[7] The fact-witness declarations Plaintiffs presented are inadmissible hearsay. Legislative Defendants propose these findings on a contingent basis assuming the respective witnesses appear and testify in accord with the declarations. If they do not, findings concerning this testimony will not be necessary.

with other members who had been paired in prior renditions of the plan, *see id.* ¶ 21. Sen. Marcus, however, refused to vote for the plan, even if the pairing she complained of were remedied. *Id.* ¶ 25. Senator Marcus's testimony says more about her own unwillingness to compromise than on the General Assembly's motive in configuring the 2021 Senate Plan.

66. Plaintiffs point to a criterion entitled "Community Consideration" and contend that this criterion gave a back-door endorsement to the very partisan considerations barred by the prior criterion entitled "Election Data." But the language of the "Community Consideration" criterion explicitly refutes this assertion. The criterion provides that only "[s]o long as a plan complies with the foregoing criteria" may "local knowledge of the character of communities and connections between communities . . . be considered . . . ." Because the "Election Data" criterion, which forbade "[p]artisan considerations" is among "the foregoing criteria," there is no factual basis to read the "Community Consideration" criterion as endorsing partisan considerations.

2. Circumstantial Evidence

67. In truth, Plaintiffs' case is one based only on circumstantial-evidence, predicated on the theory that partisan intent can be discerned by objective means sufficiently probative to override legislators' denial of partisan intent. However, Plaintiffs failed to establish partisan intent as a matter of fact, and the circumstantial evidence confirms the direct evidence cutting against Plaintiffs' assertions.

a. Alternative Plans

68. The parties sponsored expert testimony predicated on comparisons of the 2021 Plans against alternative plans or sets of plans, the purpose being to establish an alleged redistricting base line from which intent (and, in some instances, effect) might be inferred circumstantially. The experts achieved varying degrees of success.

i. Dr. Barber

69. The most persuasive expert opinion in this genre was that of Dr. Michael Barber, an associate professor of political science at Brigham Young University and faculty fellow at the Center for the Study of Elections and Democracy in Provo, Utah. Barber Rep. 6. Dr. Barber earned his doctorate in political science from Princeton University in 2014, with emphases in American politics and quantitative methods/statistical analyses. *Id.* He teaches college courses in American politics and quantitative research methods, statistical methods, and research design, and conducts research in these fields and publishes articles in peer-reviewed journals. *Id.* at 6–7. Dr. Barber is qualified as an expert in American politics and quantitative methods and statistical analysis and, specifically, is qualified to offer the opinion he offered in this case.

70. Dr. Barber utilized a publicly available and peer-reviewed redistricting simulation algorithm to generate 50,000 simulated district maps in each county grouping in which there are multiple districts for both the North Carolina House and Senate redistricting plans. *Id.* at 5. The algorithm generated these plans without regard to racial or partisan data. *Id.* In this way, the simulated district establish a comparison set of plans that use purely non-partisan redistricting input. Dr. Barber then compared the 2021 House and Senate Plans against the simulated plans by reference to election results to assess whether the partisan effects of the 2021 Plans are consistent with what one would expect to see in a redistricting plan composed without reference to any partisan considerations.

71. Dr. Barber's method is credible, as is his testimony. To be sure, the method is not without limitations. Because it is impossible for a redistricting algorithm to account for all non-partisan redistricting goals—which can be idiosyncratic and district-specific—differences between the range of simulated plans and the 2021 Plans may be the result of non-partisan goals the

algorithm failed to account for, rather than of partisan goals. As thoroughly set forth above, the 2021 Plans were drawn to achieve numerous non-partisan goals that cannot be programed into a computer algorithm. There is no way, then, to be sure that differences in partisan effects from simulated plans versus legislatively enacted plans result from partisan intent rather than from non-partisan goals the algorithm was not programmed to achieve.

72. In this way, the comparison can show "false positives," and it would be improper to conclude without further investigation that a district or set of districts ostensibly shown to be a "partisan outlier" is actually a partisan outlier. This means that the simulation method can be indicative on the question of partisan intent, especially where it shows a similarity between the simulated plans and the 2021 Plans in terms of partisan impact, but not dispositive.

73. Dr. Barber's analysis showed that it is plausible, if not likely, that the 2021 Plans were prepared without partisan data or considerations. Dr. Barber's analysis showed that every county grouping of the 2021 House Plan but one falls within the range of partisan effects (measured by the number of Democratic-leaning districts) that the simulated plans anticipate from a redistricting process blind to partisan considerations. *See* Barber Rep. 32–167. Dr. Barber's analysis showed that every county grouping of the 2021 Senate Plan but two falls within the range of partisan effects (measured by the number of Democratic-leaning districts) that the simulated plans anticipate from a redistricting process blind to partisan considerations. *See* Barber Rep. 177–242.

74. In fact, Dr. Barber's report shows that some county groupings of the 2021 House and Senate Plans resulted in more Democratic-leaning districts than would have resulted in many non-partisan redistricting processes (as represented by the simulated plans). *See, e.g.*, Barber Rep. 151 (showing the 2021 House Plan as creating one Democratic-leaning district in the Chatham

grouping where 18% of non-partisan plans produced zero); *id.* at 202 (showing the 2021 Senate Plan as creating one Democratic-leaning district in the Brunswick grouping where 23% of non-partisan plans produced zero). It is unlikely that a redistricting in a body controlled by the Republican Party would have created more Democratic-leaning districts than could have been created under similar criteria, unless the map-creation was done without regard to partisan data and considerations.

75. In only three of 44 total groupings analyzed did Dr. Barber's analysis show the number of Democratic-leaning districts falling in the outlier range as compared to his sets of simulated plans. Barber Rep. 157 (Guilford House grouping); *id.* at 227 (Granville and Wake Senate grouping); *id.* at 233 (Iredell and Mecklenburg Senate grouping). And a closer inspection of those groupings suggests that partisan intent did not cause this purported effect. The House Guilford grouping largely tracks the district lines created in the 2019 redistricting overseen by the *Common Cause* court. Barber Rep. 5, 54. Dr. Barber's algorithm was unable to account for a goal of maintaining cores of prior districts and therefore unable to distinguish between a partisan effect caused by partisan intent and a partisan effect caused by the non-partisan goal of core preservation. This is a false positive.

76. The Granville and Wake Senate and Iredell and Mecklenburg Senate groupings are also false positives. As discussed above, the legislative record shows that districts in these groupings were drawn to adhere to municipal boundaries and achieve other non-partisan goals. Tr. 9:14–23 (Nov. 2, 2021); *see also id.* at 11:8–19.

77. On the whole, Dr. Barber's analysis supports the direct evidence establishing that the General Assembly and its members did not craft or enact the 2021 Plans with partisan intent.

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78. All three sets of Plaintiffs also sponsored expert opinion predicated on comparing the 2021 Plans to one or more alternatives, but these experts were less persuasive, and their testimony less probative.

ii. Dr. Duchin

79. The *NCLCV* Plaintiffs sponsored the testimony and report of Dr. Moon Duchin, who in turn compared the 2021 Plans to three alternative plans—one for the State House, one for the State Senate, and one for the congressional delegation—that the *NCLCV* Plaintiffs' complaint calls the "Optimized Plans." Duchin Rep. 3. Dr. Duchin opines that these alternatives "show[] that nothing about the state's political geography compels us to draw a plan with a massive and entrenched partisan skew . . . ." *Id.* In other words, because Dr. Duchin believes that a proportional map theoretically could have been drawn, it should have been drawn.

80. Dr. Duchin's report and method say nothing on the topic of partisan intent and can easily be ruled irrelevant on this topic. Dr. Duchin purports to show only "that it is possible to produce maps that give the two major parties a roughly equal opportunity to elect their candidates." *Id.* at 4. But it does not logically follow from this assertion, even if true, that a legislature that does not create a plan affording the two major parties a roughly equal opportunity to elect their candidates *intended* that result.

81. As Dr. Barber explained, "[s]cholarship in political science has noted that the spatial distribution of voters throughout a state can have an impact on the partisan outcomes of elections," because "Democratic-leaning voters tend to cluster in dense, urban areas while Republican-leaning voters tend to be more equally distributed across the remainder of the state." Barber Rep. 10. As a result, a legislature that gives no consideration to partisan data or information is highly *unlikely* to create a plan that affords the two major parties a roughly equal opportunity to

elect their preferred candidates. Not only is this elementary political science, but experts sponsored by other sets of Plaintiffs explicitly affirmed this principle. *See, e.g.*, Mattingly Rep. 3; Magleby Rep. 5.

82. Therefore, the fact that North Carolina did not enact plans with the effect alleged to be created by the Optimized Plans does not in any way reflect on the intent of the General Assembly or any of its members.

83. Furthermore, an important corollary principle is that achieving a plan that *does* afford the two major parties an equal opportunity to elect its candidates *requires* overriding partisan intent. Because a party-blind draw tends to advantage the party whose constituents are more evenly spread in a jurisdiction, the only way to overcome this natural geographic advantage for that party (here, the Republican Party) is to purposefully configure districts to benefit the party whose constituents are more concentrated (here, the Democratic Party).

84. It is readily apparent that the alternative Optimized Plans were optimized in *this* way, with the goal of assisting the Democratic Party in overcoming the geographic concentration of its supporters. Dr. Barber's report showed that more configurations within the so-called Optimized Plans are partisan outliers than are configurations within the enacted plans, and those shown to be partisan outliers are less defensible on non-partisan grounds and are less likely to be false positives than are the purportedly outlier groupings in the 2021 Plans. Barber Rep. 5–6. Despite Dr. Duchin being a Ph.D. mathematician who has published on the use of simulation methods to evaluate whether a plan is a partisan outlier, she did not employ her simulations techniques in this case. Dr. Duchin's report did not analyze whether the 2021 Plans or Optimized Plans were outliers against a representative sample of comparison maps; she simply compared one set of maps to another set of maps. Further, Dr. Barber's report shows that various district lines

were crafted in irregular ways that appear to exhibit overriding partisan intent for Democratic Party gain.[8] Dr. Duchin's report does not explain away the suspicious and irregular lines in the NCLCV plans.

85. The *NCLCV* Plaintiffs have never denied that the Optimized Plans were created to achieve an overriding partisan goal. Rather, the *NCLCV* Plaintiffs have taken steps to foreclose any inquiry into the Optimized Plans. This is further evidence that the Optimized Plans were created to achieve a partisan goal.

86. Comparing the 2021 Plans to plans optimized to assist the Democratic Party does not in any way show that the 2021 Plans were drawn with an intent to assist the Republican Party. Obviously, a plan drawn without intent to assist either major party would not produce as many Democratic-leaning seats as a plan drawn with the purpose of assisting the Democratic Party. As discussed in the conclusions of law below, the fact that the 2021 Plans were not drawn to assist the Democratic Party has no legal significance. Quite the opposite, in fact; assuming gerrymandering claims are justiciable, the Optimized Plans may well be vulnerable to being invalidated as gerrymanders in favor of the Democratic Party.

87. The remainder of Dr. Duchin's report is irrelevant to intent. It does not matter whether or not "the enacted maps systematically violate the principles of Close-Votes-Close-Seats

[8] Intentionally using race to draw districts of a racial target is only lawful when it advances a compelling governmental interest. *See Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 277–78 (2015). Compliance with Section 2 constitutes a compelling governmental interest. *Id.* But Section 2 does not authorize a state to use race to draw crossover districts (districts where the minority group can elect their candidate of choice with white crossover votes). *Bartlett v. Strickland*, 556 U.S. 1, 13-17 (2009) Nor does Section 2 allow a state to use race to so-called influence districts or districts where the minority group can help elect a non-minority candidate they favor. *See LULAC v. Perry*, 548 U.S. 399, 445 (2006). Requiring the General Assembly to draw a district with a targeted black population less than 50% will raise serious questions under the Fourteenth and Fifteenth Amendments of the United States Constitution. *See id.* at 443–44.

and Majority Rule," Duchin Rep. 6, because such a "rule" sheds no light on partisan intent. As noted, if the 2021 Plans did *not* violate such a rule, that would raise the inference of partisan intent. The remainder of Dr. Duchin's report, insofar as it concerns partisan matters, has no probative value in assessing partisan intent.

iii. Other Simulated-Mapping Experts

88. The *Common Cause* Plaintiff sponsored the report and testimony of alternative-mapping expert Dr. Daniel Magleby. But Dr. Magleby has admitted that his report does not speak to the issue of intent. His testimony is therefore not discussed here.

89. The *Harper* Plaintiffs sponsored the reports and testimony of three alternative-mapping experts, Dr. Jowei Chen, Dr. Wesley Pegden, and Dr. Jonathan Mattingly. All of these experts utilized mapping-simulations methods akin to the method used by Dr. Barber. None of these experts, however, presented as reliable an analysis as Dr. Barber's, and to a large extent their analyses support Dr. Barber's.

90. Dr. Pegden's report is less reliable than Dr. Barber's, and it is unclear what it shows concerning partisan intent, effect—or anything.

91. Dr. Pegden purports to have started with the 2021 Plans and then made a series of small, "random changes" to the district boundaries as a way to detect whether district lines were tailored to maximize partisan advantage. But Dr. Pegden's "random" maps are poor comparators because he did not constrain those "random changes" to the same neutral criteria that constrained the General Assembly. For instance, Dr. Pegden did not preserve municipalities in the same way as the General Assembly; he did not split the municipalities in the same way, nor did he split the same municipalities and counties as the General Assembly did. He paid no attention to the number of people affected by municipality splits and, instead, focused on matching the total number of

municipality splits as in the enacted map. This means that where a municipality split in the enacted map affected few people (some splits affected as few as 5 people), Dr. Pegden's municipality split could affect tens of thousands, and both would count as just one municipality split. This is meaningful in a case where Plaintiffs' other expert, Dr. Mattingly, opines that a difference of one or two percent democratic vote share in a House district, where ideal size total population is 86,995, means the difference between a "typical" map and an "extreme outlier."

92. Further, Dr. Pegden's methodology did not contain a compactness floor—even though compactness was one of the General Assembly's criteria—instead, he used an average. So some of his "random maps" contain districts that are less compact than the least compact district in the enacted plan so long as there is a district that is more compact to maintain the same average. You can see in Dr. Pegden's maps, as illustrated in his report, that districts are bizarrely shaped. Dr. Pegden concedes that these were not meant to be districts passed by a legislature.

93. Dr. Pegden did not review the publicly available and detailed description by map drawers about the non-partisan decisions they made to comply with the criteria and certainly made no attempt to match those non-partisan decisions in his own analysis.

94. Further, Dr. Pegden conducts his analysis only by reference to a single election, the 2020 Attorney General election. *See* Barber Reb. Rep. 11. Dr. Pegden does not justify the choice of *this* particular election, and, more importantly, does not justify the choice of conducting the analysis by reference to only *one* election. Experts in this field (and others in this case) examine multiple elections. *Id.* And there is a good reason for that: voting patterns differ across elections, idiosyncrasies impact individual elections, so only by running an analysis across elections can an expert reliably conclude anything of import from an electoral analysis. Moreover, utilizing multiple elections is particularly important for an analysis purporting to smoke out partisan intent.

Looking at a plan in hindsight, an expert does not know what partisan data (if any) a map-drawer used or did not use, so—even assuming the map-drawer engaged in partisan analysis—relying in a single election may well involve relying on an election that the map-drawer did not actually use.

95. For similar reasons, relying on only one election can be a sign of cherry-picking or rigging an analysis. An expert may run an analysis in many ways before achieving the desired result with a particular election. Or else an expert may have sufficient knowledge of the subject to know in advance that selecting that one election is likely to achieve a desired result that will not be achieved with different choices. Dr. Pegden's choice here is suspicious.[9]

96. An equally fundamental problem with Dr. Pegden's analysis is that it relies on a method that is too sensitive to small partisan differences between the 2021 Plans and the simulated plans to say anything of practical significance. As Dr. Barber shows, there are many instances where Dr. Pegden's method purports to show that portions of the 2021 Plans are partisan "outliers" in a statistical sense, but where the difference is quite small and carries no practical significance. Barber Reb. Rep. 13; *see also id.* at 16 (finding no practical significance to Dr. Pegden's labeled "outlier" grouping); *id.* at 21 (similar); *id.* at 26 (similar); *id.* at 30 (similar); *id.* at 38 (similar); *id.* at 39 (similar); *id.* at 40 (similar); *id.* at 41 (similar); *id.* at 43 (similar). In some instances, Dr. Pegden also stretches the definition of "outlier" to apply the label where it would not ordinarily apply according to sound statistical norms. *See id.* at 16 (finding that Dr. Pegden labeled a district an outlier even though it "would not constitute a statistical outlier in a traditional scientific study"). This, in turn, undermines any practical conclusion that may be drawn from Dr. Pegden's analysis,

[9] Although Dr. Pegden includes an analysis with three additional races in an appendix, he reports results only at the statewide level, which creates problems identified above and raises more questions than it answers regarding the reliability Dr. Pegden's methodology and conclusions.

since the label "outlier" says more about the sensitivity of the analysis than it does about the intent of the General Assembly.

97. Besides, Dr. Pegden repeatedly finds that groupings in the 2021 Plans are *not* outliers. *See id.* at 19 (finding that Dr. Pegden's analysis shows the Alamance County grouping is not a partisan outlier and, in fact, is more favorable to Democratic electoral interests than most of Dr. Pegden's simulations); *id.* at 23 (similar as to Cumberland County House grouping); *id.* at 28 (similar as to Brunswick-New Hanover County House grouping); *id.* at 32 (similar as to Cabarrus County House grouping); *id.* at 36 (finding that Dr. Pegden's analysis shows the Mecklenburg County House grouping is just on the outlier line). In some instances, Dr. Pegden is unable to offer any opinion at all. *See id.* at 20 (noting that Dr. Pegden presented no analysis of the Duplin-Wayne House grouping because his algorithm could not generate comparison maps other than the enacted plan itself).

98. Dr. Mattingly's analysis is partially defective and, to the extent it is not defective, supports Dr. Barber's conclusions. Dr. Mattingly produced two "ensembles" by which to judge the 2021 House and Senate Plans, but one ensemble for each is too far removed from the General Assembly's non-partisan goals to be reliable. *See* Barber Reb. Rep. 14–15. Dr. Mattingly claims that his first House ensemble "matched" the General Assembly's criteria, but Dr. Barber concluded that this was often not the case, as the 2021 Plans frequently split fewer municipalities or "ousted" fewer voters than a substantial number of simulations. *Id.* at 14. Likewise, one of Dr. Mattingly's Senate ensembles was purposefully created to split more municipalities than the 2021 Senate Plan. *Id.* at 15. These ensembles do not track the General Assembly's non-partisan criteria and therefore cannot form a reliable baseline by which to assess whether the 2021 Plans were created with partisan intent.

99. The remaining two ensembles are somewhat closer to the General Assembly's criteria, but a close look at the results of Dr. Mattingly's analysis (as well as Dr. Pegden's) reveals general agreement with Dr. Barber's analysis. In many cases, Dr. Mattingly *admits* that his own analysis does not show groupings within the 2021 House and Senate Plans to be partisan outliers. Barber Reb. Rep. at 19 (noting that Dr. Mattingly finds the 2021 House Plan is not an outlier as to the Alamance County House grouping); *id.* at 20 (same as to the Duplin-Wayne County House grouping). In other cases, Dr. Mattingly's report clearly shows that groupings within the 2021 House and Senate Plans are not outliers. *See* Barber Reb. Rep. 17 (finding agreement between the projected partisan impact of the Pitt County House grouping, the 2021 House Plan, and Dr. Barber's findings); *id.* at 26 (similar as to Durham-Person County House grouping). In most cases, Dr. Mattingly attempts to call the districts outliers, but bends the import of his analysis to make what are, in the end, trumped up assertions. *See* Barber Reb. Rep. 23 (Dr. Mattingly's report finds districts in the Cumberland County House group to be outliers when, in fact, those districts are highly competitive and responsive, and Dr. Mattingly's simulated districts are not); *id.* at 28 (Dr. Mattingly criticizes the Brunswick-New Hannover County House grouping, even though the partisan result matches his simulated version in 5 of 12 elections); *id.* at 33 (similar as to Cabarrus County House grouping); *id.* at 36–37 (Dr. Mattingly criticizes the Mecklenburg County House grouping, even though across the 13 different districts in 12 different elections, the Enacted Plan is in alignment with the majority of the simulation results in all but 1 election"); *id.* at 38 (Dr. Mattingly criticizes the Wake County House grouping, even though the 2021 Plan "actually creates a *Democratic* leaning district where the majority of simulations create a Republican leaning district); *id.* at 39 (Dr. Mattingly criticizes the Cumberland and Moore Senate grouping, even though "in all 12 elections the Enacted Map agrees with the majority of the simulations in all

districts"); *id.* at 40–41 (similar as to the Forsyth and Stokes Senate grouping); *id.* at 41–42 (similar as to the Guilford and Rockingham Senate grouping); *id.* at 42–43 (similar as to the Granville and Wake Senate county grouping); *id.* at 43–44 (Dr. Mattingly criticizes the Iredell and Mecklenburg Senate county grouping, even though "[t]he Enacted Plan is in total agreement with the majority of simulations in these districts"). Dr. Mattingly also fails to consider the cause of the supposed outlier status of districts, which are often explained through neutral means. *See* Barber Reb. Rep. 30 (Dr. Mattingly finds a district in the Forsyth-Stokes County House grouping to be an outlier, even though it matches the partisan composition of the analogue in the *NCLCV* "optimized" House plan); *id.* at 34.

100. Overall, most of Dr. Mattingly's histogram charts indicate no difference between the candidate a district elects in the enacted plan as compared to the candidate elected under Dr. Mattingly's ensemble plan. Finally, Dr. Mattingly did not review the publicly available and detailed description by map drawers about the non-partisan decisions they made to comply with the criteria and certainly made no attempt to match those non-partisan decisions in his analysis.

101. Perhaps the most telling sign of deficiencies with Plaintiffs' experts is the extent to which their reports produce inconsistent and contradictory conclusions. Dr. Barber's rebuttal report walks through the 2021 House and Senate county groupings and shows broad disagreement between and among Plaintiffs' experts assertions regarding each. *See* Barber Reb. Rep. 15–44. Dr. Barber's testimony on this topic was credible, his methods sound, and he established persuasively that Plaintiffs' experts have failed to provide reliable and consistent conclusions.

102. Plaintiffs' experts largely seek to take the focus from the deficiencies in their work by drawing the focus away from their conclusions at the county-grouping level—which, as shown, are either unreliable or actually support Legislative Defendants' position that the 2021 Plans were

not drawn with partisan intent—to the statewide level. But this is the wrong focus. Districts are drawn in North Carolina at the county-grouping level, both because State law requires this and because a map-drawer must build the map up line by line. If partisan intent is to be found, it should be found at that level. The notion that districts not shown to be the product of partisan intent at the county-grouping level can take on the cloak of partisan intent when combined with a whole map disregards how redistricting works. Further, a map-drawer intent on gerrymandering could be expected to engage in that practice with each district and grouping. It strains credulity to accept Plaintiffs' implied view that the map-drawers in this case refrained from gerrymandering at the district and grouping level towards some subtle and perfectly calculated and executed goal of a statewide gerrymander.

103. Dr. Chen also utilized a simulation-mapping method, but he analyzed only the 2021 Congressional Plan. Chen Rep. 3. Dr. Chen's analysis and conclusions are unreliable and flawed and, besides, do not present persuasive evidence of partisan intent.

104. To begin, Dr. Chen did not present a randomized set of alternative plans. His method produced 1,000 alternative congressional plans, but he admits these are not a random sampling of plans and that his algorithm was not designed to produce such maps. As a matter of basic statistics, Dr. Chen is not able to opine—at least not reliably—that numerous other plans equally the product of non-partisan criteria (even Dr. Chen's own criteria) are not plausible results. Dr. Chen is also not able to opine that such plans would have similar partisan performance metrics as the 2021 Congressional Plan.

105. Dr. Chen's method is unreliable for the additional reason that his simulations were not programmed to implement the General Assembly's redistricting criteria, as applied by the General Assembly. As Dr. Chen acknowledges, the concept of simulated mapping is to compare

the 2021 Congressional Plan against "districting plans" that "follow nonpartisan districting criteria." Chen Rep. 5. But, if those criteria differ from the non-partisan criteria used by a redistricting authority, the simulated-mapping method will not be able to discern whether different partisan outcomes resulted from partisan intent or, alternatively, from different partisan effects of non-partisan criteria.

106. Here, Dr. Chen's algorithm utilized different criteria from what the General Assembly used. He placed a strict limit of 13 county splits and 13 "voter tabulation district" (or "VTD") splits per simulated plan, which appears nowhere in the criteria. Chen Rep. 6–7. Dr. Chen reasons that the goals of maintaining whole counties and VTDs was among the criteria, and that his computer algorithm showed that these limits were possible. *Id.* But this fails to account for the fact that the General Assembly did not use a sophisticated algorithm; the 2021 Congressional Plan was drawn by hand by individuals under strict time constraints. The legislative record shows that legislators understood they had divided counties and split VTDs only when necessary to equalize population. Sen. Redistricting Comm. Tr. 11:22–12:16 (Nov. 1, 2021). No one on the legislative record asserted that fewer splits were possible. That human beings failed to achieve what computers may achieve is not evidence of partisan intent and could as easily be explained by the fact that humans are not computers.

107. On the other hand, Dr. Chen was too lenient in his algorithm when it came to municipal boundaries. Dr. Chen's algorithm treated municipal lines as a second-order priority, *see* Chen Rep. 8, but the General Assembly achieved a plan that split only two cities in the State. Sen. Tr. 11:22–12:16 (Nov. 1, 2021). Dr. Chen's reports fail to disclose how many municipal splits are in his simulated plans.

108. By these and other departures from the General Assembly's goals, Dr. Chen warped his analysis to impose different partisan effects than may have resulted from the General Assembly's criteria, and the analysis is incapable of reaching any reliable conclusion regarding partisan intent. This is particularly troubling because departures from the criteria of this genre are a common method accomplished experts may utilize to rig an analysis to achieve a desired outcome. An accomplished expert may either have an informed intuition, or even run tests to show, that certain criteria and restrictions achieve a result more or less favorable to the desired outcome of the party sponsoring the expert's testimony. When signs of this emerge in an expert report, that is a good reason to be wary of the resulting conclusion.

109. Dr. Chen also employs a series of metrics, such as the mean-median difference and what he terms a "uniform swing analysis," to illustrate that the 2021 Congressional plan exhibits less partisan symmetry than his simulated plans. But the mean-median difference (the difference between a party's mean vote-share in each district in a plan and the party's vote-share in the median district in the plan) fails to take into account aspects of a state's political geography, and is at bottom an appeal to proportional representation. Dr. Chen's uniform swing methodology is counterfactual in nature and unreliable. With uniform swing, Dr. Chen arbitrarily subtracted 0.8% from the Republican vote-share of each district in the congressional plan, and observed that this shift produced a shift in seats from Republican-favoring to Democratic-favoring in his simulated plans but not the enacted plan. This methodology is not helpful to the Court for two reasons. First, the method analyzes hypothetical, counterfactual election "results," and not real data (of which there is much in the record). Second, the method assumes that electoral "swings" from election-to-election occur uniformly across the state, but that assumption hinges on "conjecture about where possible vote-shifters will reside." *LULAC v. Perry,* 548 U.S. 399, 420 (2006) (plurality opinion).

There is no evidence in this record that "swing voters" are uniformly distributed in the state. Indeed, the evidence in this case shows regional and local variation in voting patterns throughout North Carolina. The uniform swing methodology Dr. Chen employs thus ignores the political geographic concerns that motivated Dr. Chen's use of simulations to begin with.

110. Furthermore, Dr. Chen's ultimate conclusions do not persuasively establish partisan intent. Under multiple elections Dr. Chen himself selected to conduct his partisan comparison between the 2021 Congressional plan and his set of simulated plans, the 2021 Congressional Plan falls within the anticipated range of districts with more than 50% of the Republican vote share. *See, e.g.*, Chen Rep. 88, 89, 90, 93, 94. Dr. Chen hyperbolizes in his conclusion that the 2021 Congressional plan is an extreme outlier, which also cuts against his credibility.

b. Inferences from District Lines

111. Plaintiffs also presented evidence in the form of opinion purporting to discern legislative intent directly from a review of district lines, typically overlayed on election results coded blue and red to show precincts carried by Republican and Democratic candidates, respectively, in statewide elections. These efforts are methodologically unsound and unpersuasive and smack of cherry-picking.

i. Dr. Cooper.

112. Plaintiffs rely principally on Dr. Cooper to opine on intent by reviewing maps and drawing inferences from district lines. Dr. Cooper, however, indicated that he did not analyze intent in his report. Dr. Cooper made no effort to review the legislative record to determine the intent of the legislature in drawing the 2021 Plans. Instead, Dr. Cooper simply opines on the "partisan characteristics" of the 2021 Plans. Dr. Cooper's definition of partisan gerrymandering—

"drawing lines to benefit one party at the expense of the other"—specifically implies intent, but because he does not analyze intent, this alone cannot assist the Court in determining whether partisan gerrymandering occurred, much less whether it is actionable.

113. Moreover, whatever analysis Dr. Cooper did provide lacked a reliable methodology, reliably applied. It is readily apparent that Dr. Cooper began with the conclusion that the 2021 Plans were drawn for partisan reasons and worked backward from that conclusion to review the lines and seek evidence of such partisan line-drawing. This is not the work of a reliable and credible expert.

114. As Dr. Barber explained, Dr. Cooper's report has "no systematic process by which he determines if a set of districts in a county group constitute a gerrymander or not." Barber Reb. Rep. 11. In fact, "Dr. Cooper does not describe any methods of processes that would be consistent with [his] analysis in political science." *Id.* Dr. Cooper's testimony consists merely of commentary about Dr. Cooper's view of the "partisan characteristics" of the plans—i.e., the partisan scores analyzed in his report—and other commentary that, while it appears to infer the intent of the map-drawers, Dr. Cooper admits he cannot so opine. As noted, his testimony is transparently an effort to support a predetermined conclusion.

115. Dr. Cooper's opinions are unsupported and speculative. In many instances, he simply makes bald statements about intent with no support whatsoever. *See, e.g.*, Cooper Rep. 21 (stating, without support, that NC-1 was designed "to create extra advantage for the Republican Party in other parts of the map"); *id.* at 27 (similar as to NC-4); *id.* at 31 (speculatively opining that NC-5 was designed "to pack as many Democratic precincts as possible into NC-6). Dr. Cooper picks ad hoc metrics for each district or grouping he reviews, self-evidently designed to reach a desired conclusion. *See, e.g.*, Cooper Rep. 23 (offering "a communities of interest perspective" not

offered as to other districts and discussing elementary schools and roads not discussed as to other districts); *id.* at 25 (similar ad hoc commentary).

116. Tellingly, Dr. Cooper fails to note in his report instances where communities of interest he identified in analyzing other county groupings are kept whole, which reflect nonpartisan intent. Likewise, while he indicates where municipalities are split, he did not review in his analysis the publicly available stat packs to determine the population within municipalities split by the districts, which in many cases involve relatively little population split, or no population split at all.

117. As Dr. Barber explained at length, Dr. Cooper's ad hoc testimony consistently conflicts with the opinions and analyses of Plaintiffs' own mapping experts, and it is often internally inconsistent. *See, e.g.*, Barber Rep. 24 (noting that Dr. Cooper identifies districts as "extremely competitive" that Plaintiffs' mapping experts found to be extreme outliers). Dr. Barber finds instances where Dr. Cooper omits relevant information that would undercut his analysis. *See, e.g.*, Barber Reb. Rep. 17; *id.* at 19 ("Dr. Cooper notes the unusual shape of the district but does not mention that this shape is largely the same (different by only 2.5 precincts) as the 2019 court-approved maps."); *id.* at 31 (similar); *id.* at 28–29 (identifying communities of interest purposes advanced by the 2021 House Plan that Dr. Cooper ignored, even while discussing communities of interest as to other districts and groupings). Dr. Barber also identifies statements by Dr. Cooper that simply do not make sense, and Dr. Cooper could not make sense of them himself either. *Id.* at 22 ("If the Enacted Map create[s] two strong Democratic districts, how is the announced retirement of all three Democratic incumbents in any way a result of the districting process, as Dr. Cooper implies?"); *id.* at 26 (observing Dr. Cooper's complaint about the absence of Republican VTDs in certain districts in Durham County "confusing" because "there are nearly no Republican VTD's in Durham County").

118. Finally, Dr. Cooper's discussion of "Partisan Competitiveness" erroneously depends on the premise that close statewide votes should translate into nearly equal proportions of representation of the two major parties in a state legislature. *See* Cooper Rep. 5–14. This premise is untenable for reasons identified above. Dr. Cooper's conclusion that the statewide legislative vote share to seat share is disproportionate is further undermined by his prior opinion—in an op-ed for which he was not compensated—that this difference can be "blamed as much (if not more) on the way we have settled and migrated than on the redistricting process." (Cooper Depo. Ex. 4).

ii. Other Inferential Testimony

119. Plaintiffs offered additional lay-witness evidence purporting to discern legislative intent from district lines. *See, e.g.*, Anticipated Testimony of Daye (based on Daye Decl. ¶¶ 32–36); Anticipated Testimony of Hawkins (based on Hawkins Decl. ¶¶ 14–29). This proffer of evidence suffers from all the same flaws as the testimony of Dr. Cooper, including that it is speculative and without foundation or adequate methodological underpinnings. It also suffers from the *additional* defect that the fact witnesses were not established as qualified to draw speculative inferences from district lines.

120. The testimony is also unpersuasive. District lines inevitably fall *somewhere*, and by color coding maps with red and blue, there is little limit to what someone interested in making a political point may say regarding district lines. If blue territory falls on both side of a line, the viewer calls the Democratic vote "cracked"; blue territory falls on one side and red on the other, the viewer calls it "packed." And the viewer can essentially insulate the testimony from review by claiming to know a region and understand what the map-drawer intended. This is unreliable opinion testimony that is inadmissible and completely unpersuasive. The Court can discern nothing from it concerning partisan intent.

2. Alleged Racial Intent

121. Another contested question of fact in this case is whether the 2021 Plans were created with racial intent on the part of the General Assembly or its members. The trial record, however, is far less developed on this question than on partisan intent. As with partisan intent, there is no direct evidence tending to show any racial intent on the part of the General Assembly or its members. Furthermore, there is not admissible circumstantial evidence on the record even purporting to show racial intent on the part of the General Assembly or its members. Notably, no expert witness in this case offered an admissible opinion to the effect that any portion of the 2021 Plans is best explained as the product of racial intent. The Court is therefore compelled to conclude that no racial intent entered the line drawing.

122. To begin, the adopted criteria forbade the use of racial data in the redistricting, as discussed above. The legislative record contains repeated assertions that racial data was not used. Representative Hall and Senator Hise, testified at trial and denied the use of partisan data or employment of partisan considerations in the line drawing. Their testimony was credible.

123. No contrary direct evidence of racial intent was offered. No member of the legislature came forward with any assertion amounting to direct percipient testimony that racial data or considerations were employed. Nor does any such assertion appear on the contemporaneous legislative record. The absence of such evidence, or assertions, is itself compelling evidence that no such racial data was used, given the historic transparency and public access to the line drawing.

124. No expert opinion was offered on the question of racial intent. This stands in stark contrast to the evidentiary record developed for the dispute regarding partisan intent, as expert witnesses ran simulations and other methods designed to discern partisan intent inferentially by

reference to non-partisan baselines. Nothing like that was even presented here, notwithstanding the participation of numerous witnesses in this case who have the skill to perform such analyses and could have done so with respect to the allegations of racial intent. Again, the absence of such evidence is itself affirmative evidence undercutting allegations of racial intent.

125. The two sets of Plaintiffs making assertions of racial intent, those in the *Common Cause* and *NCLCV* cases, have attempted to make their case through indirection and, in effect, political spin. Both sets of Plaintiffs contend that there is an adverse racial *effect* of the 2021 Plans, that the General Assembly had to have known of that effect, and therefore that the General Assembly intended that effect. Every step of this tortured line of argument is unsupported by evidence or logic.

126. First, there is no adverse racial effect of the 2021 Plans, as shown below. The trial evidence showed that racial polarization is, at most, muted and does not cross the line of being legally significant. Further, the levels of "Black Voting Age Population" or "BVAP" in the enacted plans create numerous equal-opportunity districts. This is explained further below. For present purposes, what matters is that the General Assembly could not have known of an adverse racial effect of the 2021 Plans because there is no such adverse effect.

127. Second, there is no evidence of knowledge on the part of the General Assembly or its members of any adverse racial impact, even an impact that might arguably exist, because no evidence has controverted the attestations and evidence that the General Assembly conducted a race-blind redistricting. On this issue, the *Common Cause* and *NCLCV* Plaintiffs attempt to manufacture knowledge by pointing out that Common Cause and Plaintiffs' attorney Allison Riggs sent correspondence and purported racial bloc voting studies attempting to show that the 2021 Plans decrease minority opportunity to elect the preferred candidates of the minority community.

128. But the mere transmission of these letters cannot create knowledge, as these superficial arguments suggest. For one thing, there is precious little information about what these studies are, and Common Cause admits they are "preliminary." Anticipated Testimony of Bob Phillips (based on Phillips Decl. ¶ 27). Legislators in receipt of this correspondence had no way to know if it is accurate, and the information itself is inadmissible for the truth of the matter asserted. For example, it is unknown who conducted the polarized voting study authenticated by Mr. Phillips or the methodologies behind the study, and the study cannot be assumed by the Court to show actual voting patterns. The study relies on exogenous races that are hardly probative of legislative and congressional races. Legislators in receipt of this information are not obligated to accept it as gospel or even credible (or even to read it), and their choice not to act on it is not in any way evidence of knowledge of racial impact.

129. Third, there is no evidence crossing the next threshold: from any knowledge that might be alleged to *intent*. No evidence before the Court establishes that any member of the General Assembly had the conscious object of creating a plan to adversely harm voters of any race. The choice to conduct a race-blind redistricting is overriding evidence to the contrary.

130. Fourth, Plaintiffs ignore the severe limitations on the General Assembly's ability to use race to achieve racial goals that Plaintiffs espouse. For example, Bob Phillips attests that his "hope was that the legislators would use this information [that he sent] to remedy these [alleged racial-effect] issues in the map." Anticipated Testimony of Phillips (based on Phillips Decl. ¶ 28). But using race to draw lines to increase BVAP in districts would have amounted to racially predominant redistricting triggering strict scrutiny under the Equal Protection Clause. *See Cooper v. Harris*, 137 S. Ct. 1455, 1469 (2017). That legislators made every effort to avoid an equal-

protection violation is not evidence that they drew lines with discriminatory intent; it is evidence of the opposite.

131. Plaintiffs also rely on assertions regarding the placement of district lines, both in the form of lay testimony that the lines appear (in their non-expert opinion) to exhibit racial intent and in the form of testimony from Dr. Duchin that the so-called "optimized plans" create more effective minority opportunity districts than the 2021 Plans. *See, e.g.*, Anticipated Testimony of Hawkins (based on Hawkins Decl. ¶¶ 14–29); Duchin Rep. 11–12. Both lines of evidence are irrelevant to the question of racial intent because, yet again, they conflate intent and effect. Even if it were true that the "optimized" plans create more minority opportunity districts than the 2021 Plans (which has not been proven), it would not follow that this occurred on purpose.

132. Indeed, the VRA itself has been constructed to acknowledge that district lines drawn with *no* racial intent may have an adverse racial impact. Congress amended Section 2 of the VRA to reject the Supreme Court's holding in *Mobile v. Bolden*, 446 U.S. 55 (1980), requiring a showing of discriminatory intent as a predicate to a Section 2 claim. *See Thornburg v. Gingles*, 478 U.S. 30, 35 (1986), This amendment, and the Supreme Court precedent interpreting it, necessarily acknowledge that district lines drawn blind to race may unintentionally "fragment" or "pack" minority voters in a way that is dilutive. *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) (discussing these concepts). Plaintiffs ask the Court to ignore the factual meaning of this authority, but the Court is not free to do so. Even if it were true that the 2021 Plans fragment or pack minority communities (which has not been proven), that fact would be equally consistent with the race-blind redistricting the General Assembly insists occurred as with the racial intent Plaintiffs have alleged but failed to prove. By the same token, even if it were true that the so-called "optimized

plans" create more minority opportunity (which has not been proven), that fact alone would not establish racial intent underpinning the 2021 Plans.

133. Plaintiffs offer a lengthy but ultimately irrelevant and inadmissible report by Dr. James Leloudis II, which offers no relevant evidence concerning the 2021 Plans or the redistricting process. In preparing his report, Dr. Leloudis did not speak to any current or former member of the General Assembly. Nor did Dr. Leloudis review or listen to any hearing of the Senate or House Redistricting Commission. As a result, Dr. Leloudis offers no opinions regarding any specific district passed by the General Assembly in 2021. Rather, the report surveys broad swaths of racial history in North Carolina and the United States going back to the Civil War. Leloudis Rep. 7–78. Much of the report is historically accurate, some of it is exaggerated, some of it is incorrect, but the Court need not parse the report topic by topic, because it is all irrelevant. This Court does not sit to judge the education, economic, or other election legislation of the General Assembly. Nor, is Dr. Leloudis an expert in education policy, political science or economics, though he has no issue including his advocacy in this report. The Court is also in no position to conclude that, because North Carolina has engaged in racial discrimination in the past, that the 2021 Plans are racially discriminatory. The Court will not make the same unfounded leap as Dr. Leloudis in equating North Carolina's past, with actions of individual legislators, who Dr. Leloudis has no affirmative evidence used racial statistics or data to draw any of the enacted plans. *See City of Mobile, Ala.*, 446 U.S. at 74 ("[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful.").

134. On the question of the 2021 Plans, the Leloudis Report has nothing credible or even admissible to say. It contends that "redistricting will always be informed by race" and that Plaintiffs' allegations are therefore to be believed. *Id.* at 77. Much like this conclusion, Dr.

Leloudis also believes that voters cannot disentangle racial animus from policy reasons and that race and ideology in voters is naturally intertwined. Dr. Leloudis reaches this troubling conclusion despite the fact that he has conducted no quantitative studies on race versus voter ideology. The Court, a neutral adjudicator of factual disputes, is not entitled to make such assumptions, and the import of basing a ruling on such assertions would simply be to condemn all legislation enacted in North Carolina to invalidation as the product of racial discrimination. Moreover, Dr. Leloudis, on this topic, proves himself to be an advocate, not an expert, as he explicitly states in his report that his testimony is part of "the fight" against "Republican legislators." *Id.* at 76. Experts have been entirely excluded over far less.[10] As further proof that Dr. Leloudis' report is based on advocacy for his own beliefs, Dr. Leloudis believed, after consultation of the Common Cause complaint, that the Plaintiffs bring challenges under the Federal Voting Rights Act of 1965. He reaches conclusions that districts are "bizarrely" shaped just by plain sight, and without comparing them to other similar districts passed by historical General Assemblies or upheld in Court opinions. And despite concluding that redistricting is an important part of North Carolina's racial history, Dr.

[10] *See, e.g.*, *Phoenix Restoration Grp., Inc. v. Liberty Mut. Grp., Inc.*, 2020 WL 622152, at *4 (D.D.C. Feb. 10, 2020) ("[C]ourts prevent expert witnesses from testifying if they 'become an advocate for the cause[.]" (citation omitted)); *see also Viterbo v. Dow Chem. Co.*, 646 F. Supp. 1420, 1425 (E.D. Tex. 1986), *aff'd*, 826 F.2d 420 (5th Cir. 1987) ("[W]here an expert becomes an advocate for a cause, he therefore departs from the ranks of an objective expert witness, and any resulting testimony would be unfairly prejudicial and misleading."); *Johnston v. United States*, 597 F. Supp. 374, 411 (D. Kan. 1984) ("[T]his Court must reject the testimony of Mr. Morgan and Mr. Gofman because they have become advocates for a cause and have therefore departed from the ranks of objective expert witnesses."); *In re Air Crash Disaster at Detroit Metro. Airport on Aug. 16, 1987*, 737 F. Supp. 427, 430 (E.D. Mich. 1989), *aff'd sub nom. Rademacher v. McDonnell Douglas Corp.*, 917 F.2d 24 (6th Cir. 1990) (disregarding expert testimony because the expert witness was an "ardent supporter and a leader of the Right to Life movement, and, as such, his opinion regarding the viability of a fetus cannot be accepted as objective."); *Lippe v. Bairnco Corp.*, 288 B.R. 678, 687 (S.D.N.Y. 2003), *aff'd*, 99 F. App'x 274 (2d Cir. 2004); Cacciola v. Selco Balers, Inc., 127 F. Supp. 2d 175, 184 (E.D.N.Y. 2001); *Selvidge v. United States*, 160 F.R.D. 153, 156 (D. Kan. 1995) ("An expert witness should never become one party's expert advocate. An expert witness should be an advocate of the truth.").

Leloudis fails to consider all of the last five redistricting cycles, or review seminal cases on North Carolina redistricting if the cases challenge a General Assembly held by a Democratic majority. These cycles and cases, he believes, are simply not relevant to the issue at hand. Likewise, while his report is full of claims of vote dilution and racial polarization, Dr. Leloudis does not conduct a racially polarized voting analysis. Instead, Dr. Leloudis equates party registration with racial polarization, and essentially believes that Democrats must be in the majority, in order for minority vote strength not to be diluted, because it's the only way minorities have the ability to effect change. These opinions, are just that, and are not based on any current or reliable research or method, and even if they were, the method or research was certainly not evenly and credibly applied. The Court finds no basis in Dr. Leloudis's report to make a finding of racial intent in the 2021 Plans.

V. Plaintiffs' Efforts To Establish Partisan and Racial Effect Lack an Evidentiary Basis

135. Another contested question of fact in this case is whether the 2021 Plans impose an adverse racial or partisan effect. The Court was provided a full record founded primarily on live witness testimony in open court and the contemporaneous legislative record. The record undercuts Plaintiffs' effect-based assertions and supports Legislative Defendants' counter-assertions.

A. Partisan Effect

136. Plaintiffs failed to present competent and credible evidence tending to establish an adverse partisan effect created by the 2021 Plans. Their problem begins at the conceptual stage of understanding what an adverse effect even means in this context. And the problem unfolds as Plaintiffs' evidentiary showings consistently fall short of establishing a meaningful partisan effect.

1. The Conceptual Problem

137. A threshold problem is conceptualizing, as a factual matter, what qualifies as an adverse partisan effect. The legal meaning of this problem is discussed below. Here the concern is simply with understanding what facts are even averse to the supporters of a political party in the context of redistricting.

138. On this topic, among others, Legislative Defendants sponsored the testimony and report of Dr. Andrew Taylor, a tenured professor of political science at North Carolina State University, where he has taught and conducted research for 26 years. Taylor Rep. 2. Dr. Taylor has authored four books and 28 peer-reviewed arguments on political science, and he is an expert in redistricting and North Carolina politics. *Id.* He was accepted as an expert by the Court and gave credible testimony.

139. Dr. Taylor provided credible and informative expert opinion on the difficulties political scientists have had in conceptualizing claims that district lines have an adverse partisan effect.

140. As an initial matter, Dr. Taylor credibly and accurately testified that there is no basis in North Carolina political history supporting the assertion that a partisan impact of a redistricting plan is somehow measurable or injurious. Dr. Taylor also testified that there is no recognized baseline of transparency and that the 2021 redistricting was, by all accounts, more transparent than any redistricting by any legislative body in history.

141. Dr. Taylor also testified that complaints about unfair district lines are removed from the concepts of free elections, equal protection, and free speech and assembly, at least as those ideas have historically been understood by political scientists. Taylor Rep. 15–25. A free election is not generally understood to be one without burdens on the right to vote (since basic regulatory

frameworks necessarily place some burden on that right), and a given districting system is not generally understood as essential to the meaning of free elections (since even free elections have limited options in all events). *Id.* at 21–22.

142. Likewise, an election is generally regarded as "equal" so long as "[e]ach person has one vote to elect one legislator who has one vote in the legislature," and departures even from that ideal are tolerated (as in the case of non-citizens, who are counted towards the baseline of district population even though they are not permitted to vote). *id.* at 23. Equal outcomes are not generally accepted as a necessary facet of equal elections, administering such a rule would seem to be unworkable, and voting is not a feature of party participation but of individual participation as a citizen. *Id.* In this respect, it makes no sense to refer to citizens as having cast "wasted" votes; it is the parties, not voters, who are properly viewed as wasting votes." *Id.* at 24.

143. Similarly, purportedly "fair" redistricting plans are not understood in the political-science field as germane to free speech, which can occur regardless of the shapes and sizes of districts. *Id.* at 24–25. Numerous legal restrictions (such as campaign-finance rules) directly touch on free speech and yet have long been tolerated as consistent with free speech. *Id.* It is unclear what relation a redistricting plan even has to one's ability to speak one's mind.

144. For many of these reasons, measuring gerrymanders is elusive, problematic, and beyond the consensus of political scientists. *See id.* at 25–32. Measuring an alleged gerrymander as one that "produce[s] outcomes in which the share of the legislative body's seats won by a party is not proportionate with its share of the aggregate statewide vote and/or . . . produce too many districts where there is little meaningful competition" runs into the problem that "proportionality was not an objective of the designers of our electoral system." *Id.* at 27. Further, the goals of proportionality and competitiveness are often incompatible. *Id.* at 27–29.

145. Dr. Taylor further testified that prominent political science measures of "fairness" have proven incapable of commanding consensus because they are all deficient in one or more respects. *Id.* at 29–38. Those methods tied to a measure of vote totals and seat totals are too tied into proportionality to present a meaningful notion of fairness, especially given that avoiding this problem would require gerrymandering in favor of the party complaining of unfairness. *Id.* at 34–37. Many measures of fairness are too subjective to be of use to political scientists. *See id.* at 38. All measures require judgment calls like choice of metrics and elections data for measuring partisan effect, which is a fluid concept that changes year to year. *Id.* at 37. The mapping-simulation method utilized by many experts in this case suffers from these flaws and the additional flaw that judgment calls must be made in programming the algorithm to run the maps. *Id.* at 36–37.

146. There is, in short, no reliable way to know, as a matter of fact, whether a plan produces an unfair partisan effect.

2. Plaintiffs' Evidentiary Shortcomings

147. Setting those conceptual problems aside, the Court is unable to find a meaningful partisan effect even by Plaintiffs' own terms.

148. As discussed above, Dr. Barber's analysis established that all but three of the State House county groupings and all but two of the State Senate groupings fall within the range of non-partisan effects anticipated by two sets of 50,000 plans created with no consideration of partisan data. This result is probative evidence that any alleged partisan effects are precisely the effects one would expect as a matter of North Carolina's political geography and neutral redistricting criteria. Even in the remaining districts, the analysis above shows that these configurations, too, are best explained as the result of political geography and neutral criteria.

149. As Dr. Taylor explained, the Democratic Party's message is successful only in limited geographic areas, Taylor Rep. 38–41, so any partisan "effect" the Democratic Party or its supporters complain of is best understood as the natural and probable consequences of neutral factors that cannot be considered unfair or adverse as a factual matter.

150. Plaintiffs' competing expert presentations do not create a persuasive basis to conclude that the 2021 Plans produce any adverse partisan effect.

151. Dr. Duchin's analysis as relates to effect is irrelevant for many of the same reasons it is irrelevant to intent. Dr. Duchin compares the 2021 Plans to "optimized" plans under many of the votes-to-seats approaches Dr. Taylor persuasively criticized, and the import of her opinion is merely that it is possible to create redistricting plans more likely to assist the two major parties in achieving a majority of the seats in years when they obtain majorities of the statewide vote. Duchin Rep. 4–10. Because there is no political-science basis to conclude that the two major parties have suffered an adverse effect from not winning a majority of seats when they win a majority of the vote, this testimony carries no meaning.

152. Dr. Pegden's analysis attempts to tether a showing of partisan effect to political geography, rather than to an abstract and untenable votes-to-seats ideal, but his analysis runs into the problem Dr. Taylor recognized of judgment in choice of elections. As discussed above, Dr. Pegden predicated his analysis on a single statewide race, the 2020 Attorney General Election. *See* Barber Reb. Rep. 11. This provides no credible basis for the Court to conclude that the 2021 Plans establish any inflexible partisan result across the manifold election environments that will arise over the course of 10 years. Besides, as discussed above, Dr. Pegden's analysis, even where it purported to show statistical "outliers," identified no material, practical effect of the supposed

gerrymander in terms of election outcomes as to most county groupings. Barber Reb. Rep. 13. At best, his analysis shows very small effects of the supposed gerrymandering.

153. Dr. Mattingly—to the extent his analysis is not plagued by methodological problems, discussed above—offered an analysis that supports Dr. Barber's. Dr. Mattingly's analysis shows that numerous groupings are not partisan outliers and therefore, under the premises of his own method, cannot be viewed as creating an adverse partisan effect. *See, e.g.*, Barber Reb. Rep. 17, 19, 20, 23, 26, 28, 30, 33, 34, 36, 37, 38, 40, 41, 42, 43, 44. Dr. Chen's analysis was likewise plagued by methodological problems and also showed, at most, a minor adverse effect. His analysis consistently showed that "neutral" simulated plans would afford the Democratic Party an average of only a single additional favorable congressional seat. *See* Chen Rep. 86–95.

154. The report and testimony of Dr. Magleby also fails to establish a meaningful partisan effect. For one, Dr. Magleby relies on a less reliable method than Dr. Barber. Dr. Magleby relies on a random sample of 1,000 redistricting plans drawn from a larger set of simulated plans, but it is unclear whether the plans selected fare as well as or better than the 2021 Plans under key criteria, such as county traversals and compactness scores; Dr. Barber, by contrast, only permitted plans matching or exceeding the 2021 Plans by these measures in the set of simulations chosen as the baseline comparison. Barber Reb. Rep. 8–9.

155. Further, Dr. Magleby's report is unhelpful because it conducts the comparison between the 2021 Plans and simulated plans at the statewide level, not at the county-grouping level. *See* Magleby Rep. 10–20; *see also* Barber Reb. Rep. 9 (observing this omission in Dr. Magleby's report). Dr. Magleby admits that he ran no comparison at the county-grouping level. As discussed above, a simulation method is not a foolproof or automatic method for assuredly identifying partisan intent. Rather, when an outlier is identified, further analysis is warranted. In

this respect, identifying an entire plan as an outlier does little to inform an objective onlooker as to *where* to look for evidence of partisan intent. Dr. Magleby, however, admits that he did not examine the legislative record to assess whether non-partisan reasons may have caused any difference in partisan effect, and he could not have done so at the statewide level.

156. What's more, Dr. Magleby uses the medium mean test to measure fairness. Under this test a party should receive a majority of the votes if they receive a majority of the votes in statewide elections. Thus, Dr. Magleby proposes that any "fair" plan must be based upon one measure of proportional representation. Dr. Magleby could name no other state that has expressly adopted proportional representation as a mandatory standard for political fairness and it has been completely rejected by the United States Supreme Court. *Rucho*, 139 S. Ct. at 2515.") (Kagan, J., dissenting) ("Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other;") *Vieth v. Jubelirer*, 541 U.S. 267, 288 (2004) (plurality op.); *Davis v. Bandemer*, 478 U.S. 109, 130 (1986) (plurality op.) ("Our cases, however, clearly foreclose any claim 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.").

157. Indeed, the evidence suggests that Dr. Magleby has not, in fact, identified any partisan outliers. Importantly, Dr. Magleby's statewide results do not differ significantly from Dr. Barber's. Barber Reb. Rep. 9–10. As shown above, Dr. Barber's analysis identified potential "outliers" in only three groupings out of dozens, and those turned out to be more accurately explained by non-partisan goals than by partisan intent. There is no credible basis from which to conclude that Dr. Magleby's report does not establish the same phenomenon. Insofar as it is

reliable at all, Dr. Magleby's report is best understood as a less detailed rendition of Dr. Barber's analysis that confirms it in all material respects.

158. Dr. Magleby's report can be discredited because he did not follow the criteria adopted by the General Assembly. For example, in his simulated legislative districts, his algorithm allowed districts to be drawn with a plus or minus 6.5% instead of the plus or minus 5% required by North Carolina law. This alone should cause the Court to discredit Dr. Magleby's report. Further, he admits that his algorithm did not account for the criterion of minimizing splits of municipal boundaries. So while the General Assembly aimed for and achieved minimal municipal splits, Dr. Magleby does not know how many split cities are contained in his alternative plans. He also never counted the number of traversals for districts with multi county groups. And he never compared or reported on the number of divisions in municipalities found in the enacted plans versus his simulations. Nor did he compare the compactness scores for districts in his simulations versus the compactness scores of the enacted districts. Nor did he discuss how many VTDs were divided versus in his simulation versus the number of VTDs divided in the enacted districts. Nor did he identify any specific districts that he contends were gerrymandered and instead reports only on state totals.

159. Indeed, Dr. Magleby admitted that his report reflects only on the effect of the redistricting plans and says nothing about intent. Dr. Magleby did not investigate whether there were non-political explanations for alleged gerrymandered districts as explained by Senator Hise in his testimony regarding Senate and Congressional Districts or Representative Hall in his testimony regarding House Districts.

160. The majority of Dr. Magleby's simulations created 52 Democrat districts, or only 4 fewer seats than the projected number of seats under the enacted House Plan. Even if Dr.

Magleby's report is considered, this clearly does not show the existence of any allegedly "extreme gerrymander." Similarly the majority of Dr. Magleby's Senate simulations create 22 Democratic districts as opposed to the 19 districts projected for the enacted Senate Plan. This slim difference in seats, without any other specific investigation of whether there are non-political explanations for any alleged gerrymandered seats is not evidence of a "severe gerrymander." The majority of Dr. Magleby's simulations predict only five Democratic districts or only one more than the four Democratic districts he projects for the enacted Congressional Plan. Dr. Magleby also admits that at least 100 of his simulation would result in only 4 Democratic districts, or the exact number he projects for the enacted Congressional plan. Dr. Magleby also admits that in each of his simulations, there are simulated plans that result in the same number of seats he projects for each of the enacted plans challenged by Plaintiffs. He admits that if his simulations were placed in a barrel and were then randomly drawn, one or more of his simulations would result in plans drawn without partisan factors that still create the same number of Democratic seats as the enacted plans.

161. Ultimately, North Carolina law requires that the Court identify any district it finds illegal and explain specifically to the General Assembly what it must do to fix that district. N.C.Gen.Stat. § 120-2.3. Such an analysis is impossible using Dr. Magleby's simulations and report, since he refused to do a county group by county group analysis, and instead relied on statewide totals.

162. Ultimately, Dr. Magleby's complaint is that the Democratic Party is unlikely to win a majority of legislative or congressional seats even if it receives a majority of the statewide vote. As explained, this is not problematic in any meaningful sense under North Carolina law.

163. Lastly, Dr. Cooper's report is flawed for reasons described above and, in any event, contained no helpful measure of partisan effect.

B. Racial Effect

164. Plaintiffs failed to present competent and credible evidence tending to establish an adverse racial effect created by the 2021 Plans. Their showing on this contested fact question has proven rhetorical, as Plaintiffs contend that a race-blind approach to redistricting simply *must* dilute votes on the basis of race. That assumption is factually incorrect.

165. The factual question of racial vote dilution centers on the degree to which voting is polarized—i.e., the degree to which members of a minority group, on the one hand, and white voters, on the other, tend to prefer different candidates, as proven over the course of many races. Here, the only evidence of minority voting patterns has concerned African American (or Black) voters. Notably, however, no set of Plaintiffs has alleged or attempted to prove the elements of a Section 2 Voting Rights Act violation (as described below in the conclusions of law). In fact, Common Cause expressly disclaims attempting to prove such a claim.

166. The only competent evidence Plaintiffs have provided on racial impact is the testimony and report of Dr. Duchin. *See* Duchin Rep. 11–12. Dr. Duchin relied on eight elections (four general and four primary) that were "chosen to be informative in determining whether Black voters have an opportunity to elect their candidates of choice"—based on unclear criteria. Duchin Rep. 11. Dr. Duchin concluded that, if "at least 25% of the voting age population is Black" in a district anywhere in the State and the Black candidate of choice prevails in 6 of 8 of her elections, she "label[s] the district to be effective for Black voters." *Id.* 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 "optimized" plans have

more "effective districts" than the 2021 Plans. *Id.* at 12. Dr. Duchin did not, however, compare the 2021 Plans to a neutral baselined computed using a simulations analysis.

167. There are many problems with this approach.

168. First, the standard Dr. Duchin employs is unclear and arbitrary. She selected eight contests based on unclear criteria; different contests would have produced different results. Then she arrived at a statewide number of 25% BVAP as the effectiveness level, which is dubious at best since polarization rates can be expected to differ markedly by region. Then, she excluded some districts with much higher BVAP levels, though it is unclear which ones and whether this approach was applied uniformly across regions and plans. And she also excluded districts based on her "six out of eight" win-rate requirement that comes with no credible justification.

169. Second, the expert analysis of Dr. Jeffrey Lewis far exceeds Dr. Duchin's analysis in thoroughness and reliability and undermines her conclusions. *See* Lewis Rep. Dr. Lewis is a political science professor at the University of California, Los Angeles (UCLA), and is the past department chair of UCLA's political science department and past president of the Society for Political Methodology. Lewis Rep. ¶ 1. Dr. Lewis is an expert in quantitative political methodology with a focus on making inferences about preferences and behavior from the analysis of voting patterns in the mass public and in legislatures. He was accepted as an expert and is qualified to offer the opinions he offered in this case.

170. Dr. Lewis examined more than 420 individual elections including more than 190 involving a Black candidate (which are the most probative races). *Id.* ¶ 16. In other words, Dr. Lewis examined 52 times the number of elections Dr. Duchin analyzed. That is a far more reliable dataset, and the results are more reliable.

171. Once Dr. Lewis's dataset is used, Dr. Duchin's is exposed as underreporting the number of effective districts in the 2021 Plans. Utilizing Dr. Duchin's definition of an "effective" district, Dr. Lewis's data set shows as many as seven additional State House districts and four additional State Senate districts more than Dr. Duchin's analysis identifies as equal opportunity districts. *Id.* ¶ 17. But, because Dr. Duchin's definition is arbitrary and restrictive, Dr. Lewis also identified the number of effective minority districts under slightly less stringent definitions and determined that the 2021 Plans have dozens more effective districts that afford the Black community an equal opportunity to elect their preferred candidates. *Id.* ¶ 21. Ultimately, Dr. Lewis concluded that a majority Black VAP is not needed for a district to afford an equal opportunity for the Black community to elect its preferred candidates and that opportunity exists at least at the overall Black proportion of the population. *Id.* ¶¶ 22–23.

172. Dr. Lewis's analysis shows that the 2021 Plans create no adverse racial impact. 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* Duchin Rep. 11; Lewis Rep. ¶ 21. And those numbers increase markedly as the standard of an opportunity is relaxed. Lewis Rep. ¶ 21. 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.

VI. The County Groupings

173. As noted, the State Constitution requires that State House and Senate district comply with a series of requirements adopted to implement the Constitution's Whole County

Provisions (or "WCP"). The following facts are relevant to the *NCLCV* Plaintiffs' claim under the WCP.

174. The 2021 House and Senate Plans were drawn to respect county groupings. The county groupings chosen were selected from an academic paper prepared by recognized experts who identified the proper county grouping options under *Stephenson*. The General Assembly worked off of the county clustering created by nonpartisan scholars from Duke University, who applied *Stephenson* and its progeny to the 2020 Census data to create the only "possible optimum groupings." House Tr. 8:7–10 (Oct. 5, 2021).

175. In several regions, multiple county groupings were possible under the State Supreme Court's interpretation of the WCP. In such instances, groupings were chosen from the range of legally possible groupings, as identified in the Duke paper.

176. Because the General Assembly did not find that majority-minority districts under Section 2 of the VRA are required anywhere in North Carolina, it did not depart from these groupings.

177. There is on the record before the Court no evidence that majority-minority districts under Section 2 of the VRA are required anywhere in North Carolina.

178. Within each county grouping no district line's traversal of any county line exists, except where necessary to comply with the equal-population rule of federal law.

VII. The Present Litigation

179. Three sets of plaintiffs filed these lawsuits, which have been consolidated in this matter.

A. The *NCLCV* Plaintiffs

180. The *NCLCV* Plaintiffs comprise various voters and a public-advocacy organization. Each of the voters is a registered Democrat who prefers Democratic candidates. The public-advocacy organization claims to be non-partisan.

181. Edna Scott lives in Congressional District 2, Senate District 2, and House District 27, of the 2021 Plans. E. Scott Aff. 1.

182. Roberta Scott lives in Congressional District 2, Senate District 2, and House District 27. R. Scott Aff. 1.

183. Yvette Roberts lives in Congressional District 2, Senate District 2, and House District 27. Roberts Aff. 1.

184. Jereann King Johnson lives in Congressional District 2, Senate District 2, and House District 27, as set forth in the Enacted Plans. Johnson Aff. 1.

185. Yarbrough Williams, Jr., lives in Congressional District 2, Senate District 2, and House District 27. Williams Aff. 1.

186. Reverend Deloris L. Jerman lives in Congressional District 2, Senate District 2, and House District 27. Jerman Aff. 1.

187. Cosmos George in Congressional District 2, Senate District 2, and House District 27. George Aff. 1.

188. Viola Ryals Figueroa lives in Congressional District 2, Senate District 4, and House District 10. Figueroa Aff. 1.

189. Reverend Reginald Wells lives in Congressional District 4, Senate District 12, and House District 6. Wells Aff. 1.

190. Henry M. Michaux, Jr., lives in Congressional District 6, Senate District 20, and House District 29. Michaux Aff. 1.

191. Plaintiff Katherine Newhall lives in Congressional District 6, Senate District 23, and House District 56. Newhall Aff. 1.

192. Plaintiff Dandrielle Lewis lives in Congressional District 11, Senate District 27, and House District 58. Lewis Aff. 1.

193. Plaintiff Talia Fernos lives in Congressional District 11, Senate District 27, and House District 61. Fernos Aff. 1.

194. R. Jason Parsley lives in Congressional District 12, Senate District 32, and House District 72. Parsley Aff. 1.

195. Plaintiff Timothy Chartier lives in Congressional District 13, Senate District 37, and House District 98. Chartier Aff. 1.

196. The North Carolina League of Conservation Voters, Inc. ("NCLCV") is a non-partisan non-profit advocacy organization. Redenbaugh Aff. ¶ 3. NCLCV's stated "mission is to protect the health and quality of life for all North Carolinians" and it seeks "to build a world with clean air, clean water, clean energy, and a safe climate." *NCLCV* Compl. ¶ 11; Redenbaugh Aff. ¶ 3.

197. NCLCV consistently asserts, on its website and in its court filings, that it is non-partisan. *See NCLCV* Compl. ¶ 11. And its president attested under penalty of perjury that this lawsuit is brought "on its own behalf and on behalf of thousands of its members who are registered to vote in North Carolina." Redenbaugh Aff. ¶ 4. Further underscoring its non-partisan purpose and commitment to non-partisanship, NCLCV alleged that it "counts among its members voters of all political stripes—Democrats, Republicans, and independents." *NCLCV* Compl. ¶ 11 n.4.

198. NCLCV does not identify by name a representative group of members—*i.e.*, members representing the non-partisan nature of the organization—who are registered voters in every congressional district, every senate district, and every house district. NCLCV alleges that it has registered Democrats in each congressional district, senate district, and house district, but none of these members is identified by name. *NCLCV* Compl. ¶ 11 n.4. And, in any event, those members alone would not be representative of an organization committed to non-partisanship. NCLCV does not allege whether it has Republican or Independent members in all of the relevant districts.

B. The *Harper* Plaintiffs

199. The *Harper* Plaintiffs comprise North Carolina voters who are registered Democrats and prefer Democratic candidates.

200. Rebecca Harper lives in Congressional District 6, Senate District 17, and House District 21. Harper Aff. 1.

201. Amy Clare Oseroff lives in Congressional District 1, Senate District 5, and House District 8. Oseroff Aff. 1.

202. Donald Rumph lives in Congressional District 1, Senate District 5, and House District 9. Rumph Aff. 1.

203. John Anthony Balla lives in Congressional District 5, Senate District 18, and House District 40. Balla Aff. 1.

204. Plaintiff Richard R. Crews lives in Congressional District 14, Senate District 47, and House District 85. Crews Aff. 1.

205. Lily Nicole Quick lives in Congressional District 7, Senate District 28, and House District 59. Quick Aff. 1.

206. Gettys Cohen Jr., lives in Congressional District 4, Senate District 10, and House District 28. Cohen Aff. 1.

207. Shawn Rush lives in Congressional District 10, Senate District 33, and House District 76. Rush Aff. 1.

208. Mark S. Peters lives in Congressional District 14, Senate District 46, and House District 115. Peters Aff. 1.

209. Kathleen Barnes lives in Congressional District 14, Senate District 50, and House District 119. Barnes Aff. 1.

210. Virginia Walters Brien lives in Congressional District 9, Senate District 40, and House District 102. Brien Aff. 1.

211. Plaintiff David Dwight Brown lives in Congressional District 11, Senate District 27, and House District 58. Brown Aff. 1.

212. Eileen Stephens lives in Congressional District 3, Senate District 7, and House District 18 under the 2021 Plans. Stephens Aff. 1.

213. Barbara Proffitt lives in Congressional District 8, Senate District 41, and House District 103. Proffitt Aff. 1.

214. Mary Elizabeth Voss lives in Congressional District 13, Senate District 38, and House District 101. Voss Aff. 1.

215. Chenita Barber Johnson lives in Congressional District 12, Senate District 32, and House District 72. C. Johnson Aff. 1.

216. Sarah Taber lives in Congressional District 4, Senate District 19, and House District 43, as set forth in the Enacted Plans. Taber Aff. 1.

217. Joshua Perry Brown lives in Congressional District 10, Senate District 27, and House District 60. J. Brown Aff. 1.

218. Laureen Flood lives in Congressional District 2, Senate District 1, and House District 27. Flood Aff. 1.

219. Donald M. Mackinnon lives in Congressional District 10, Senate District 27, and House District 62. Mackinnon Aff. 1.

220. Ron Osborne lives in Congressional District 7, Senate District 25, and House District 64. Osborne Aff. 1.

221. Ann Butzner lives in Congressional District 14, Senate District 49, and House District 115. Butzner Aff. 1.

222. Sondra Stein lives in Congressional District 6, Senate District 22, and House District 2. Stein Aff. 1.

223. Bobby Jones lives in Congressional District 2, Senate District 4, and House District 10. Jones Aff. 1.

224. Kristiann Herring lives in Congressional District 2, Senate District 4, and House District 10. Herring Aff. 1.

C. Districts Where No Individual Plaintiff Resides

225. There are 120 House Districts in the 2021 Enacted Plan. Individual Plaintiffs reside in 28 of the 120 House Districts.[11] No plaintiff resides in the other 92 House Districts.

226. In other words, no individual plaintiff resides in more than 75% of the House Districts. These include House Districts 1, 3, 4, 5, 7, 11, 12, 13, 14, 15, 16, 17, 19, 20, 22, 23, 24,

[11] The House Districts where an Individual Plaintiff resides include 2, 6, 8, 9, 10, 18, 21, 27, 28, 29, 40, 43, 56, 58, 59, 60, 61, 62, 64, 72, 76, 85, 98, 101, 102, 103, 115, and 119.

25, 26, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 63, 65, 66, 67, 68, 69, 70, 71, 73, 74, 75, 77, 78, 79, 80, 81, 82, 83, 84, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 118, and 120.

227. There are 50 Senate Districts in the 2021 Enacted Plan. Individual Plaintiffs in the consolidated cases reside in 26 districts.[12] No plaintiff resides in the other 24 Senate Districts.

228. Put differently, no individual plaintiff resides is nearly 50% of the Senate Districts. The Senate Districts without any plaintiff include Senate District 3, 6, 8, 9, 11, 13, 14, 15, 16, 21, 24, 26, 29, 30, 31, 34, 35, 36, 39, 42, 43, 44, 45, and 48.

229. There are 14 congressional districts. No plaintiff resides in Congressional District 3.

D. Common Cause

230. The *Common Cause* case was brought by a single Plaintiff, Common Cause, which is a non-partisan non-profit advocacy organization. *Common Cause* Compl. ¶ 17. Its interest is in "fair elections and making government at all levels more representative, open, and responsive to the interests of ordinary people." *Common Cause* Compl. ¶ 17.

231. Common Cause alleges that it "brings this action on its own behalf and on behalf of its members and supporters who are registered voters in North Carolina." *Common Cause* Compl. ¶ 17. It further alleges that its "members and supporters" are "registered voters in North Carolina."

[12] The Senate Districts where an Individual Plaintiff resides include 1, 2, 4, 5, 7, 10, 12, 17, 18, 19, 20, 23, 27, 28, 32, 33, 37, 38, 40, 41, 47, 50

232. No specific member of Common Cause alleged to reside in any district of the 2021 House, Senate, or Congressional Plans is identified by name.

E. The Claims

233. The *NCLCV* Complaint asserts five causes of action: partisan gerrymandering in violation of the North Carolina State Constitution's Free Elections Clause, Article I, Section 5, *NCLCV* Compl. ¶¶ 194–203; partisan gerrymandering in violation of the State Constitution's Equal Protection Clause, Article I, Section 19, *NCLCV* Compl. ¶¶ 204–212; partisan gerrymandering in violation of the State Constitution's Free Speech and Free Assembly Clauses, Article I, Sections 12 and 14, *NCLCV* Compl. ¶¶ 213–223; unlawful racial vote dilution in violation of the North Carolina State Constitution's Free Elections Clause, Article I, Section 5, *NCLCV* Compl. ¶¶ 224–232; unlawful racial vote dilution in violation of the North Carolina State Constitution's Equal Protection Clause, Article I, Section 19, *NCLCV* Compl. ¶¶ 233–241; and unlawful districting allegedly in violation of the State Constitution's Whole County Provisions, Article II, Sections 3(3) and 5(3), *NCLCV* Compl. ¶¶ 242–248.

234. The *Harper* Complaint alleges three causes of action: partisan gerrymandering in violation of the North Carolina Constitution's Free Elections Clause, Art. I, § 10, *Harper* Compl. ¶¶ 165–172; partisan gerrymandering in violation of the State Constitution's Equal Protection Clause, Art. I, § 19, *Harper* Compl. ¶¶ 173–179; and partisan gerrymandering in violation of the State Constitution's Freedom of Speech and Freedom of Assembly Clauses, Art. I, §§ 12 & 14. *Harper* Compl. ¶¶ 180–187.

235. The *Common Cause* Complaint alleges five causes of action: declaratory judgment that the criterion prohibiting consideration of racial data contravenes the State Supreme Court's *Stephenson* decisions, *Common Cause* Compl. ¶¶ 151–160; intentional racial discrimination in

violation of the State Constitution's Equal Protection Clause, Art. I, § 19, *Common Cause* Compl. ¶¶ 161–173; partisan gerrymandering in violation of the North Carolina State Constitution's Free Elections Clause, Article I, Section 5, *Common Cause* Compl. ¶¶ 174–185; partisan gerrymandering in violation of the State Constitution's Equal Protection Clause, Article I, Section 19, *Common Cause* Compl. ¶¶ 186–194; and partisan gerrymandering in violation of the State Constitution's Free Speech and Free Assembly Clauses, Article I, Sections 12 and 14, *Common Cause* Compl. ¶¶ 195–202.

[PROPOSED] CONCLUSIONS OF LAW

I. Plaintiffs Lack Standing

1. Plaintiffs have failed to establish standing to challenge districts in the 2021 Plans.

2. "Only one who is in immediate danger of sustaining a direct injury from legislative action may assail the validity of such action. It is not sufficient that he has merely a general interest common to all members of the public." *Charles Stores Co. v. Tucker*, 263 N.C. 710, 717, 140 S.E.2d 370, 375 (1965); *see also New Hanover Cty. Bd. of Educ. v. Stein*, 374 N.C. 102, 116, 840 S.E.2d 194, 204 (2020), *as modified on denial of reh'g* (May 18, 2020) ("[T]he only persons entitled to "call into question the validity of a statute [are those] who have been injuriously affected thereby in their persons, property or constitutional rights."). "The direct injury requirement applicable in cases involving constitutional challenges to the validity of government action is a rule of prudential self-restraint based on functional concern for assuring sufficient concrete adverseness to address difficult constitutional questions." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 608, 853 S.E.2d 698, 733 (2021) (quotation marks omitted).

3. Because the right to vote is individual and unique to each person, and any "interest in the composition of 'the legislature as a whole'" is "not an individual legal interest," the U.S.

Supreme Court has recognized that a voter is only directly injured by specific concerns with that voter's districts. *Gill v. Whitford,* 138 S. Ct. 1916, 1932 (2018). A plaintiff has standing to challenge the districts in which that plaintiff lives but cannot raise generalized grievances about redistricting plans. *See id; see also United States v. Hays,* 515 U.S. 737, 745 (1995). The U.S. Supreme Court also offered parameters for assessing individualized injury. One is that a "hope of achieving a Democratic [or Republican] majority in the legislature" is not a particularized harm; the voter's interest is in the voter's own district, where the voter votes. *Id.* at 1932. Another is that dissatisfaction with a district's partisan composition is not a cognizable injury if a similar composition would result "under any plausible circumstance." *Id.* at 1924, 1932. A third is that injury must be proven, not merely alleged. *Id.* at 1931–32.[13]

4. Plaintiffs fail to establish standing under this test.

A. The Individual Plaintiffs

5. Plaintiffs lack standing to challenge the numerous districts in which no individual Plaintiff resides. No voter Plaintiff resides in House Districts 1, 3, 4, 5, 7, 11, 12, 13, 14, 15, 16, 17, 19, 20, 22, 23, 24, 25, 26, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57, 63, 65, 66, 67, 68, 69, 70, 71, 73, 74, 75, 77, 78, 79, 80, 81, 82, 83, 84, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 116, 117, 118, and 120. No voter Plaintiff resides in Senate District 3, 6, 8, 9, 11, 13, 14, 15, 16, 21, 24, 26, 29, 30, 31, 34, 35, 36, 39, 42, 43, 44, 45, and 48. No voter Plaintiff resides in Congressional District 3. For reasons stated below, the organizational Plaintiffs lack standing to

[13] Though not binding, U.S. Supreme Court precedent is "instructive" for interpreting North Carolina standing requirements. *Goldston v. State*, 637 S.E.2d 876, 882 (N.C. 2006). It is especially instructive here, where the case law is unanimous and directly on point.

sue in their own right or on behalf of unnamed members. As a result, Plaintiffs lack standing to challenge these districts.

6. Plaintiffs also lack standing to challenge districts alleged to be "packed" with Democratic voters and which likely would be packed under any reasonable alternative configuration drawn to achieve neutral criteria. These Plaintiffs clearly have not suffered any harm. *Gill*, 1916 S. Ct. at 1932. Dr. Chen's report, taken at face value, shows that Congressional Districts 2, 5, 6, and 9 contain safe Democratic majorities and would likely do so under the entire set of Dr. Chen's alternative plans. *See* Chen Rep. 76–85. Democratic voters in these districts are able to elect their preferred candidates and would likely continue to do so under any alternative configuration. They have not suffered a direct harm, even as judged by their own evidence taken at face value.

7. Additionally, Plaintiffs lack standing to challenge districts alleged to be filled with safe majorities of Republican voters and which likely would contain safe Republican majorities under any reasonable alternative configuration drawn to achieve neutral criteria. These Plaintiffs have not suffered a direct harm capable of being remedied, since it is their place of residence, not district lines, that is plainly to blame for the alleged injury. Dr. Chen's report, taken at face value, shows that Congressional Districts 1, 3, 7, 8, 10, 12, and contain safe Republican majorities and would likely do so under the entire set of Dr. Chen's alternative plans. *See* Chen Rep. 76–85.

8. That leaves only three Congressional districts, Congressional Districts 4, 11, and 14, where, according to Plaintiffs' allegations, residents can plausibly claim that a different configuration would yield different electoral results. *See* Chen Rep. 76–85. These individuals' claims fall short as well. For one thing, numerous possible configurations of these districts would *still* be highly favorable to Republican electoral prospects. *See id.* And, regardless, American law

and democratic tradition presume that a person is represented by the person's designated representative, regardless of descriptive similarity or party affiliation. *See Davis v. Bandemer*, 478 U.S. 109, 132 (1986); *Whitcomb v. Chavis*, 403 U.S. 124, 149–153 (1971). It is therefore not self-evident that these Plaintiffs are injured simply in that they may be represented by a Republican after the 2022 election or in that the map places them in a district with constituents who prefer Republican candidates. Plaintiffs must demonstrate an additional individual injury from the district lines and have failed to do so.

9. Additionally, as to the State House and Senate Plans, Plaintiffs presented no evidence establishing that their particular districts would be differently configured under a reasonable alternative configuration drawn to achieve neutral criteria. Dr. Chen did not analyze the House and Senate Plans, and *no* expert method establishes different reasonable configurations of individual districts to show that given districts would switch to being Republican-leaning to Democratic-leaning in the absence of gerrymandering. Dr. Cooper did not opine on alternative districts. Dr. Pegden did not establish different reasonable configurations of individual districts to show that given districts would switch to being Republican-leaning to Democratic-leaning in the absence of gerrymandering. Dr. Duchin analyzed "optimized" maps but did not show which districts in the maps replaced Republican-leaning districts in the 2021 Plans with Democratic-leaning districts. And Dr. Mattingly also did not make a district-by-district comparison; instead, he simply ranked the most to least Democratic districts in each county grouping without providing a geographic comparison to given districts. *See* Mattingly Rep. 30–64. The Court is unable to tell which Plaintiff have suffered a direct harm that an injunction would ameliorate, and Plaintiffs have failed to prove standing as to any district in the House and Senate Plans.

B. The Entity Plaintiffs

10. Neither NCLCV nor Common Cause have associational standing to challenge the 2021 Plans. To establish associational standing, an organization must show that (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *State Emps. Ass'n of N. Carolina, Inc. v. State*, 357 N.C. 239, 580 S.E.2d 693 (2003) (per curiam) (adopting the test of *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1979)). Neither NCLCV nor Common Cause can satisfy any of these elements.

11. As to the first element, neither Entity Plaintiff has demonstrated that its members would otherwise have standing to sue in their own right. In order to meet this test, an organization must demonstrate that its members meet the traditional test for standing, i.e., that they have suffered or can demonstrate immediate or threatened injury. *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E. 2d 538, 555 (1990). As discussed, that means the organizations must show that individual members have been harmed on a district-by-district basis. Individual voters are "placed in a single district" and "vote[] for a single representative," and the harm in redistricting is limited to its impact on the district in which they reside. *Gill*, 138 S. Ct. at 1930. Generalized complaints about redistricting plans from individuals who do not live in a gerrymandered district are insufficient to convey standing, as they amount to "a generalized grievance against governmental conduct of which he or she does not approve." *Id*. (cleaned up).

12. Perhaps more importantly, an organization is obligated to name the specific members on whose standing it relies and demonstrate their standing. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 498–99 (2009). NCLCV's generic statements are insufficient to meet this test.

NCLCV states that "it has members who are registered Democratic voters in all" districts drawn by the 2021 Plans. It also states that it has members "who are black registered voters in some districts" drawn in the 2021 Plans, but is unable to aver that it has members who are black registered voters in all districts. *NCLCV* Compl. ¶ 11 n.4. NCLCV has failed to proffer any names or demonstrate the standing of any members. Furthermore, it is of no consequence that "NCLCV counts among its members voters of all political stripes…who care about fair districting and about fair and effective representation for all North Carolinians." *Id.* These individuals have a generalized grievance about the manner in which redistricting is conducted, they are not named, and they are not shown to have suffered a direct injury.

13. The same is true of Common Cause. It argues only that its "members *and supporters*" include "registered voters in every county in North Carolina, registered Democrats and/or voters who support Democratic candidates in each of the districts alleged to be partisan gerrymanders herein, and voters who identify as Black in each of the effective districts for voters of color that were intentionally and unlawfully dismantled" by the 2021 Plans. *Common Cause* Compl. ¶ 17 (emphasis added). This is insufficiently specific. Not only does the organization fail to provide individual names, *see Summers*, 555 U.S. at 498–99, it also uses the vague phrase "members *and supporters.*"

14. As to the second element, neither Entity Plaintiff demonstrates that the interests it seeks to protect are germane to its purpose.

15. NCLCV avers that its purpose is to "protect the health and quality of life for all North Carolinians, by fighting to build a world with clean air, clean water, clean energy, and a safe climate, all protected by a just and equitable democracy." *NCLCV* Compl. ¶ 11. To that end, it "helps elect legislators and statewide candidates who share its values, to build a pro-environment

majority across the state of North Carolina" and "holds elected officials accountable for their votes and actions." *Id.* But NCLCV cannot demonstrate that these activities are germane to the election of more Democratic or black-preferred candidates in North Carolina. Voters of both parties or no party at all are impacted by and care about the environment. So even if the 2021 Plans "entrench[ed] one party in power," this would not frustrate the NCLCV's ability to "engage in effective advocacy for candidates who" they believe "will protect the environment." It means, at most, that NCLCV would need to focus its attention on the relevant party's primary as opposed to the general election. To this end, NCLCV's interests sound much like the "abstract interest in policies adopted by the legislature" that the Supreme Court rejected as sufficient for the conferral of standing in *Gill.*

16. Moreover, NCLCV concedes that "it counts among its members voters of all political stripes—Democrats, Republicans, and intendents." *Id.* ¶ 11 n.4. This broad-based support is a fundamental problem for NCLCV. A suit that "do[es] not reflect and [is] actually at odds with the interests of some of its members … cannot be said to be 'germane' to [the association's] overriding purposes." *Sw. Suburban Bd. of Realtors, Inc. v. Beverly Area Plan. Ass'n*, 830 F.2d 1374, 1381 (7th Cir. 1987). On NCLCV's theory, its suit—if successful—would harm its Republican members. The suit therefore is not germane to the organization's interests.

17. Common Cause's purpose is similarly removed from the interests this suit seeks to vindicate. Common Cause describes itself as "dedicated to fair elections and making government at all levels more representative, open, and responsive to fair elections and making government at all levels more representative, open, and responsive to the interests of ordinary people." *Common Cause* Compl. ¶ 17. This is nothing but a generalized statement about good government. And the

aim is not germane to the interest Democratic voters to an enhanced opportunity to elect Democratic candidates.

18. As to the third element, the individual right to vote is not a right that can be vindicated by an organization. It is individual to each voter. Thus, the organizational Plaintiffs lack standing because individual participation is a necessary prerequisite to asserting this individual right.

19. Plaintiffs in all cases must demonstrate that they have "a personal stake in the outcome." *Gill,* 138 S. Ct. at 1923. But this is especially so when the right they seek to vindicate is the right to vote, which is "individual and personal in nature." *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)). Because one must "allege facts showing disadvantage to themselves *as individuals*," *Baker v. Carr*, 369 U.S. 186, 206 (1962) (emphasis added), associational standing is inappropriate for claims seeking to vindicate the right to vote. Plaintiff's injury in these cases is individual and district specific: "An individual voter…is placed in a single district. He votes for a single representative. The boundaries of that district, and the composition of its voters, determine whether and to what extent" the particular voter has been injured. *Gill*, 138 S. Ct. at 1930.

20. Injury to "collective representation in the legislature," and a diminished ability to influence the legislature's overall "composition and policymaking"—what animates organizational plaintiffs here—is simply not "an individual and personal injury of the kind required" *Id.* at 1931, and not amenable to associational standing. Put another way, "[a] citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative," not an "abstract interest in policies adopted by the legislature." *Id.* (cleaned up). Group political interests are not individual legal rights. *Id.*

21. For similar reasons, neither NCLCV, nor Common Cause has organizational standing. Neither organization has suffered or can demonstrate immediate or threatened injury. *River Birch Assocs.*, 326 N.C. at 129, 388 S.E. 2d at 555. Indeed, no organization can ever suffer injury as a result of redistricting. Organizations are not voters who have been harmed by the alleged dilution here and cannot sue to invalidate any redistricting plan.

22. NCLCV and Common Cause claim that they "will have to expend additional funds and other resources," NCLCV Comp. ¶ 12, or "divert resources toward combatting the ill effects of unlawful redistricting" if these plans stand. *Common Cause* Compl. ¶ 17. Maybe so. But that is not the sort of injury that the law recognizes as stemming from gerrymandering. And Plaintiffs' other assertions that their organizational efforts will be otherwise frustrated are also no more than a grievance about the workings of government that courts refuse to countenance. *Gill*, 138 S. Ct. at 1931.

II. The Partisan Claims Are Non-Justiciable

23. Plaintiffs' claims also are not justiciable.

24. North Carolina courts lack jurisdiction over political questions. *See, e.g.*, *Bacon v. Lee*, 353 N.C. 696, 716, 549 S.E.2d 840, 854 (2001); *Hoke Cnty. Bd. of Educ. v. State*, 358 N.C. 605, 639, 599 S.E.2d 365, 391 (2004). The State Constitution delegates to the General Assembly, not courts, the power to create congressional districts. Because "a constitution cannot be in violation of itself," *Stephenson v. Bartlett*, 355 N.C. 654, 378, 562 S.E.2d 377, 378 (2002), a delegation of a political task to a political branch of government implies a delegation of political discretion. *See id.* 371-72, 562 S.E.2d at 390.

25. The justiciability holding of *Common Cause* is neither binding authority, nor persuasive. That decision disregarded the direct opposite conclusion of the North Carolina

Supreme Court, which has made clear 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. To be sure, this must occur "in conformity with the State Constitution," *id.*, but *Stephenson* was referring to the textual limitations the North Carolina Constitution imposes on redistricting, such as the whole-county rules governing legislative plans. *See id.*

26. Although the Constitution subjects the General Assembly's discretionary exercise of redistricting authority to a series of specific criteria—including that districts be of approximately equal population and that county lines not be unnecessarily crossed—and although the State courts have correctly asserted the prerogative to enforce these express provisions, this only emphasizes the non-justiciable nature of Plaintiffs' claims. Just as "[t]he people of North Carolina chose to place several explicit limitations upon the General Assembly's execution of the legislative reapportionment process," *id.* at 389, they *could* have chosen to adopt express partisan fairness metrics that would, in turn, be judicially enforceable.

27. The absence of the criteria Plaintiffs propose from the Constitution is proof that the State courts are not free to invent them. *See State ex rel. Martin v. Preston*, 325 N.C. 438, 461, 385 S.E.2d 473, 486 (1989) (finding express redistricting requirements in some constitutional provisions to foreclose inferring requirements in others); *Cooper v. Berger*, 371 N.C. 799, 810–11, 822 S.E.2d 286, 296 (2018) ("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." (citation omitted)).

28. Beyond the textually clear restrictions on redistricting, courts in North Carolina have repeatedly refused to encroach on the power of the General Assembly. "Our North Carolina

Supreme Court has observed that 'we do not believe the political process is enhanced if the power of the courts is consistently invoked to second-guess the General Assembly's redistricting decisions.'" *Dickson v Rucho*, No. 11 CVS 16896, 2013 WL 3376658, at *2 (N.C. Super. Ct. July 08, 2013) (quoting *Pender County v. Bartlett*, 361 N.C. 491, 506, 649 S.E. 3d. 364, 373 (2007)). Whether or not the General Assembly's acts are wise, "this court is not capable of controlling the exercise of power on the part of the General Assembly, . . . and it cannot assume to do so, without putting itself in antagonism as well to the General Assembly . . . and erecting a despotism of [judges], which is opposed to the fundamental principles of our government and usage of all times past." *Howell v. Howell*, 151, N.C. 575, 66 S.E. 571, 573 (1911). Courts in other states have issued similar rulings. Just days ago, the Wisconsin Supreme Court held that "[w]hether a map is 'fair' to the two major political parties is quintessentially a political question." *Johnson v. Wisconsin Elections Comm'n*, N.W.2d , 2021 WL 5578395, at *9 (Wis. Nov. 30, 2021).

29. Indeed, it has been settled for over 100 years in North Carolina that these claims are non-justiciable. *Howell* 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." *Howell*, 151 N.C. at 575, 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 575, 66 S.E. at 574. And yet the court still held that "the courts [are] powerless to interfere and aid the plaintiffs." *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 575, 66 S.E. at 573.

30. This line of judicial prudence was upheld less than twenty years later in *Leonard v. Maxwell*, when the North Carolina Supreme Court held that the "the question [of reapportionment] is a political one, and there is nothing the courts can do about it." 216 N.C. 89, 3 S.E.2d 316, 324 (1939). This Court will follow this binding precedent and refuse to "cruise in nonjusticiable waters." *Id.*

31. Numerous other cases hold that the lines of legislatively created districts are not subject to judicial review. *Norfolk & S.R. Co. v. Washington Cnty.*, 154 N.C. 333, 70 S.E. 634, 635 (N.C. 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, 62 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 and Gaston R.R. Co. v. Davis,* 19 N.C. (2 Dev. & Bat.) 451, 465 (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 . . . .").

32. Plaintiffs' claims are no different from the claim the North Carolina Supreme Court rejected in *Dickson v. Rucho*, 367 N.C. 542, 575, 766 S.E.2d 238, 260 (2014), under the "Good of

the Whole" clause found in Article I, Section 2. The court held that an argument that plans favorable to one political party were not enacted for the "best" interests of "our State as a whole" is "not based upon a justiciable standard." *Id*. Although styled under different provisions, Plaintiffs' claims mirror both substance and lack of justiciability. This Court is bound to follow this precedent as written. *Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985) (finding lower court "acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina"); *Respess v. Respess*, 232 N.C. App. 611, 625, 754 S.E.2d 691, 701 (2014).The failure of the *Common Cause* court to honor binding precedent does not excuse this Court from the same obligation.

33. Further, no satisfactory or manageable criteria or standards exist to adjudicate the sorts of claims Plaintiffs make. "The lack of standards by which to judge partisan fairness is obvious from even a cursory review of partisan gerrymandering jurisprudence." *Johnson*, 2021 WL 5578395, at *9. Indeed, both sets of Plaintiffs admit that their demand is for proportional representation, but "[t]his theory has no grounding in American or [North Carolina] law or history, and it directly conflicts with traditional redistricting criteria." *Id.* "Even if a state's partisan divide could be accurately ascertained, what constitutes a 'fair' map poses an entirely subjective question with no governing standards grounded in law." *Id.*

34. It is elementary that "the wisdom and expediency of the enactment is a legislative, not a judicial, decision." *Wayne Cnty. Citizens Ass'n for Better Tax Control v. Wayne Cty. Bd. of Comm'rs,* 328 N.C. 24, 29, 399 S.E.2d 311, 315 (1991) (internal quotations and citations omitted). There is no rule "that this Court can address the problem of partisan gerrymandering because it must." *Gill*, 138 S. Ct. at 1929. It is not the role of the State courts to update the Constitution to address "existing conditions"; "[h]owever liberally [a court] may be inclined to interpret the

fundamental law, [the court] [would] offend every canon of construction and transgress the limitations of [the court's] jurisdiction to review decisions upon matters of law or legal inference [and] undert[ake] to extend the function of the court to a judicial amendment of the Constitution." *Elliott v. Gardner*, 203 N.C. 749, 166 S.E. 918, 922 (1932).

35. Plaintiffs' desires could only be served by a constitutional amendment. Claims asserting that a districting plan is somehow harmful to democracy are "not based upon a justiciable standard." *Dickson*, 367 N.C. at 575, 766 S.E.2d at 260. 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. Plaintiffs cannot offer any test for discerning "at what point" politics "went too far." *Rucho*, 139 S. Ct. at 2501. That is because this question simply asks whether a political act is wise or unwise.

36. Put simply, Plaintiffs' case is "about group political interests, not individual legal rights." *Gill,* 138 S. Ct. at 1933. Even if Plaintiffs think their preferences are good for democracy, courts are "not responsible for vindicating" them. *Id.* Plaintiffs complain of the political impact of district lines that will, in all events, have political consequences. But a "politically mindless approach" is not advisable, and, "in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended." *Gaffney*, 412 U.S. at 753. It is simply impossible in this arena to avoid political results.

37. The problems with maintaining judicial impartiality in the face of highly partisan redistricting lawsuits ring as true in state court as in federal court. The *Common Cause* court's justiciability holding has been shown to open the proverbial floodgates of litigation: there has been

a partisan-gerrymandering claim pending in this State at every moment since the *Common Cause* liability ruling was handed down. Continuation of this anomaly would only invite more litigation and at all levels of government. It would subject legislative will to judicial oversight and invade this discretionary sphere on a highly subjective basis. And each case would tempt the presiding 36 judge or judges to abandon neutral rules of law in favor of partisan preference. Vindicating a fear that legislatures might place "too much" weight on partisan considerations would pose the unquestionably unacceptable risk that judges will place *any* weight on such considerations—thereby trading partisan redistricting for partisan redistricting *litigation*.

III. The Partisan Claims Are Non-Cognizable

38. The rights Plaintiffs claim do not fall within the scope of the constitutional provisions they cite. All of these provisions guarantee distinct individual rights, not the group rights to partisan fairness that form the basis of their claims.

39. The constitutional starting point is the presumption that any act of the General Assembly is constitutional. *Wayne Cnty. Citizens Ass'n for Better Tax Control*, 328 N.C. at 29, 399 S.E.2d at 315. "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). "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, 187 S.E. 781, 784 (1936) (same); *Town of Boone v. State*, 369 N.C. 126, 130, 794 S.E.2d 710, 714 (2016) (same). Plaintiffs cannot meet this onerous standard.

A. Free and Fair Elections

40. Plaintiffs' claims under the Free Elections Clause run directly counter to that Clause's plain text and purpose to preserve elections from the very inter-branch intermeddling Plaintiffs advocate. "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* ("Orth") 56 (2d ed. 2013). The Free Elections Clause simply bars any act that would deny a voter the ability to freely cast a vote or seek candidacy. *See Clark v. Meyland*, 261 N.C. 140, 142-43, 134 S.E.2d 168, 170 (1964).

41. Plaintiffs make no assertion that any voter is prohibited from voting or faces intimidation likely to deter the exercise of this right—only that the Free Elections Clause guarantees "each major political party . . . to fairly translate its voting strength into representation." *NCLCV* Compl. ¶ 199. But the right to win or assistance in winning is not encompassed by this provision. *Royal v. State*, 153 N.C. App. 495, 499, 570 S.E.2d 738, 741 (2002) (ruling the free elections clause does not require public financing of campaigns). "The idea that partisan gerrymandering undermines popular sovereignty because the legislature rather than the people selects representatives is rhetorical hyperbole masked as constitutional argument. When legislatures draw districts, they in no way select who will occupy the resulting seats." *Johnson*, 2021 WL 5578395, at *12 (citation omitted).

42. Reading the Free Elections Clause to contain such rights would be ahistorical and counter-productive to free elections. *See Stephenson*, 355 N.C. at 370-71, 562 S.E.2d at 389 (looking to "history of the questioned provision and its antecedents" in interpreting the State Constitution). 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." Orth 56.15 No one

thought that this contained a prohibition against "partisan gerrymandering." 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 Rotten boroughs were not eliminated in England until the Reform Act of 1832, so the notion that they were somehow outlawed in England in 1689 (or, in North Carolina, in 1776) is untenable.

43. What the free-elections provision of the English Declaration of Rights *did* do was prohibit other branches of government from meddling with elections to Parliament. Put another way, the declaration that elections would be "free" vindicated separation-of-powers concerns. 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).

44. *NCLCV* Plaintiffs argue that the Free Elections Clause promises them favorable districts regardless of whether the General Assembly redistricted with partisan intent—i.e., that the Constitution requires that the General Assembly *must affirmatively assist them in electing their preferred candidates*. *NCLCV* Compl ¶¶ 199–200. They are asking for favoritism not equality. "A proportional party representation requirement would effectively force two dominant parties to create a 'bipartisan' gerrymander to ensure the 'right' outcome." *Johnson*, 2021 WL 5578395, at *11. The Wisconsin Supreme Court adequately addressed this absurd idea, which is the logical conclusion of the arguments of Plaintiffs:

45. Perhaps the easiest way to see the flaw in proportional party representation is to consider third party candidates. Constitutional law does not privilege the "major" parties; if Democrats and Republicans are entitled to proportional representation, so are numerous minor

parties. If Libertarian Party candidates receive approximately five percent of the statewide vote, they will likely lose every election; no one deems this result unconstitutional. The populace that voted for Libertarians is scattered throughout the state, thereby depriving them of any real voting power as a bloc, regardless of how lines are drawn. Only meandering lines, which could be considered a gerrymander in their own right, could give the Libertarians (or any other minor party) a chance. Proportional partisan representation would require assigning each third party a "fair" share of representatives (while denying independents any allocation whatsoever), but doing so would in turn require ignoring redistricting principles explicitly codified in the Wisconsin Constitution. *Johnson*, 2021 WL 5578395, at *11 (citation omitted).

B. Equal Protection

46. Plaintiffs' equal-protection claims fail. They are not predicated on a "classification" that "operates to the disadvantage of a suspect class or if a classification impermissibly interferes with the exercise of a fundamental right." *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 326 N.C. 742, 746 392 S.E.2d 352, 355 (1990). Membership in a political party is not a suspect classification. *See Libertarian Party of N. Carolina v. State*, 365 N.C. 41, 51-53, 707 S.E.2d 199, 206 (2011); *Libertarian Party of North Carolina v State*, No. 05 CVS 13073, 2008 WL 8105395, at *6 (N.C. Super. Ct. May 27, 2008).

47. While the right to vote is fundamental, political considerations in redistricting do not "impinge" that right in any way, much less to a degree warranting strict scrutiny. *Town of Beech Mountain v. Cnty. of Watauga*, 324 N.C. 409, 413, 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). There is nothing in the 2021 Plans that operates to "totally den[y] . . . the opportunity to vote." *Dunn v. Blumstein*, 405 U.S.

330, 334–35 (1972) (cited approvingly by *Town of Beech Mountain*, 378 S.E.2d at 783). Nor is there an unequal weighting of votes as occurs when districts are of markedly unequal population or where districts have different numbers of representatives. *See Stephenson*,355 N.C. at 378-79, 562 S.E.2d at 394 (finding unequal weighting where voters in some districts elected five representatives and voters in others elected one or two).

48. Here, all individual votes are counted and equally weighted. Plaintiffs' contention is that voters of each major party do not have an equal opportunity to prevail, but equal-protection principles do not protect the right to win.

49. In fact, there "is not a fundamental right" even to have "the party of a voter's choice appear on the ballot." *Libertarian Party of North Carolina*, 2008 WL 8105395, at *7, *aff'd*, 365 N.C. 41, 707 S.E.2d at 199. If the law were otherwise, the *Stephenson* Court would not have endorsed "consider[ation] [of] partisan advantage and incumbency protection in the application of its discretionary redistricting decisions." *Stephenson*, 355 N.C. at 378, 562 S.E.2d at 390. Thus, rational-basis review applies, and any plan that complies with the equal-population rule and other legal requirement is amply supported by a rational basis. The Enacted Plans clearly meet this standard.

C. Speech and Assembly

50. Plaintiffs' free speech and association claims fare no better. 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*, 238 N.C. App. 246, 253, 767 S.E.2d 615, 620 (2014); *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993); *State v. Shackelford*, 264 N.C. App. 542, 552, 825 S.E.2d 689, 696 (2019). The right to free speech is impinged when "restrictions are placed on the espousal of a particular viewpoint," *Petersilie*, 334 N.C. at 183, 432 S.E.2d at

840, 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, 478, 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, 11, 510 S.E.2d 170, 177 (1999). If there are no restraints on speech, then redistricting cannot fairly be characterized as retaliation.

51. Nothing in the Enacted Plans place "restrictions . . . on the espousal of a particular viewpoint," *Petersilie*, 334 N.C. at 183, 432 S.E.2d at 840, or "would likely 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. Plaintiffs "appear to desire districts drawn in a manner ensuring their political speech will find a receptive audience; however, nothing in either constitution gives rise to such a claim." *Johnson*, 2021 WL 5578395, at *13. "Associational rights guarantee the freedom to participate in the political process; they do not guarantee a favorable outcome." *Id.* Simply put, "there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue.

52. Plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district." *Rucho*, 139 S. Ct. at 2504. People are free to speak their mind and petition the Legislature—no matter whether they affiliate with the same political party with their representative or not. And they remain free to join the Democratic Party and vote for Democrats. What the Constitution guarantees is the right to meet up and speak up—not to be listened to. Plaintiffs present no evidence that they chose to forbear from speech or association for fear of

gerrymandered districts, and no such assertion would be credible given that real gerrymandering actually took place in this State at the hands of their own Democratic Party.

53. Taken to its logical end, Plaintiffs' theory would lead to the absurd result that any person who did not vote for their elected representative would have a free speech and free assembly claim under North Carolina's Free Speech and Free Assembly Clauses.

IV. Plaintiffs Partisan Claims Fail Under Their Own Terms

54. Even assuming Plaintiffs' claims were cognizable or justiciable, Plaintiffs have failed to establish necessary elements of such claims.

A. Intent

55. An essential element of any cognizable constitutional partisan gerrymandering claim is discriminatory intent. *See Common Cause*, 2019 WL 4569584, at *114 ("[T]he plaintiffs challenging a districting plan must prove that state officials' predominant purpose in drawing district lines was to entrench their party] in power by diluting the votes of citizens favoring their rival." (quotation and edit marks omitted)). In *Common Cause* the trial court found this element met based in large part on "direct evidence": "Legislative Defendants openly admitted that they used prior election results to draw districts to benefit Republicans in both 2011 and 2017." *Id*. at *115.

56. This case is different. The General Assembly adopted a criterion rejecting the use of political data in redistricting and conducted a transparent process. There is no direct evidence of partisan intent on the part of the General Assembly or its members. "The good faith of [public] officers is presumed and the burden is upon the complainant to show the intentional, purposeful discrimination upon which he relies." *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 662, 178 S.E.2d 382, 386 (1971).

57. What's more, even if Plaintiffs demonstrated some degree of partisan intent, it would be insufficient because partisan gerrymanders must be outrageous to warrant court correction. "Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2516 (2019) (Kagan, J., dissenting). Eking out a subtle advantage of a couple of seats does not rise this level, especially where "partisan advantage" is allowed. *Stephenson*, 562 S.E.2d at 390. Further, North Carolina county-grouping and traversal rules—not to mention the restraints and criteria self-imposed by the legislature—substantially curtailed, and perhaps eliminated, the General Assembly's ability to craft an egregious partisan gerrymander in any event.

58. As shown above, the circumstantial case Plaintiffs attempted to make fail short as a factual matter. The best circumstantial evidence available undercuts the claims, and Plaintiffs' efforts to establish circumstantial evidence of partisan intent fell short.

B. Effect

59. Another essential element of any arguably cognizable partisan gerrymandering claim is discriminatory effect. *Common Cause*, 2019 WL 4569584, at *116 ("Plaintiffs must also establish that the enacted legislative districts actually had the effect of discriminating against—or subordinating— voters who support candidates of the Democratic Party").

60. Plaintiffs failed to establish this as a matter of fact. Boiled down to essentials, Plaintiffs' assertion is that the alleged inability of the Democratic Party to obtain a majority of seats when it wins the majority of votes is problematic. But there is no right to proportionality. Although Plaintiffs play clever semantic games with the word "proportional," they all bypass the simple problem that there is nothing legally problematic with a state of affairs where statewide

vote totals are not matched in the composition of a legislative bode elected from single-member, geographic-based districts.

61. All of Plaintiffs' arguments sound in proportionality. *NCLCV* Plaintiffs, for instance allege that transposing statewide election results in a close race should yield the same result in a lawfully drawn legislative or congressional plan. *NCLCV* Compl. ¶¶ 91, 101, 114. Stated differently, any departure from proportional representation constitutes an unlawful effect, in their view. No serious jurist agrees. *See Rucho*, 139 S. Ct. at 2509 (Kagan, J, dissenting) (stating that legitimate "standards . . . . do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other"); *Vieth*, 541 U.S. at 286–87 (plurality op. of Scalia, J.) (rejecting concept that majority of votes must lead to majority of seats); *id.* at 308 (Kennedy, J., concurring in the judgment) ("The fairness principle appellants propose is that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation. There is no authority for this precept. Even if the novelty of the proposed principle were accompanied by a convincing rationale for its adoption, there is no obvious way to draw a satisfactory standard from it for measuring an alleged burden on representational rights.")

62. *NCLCV* Plaintiffs also posit that "optimized" maps can be drawn to achieve an "almost evenly divided" delegation or body. *NCLCV* Compl. ¶¶ 161; *see also id.* ¶¶ 166, 174. This, too, simply asks the Court "to rely on [its own] ideas of electoral fairness," not on a cognizable legal standard. *Rucho*, 139 S. Ct. at 2509 (Kagan, J., dissenting). This Court declines the invitation "to engage in policy-making by comparing the enacted maps with others that might be 'ideally fair' under some judicially-envisioned criteria." *Common Cause*, 2019 WL 4569584, at *128. In all events, Plaintiffs cannot change the simple fact that redistricting in North Carolina (and every

other state) is an inherently geographic exercise, and Republicans in North Carolina hold a geographic advantage in having more voters spread out around the State.

63. Ultimately, Plaintiffs' claims are affirmatively troubling because, in asking this Court to enforce their partisan preferences, they are actually asking to codify favoritism for the Democratic Party into the State Constitution. For more than 100 years the Democratic Party controlled the redistricting process and drew district lines to serve its partisan goals. However unsavory this may have been, at least the Democratic Party could claim a majority of the General Assembly, the traditional basis for claiming the benefits of a redistricting process.

64. Now, the Democratic Party no longer holds that majority, yet seeks to accomplish *the same partisan goals as it had advanced in prior redistricting processes* through a court effort. Make no mistake: this case is about achieving partisan goals in court. This Court will not endorse such an effort.

C. Justification

65. If both the intent and effect element are met, the State "must provide a legitimate, non-partisan justification (i.e., that the impermissible intent did not cause the effect) to preserve its map." *Common Cause*, 2019 WL 4569584, at *114 (citing *Rucho,* 139 S. Ct. at 2516 (Kagan, J., dissenting)).

66. Legislative Defendants provided ample, non-partisan justification for the reasoning behind its map. As discussed above, the legislative record contains detailed, district-by-district goals behind the 2021 Plans. All of the goals identified are non-partisan and constitute compelling purposes to justify any partisan effect or intent behind the 2021 Plans.

V. The Racial Claims Lack Merit

67. The *NCLCV* and *Common Cause* Plaintiffs also assert racial claims but these lack merit. The General Assembly did not consider racial data in the redistricting, and it is not a violation of the State Constitution to *avoid* discriminating on the basis of race. Indeed, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748, (2007).

A. No Discriminatory Intent

68. Plaintiffs' claims miss the essential element of discriminatory intent.

69. Discriminatory intent is a necessary element of an equal-protection claim under the State Constitution. *Holmes v. Moore*, 270 N.C. App. 7, 16, 840 S.E.2d 244, 254 (2020). In the context of redistricting, a plaintiff alleging racial discrimination "has the burden of establishing that race with the predominant motive behind the state legislature's action." *Dickson v. Rucho*, 368 N.C. 481, 505, 781 S.E.2d 404, 422 (2015), *cert. granted, judgment vacated on other grounds*, 137 S. Ct. 2186 (2017) (citing *Miller v. Johnson*, 515 U.S. 900 (1995)).

70. To succeed, Plaintiffs must show that the General Assembly "subordinated traditional race-neutral districting principles, including but not limited to … respect for political subdivisions … to racial considerations. Where these or other race-neutral considerations are the basis for redistricting legislation, and are not subordinated to race, a State can 'defeat a claim that a district has been gerrymandered on racial lines." *Id.* (quoting *Miller*, 515 U.S. at 916); *see also Bush v. Vera*, 517 U.S. 952, 978 (1996). And the Supreme Court has admonished that "courts must exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001).

71. Plaintiffs failed to meet this burden for reasons explained at length in the findings of fact. To begin, Plaintiffs failed even to establish *awareness* of any adverse racial impact of the 2021 Plans. This is both because Plaintiffs acknowledge that racial data was not consulted by the General Assembly or its members and because there is, in fact, no adverse racial impact shown.

72. Furthermore, even if *awareness* had been shown, that would still fall short of *purpose*. 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, 840 S.E.2d at 255 (quoting *Pers Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)). Plaintiffs' evidentiary showing fell well short of this mark. And, as their presentation regarding partisan intent showed, this was not for lack of resources and incentive. There is simply no evidence of racial intent to be found on this record.

73. Importantly, without direct evidence of racial intent, Plaintiffs must rely on pattern evidence. But the standard for showing pattern evidence is even higher than the standard where direct evidence is present. Plaintiffs must "show a clear pattern, unexplainable on grounds other than" unlawful intent. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 266 (1977). 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. Again, nothing remotely like this is present on this record.

B. Plaintiffs' Efforts To Sidestep the Law

74. The *NCLCV* and *Common Cause* Plaintiffs attempt to sidestep the established law of racial-discrimination claims through efforts to manufacture intent as inferred either from effects or from the General Assembly's choice *not* to engage in racial discrimination. These efforts fail as a matter of law.

1. There Is No Legal Obligation to Conduct a Polarized Voting Analysis

75. *Common Cause* Plaintiff criticizes what it views as the General Assembly's failure to follow the requisite procedure set out by the North Carolina Supreme Court in *Stephenson.* It is Common Cause, not the General Assembly, that is confused about the law.

76. The State Constitution does not require the General Assembly to consider race or conduct and polarized-voting analysis. The *Stephenson* decisions did not announce a legal rule requiring anything like that. Instead, *Stephenson* interpreted provisions of the State Constitution, N.C. Const. art. II, §§ 3, 5, together mandating that "[n]o county shall be divided in the formation of a senate or representative district," and which are referred to as the whole-county rules (or WCP). *Stephenson*, 355 N.C. at 363, 562 S.E.2d at 384.

77. The fundamental problem in *Stephenson* was that strict compliance with the WCP is frustrated by 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 WCP to forbid county lines from being transgressed "for reasons unrelated to compliance with federal law." *Id.* at 371, 562 S.E.2d at 389.

78. The State Supreme Court therefore directed that "legislative districts required by the VRA" be "formed prior to creation of non-VRA districts," that total-population deviations "be at or within plus or minus five percent for purposes of compliance with federal 'one-person, one-vote' requirements," and that county groupings be identified consistent with those federal requires to ensure that county lines are adhered to where federal law is not contravened. *See Id.* at 383, 562 S.E.2d at 396–97. Stated differently, the VRA provides a justification for the General Assembly to depart from county lines.

79. But Common Cause incorrectly reads the WCP 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." *Common Cause* Compl. ¶ 159. 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 Plaintiff's characterization of *Stephenson*, Common Cause Compl. ¶ 39—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 districts. The General Assembly has done so. *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.[14] Nor would such a reading of *Stephenson* be tenable: as noted, the case interpreted the WCP requirement that ""[n]o county shall be divided in the formation of a senate or representative district." *Stephenson*, 355 N.C. at 363, 562 S.E.2d at 384. That text does not speak to racial considerations.

80. This case involves no cause of action under the Voting Rights Act, but Common Cause invokes the VRA as allegedly incorporated into various provisions of North Carolina law. Even if that incorporation theory is correct, Common Cause misconstrues the VRA itself, which does not require any racial analysis as a prerequisite to redistricting.

81. 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.

[14] 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).

§ 10301(a). The U.S. Supreme Court has identified independent "intent" and "effects" tests in this provision. *Thornburg v. Gingles*, 478 U.S. 30, 66, 71–72 (1986) (plurality opinion); *see also Cano v. Davis*, 211 F. Supp. 2d 1208, 1230–31 (C.D. Cal. 2002), *aff'd*, 537 U.S. 1100 (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).

82. 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. "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).

83. The alleged requirement of a racial "analysis" does not fit within either test. Common Cause Compl. ¶ 39. To avoid liability under the intent test, the redistricting authority need merely avoid "purposefully draw[ing]" districts "on racial lines." *City of Mobile, Ala.*, 446 U.S. at 67 (citation and quotation marks omitted). A mandated consideration of race would be an odd way to implement this requirement of race neutrality, and Plaintiffs cite no case in which the *failure* to consider race amount to discrimination on the *basis* of race. *See Parents Involved*, 551 U.S. at 748.

84. The effects test also does not create any requirement that a redistricting authority conduct a racial analysis. The Section 2 effects test applies *regardless* of intent, *see, e.g.*, *Cano*, 211 F. Supp. 2d at 1230–31, so an alleged requirement that a redistricting authority *subjectively* consider race is at cross-purposes with this test. The question in a Section 2 case is whether the *Gingles* factors are established, and whether the effect of vote dilution exists under the totality of the circumstances, not whether the redistricting authority engaged in certain considerations or processes at the time the map was drawn or enacted. Plaintiffs cite no case in which a redistricting plan was invalidated due simply to the redistricting authority's decision not to consider race at the time of redistricting.

85. At best, Common Cause asserts a rule of prudence, not a rule of law. There may be a practical, legal risk to a redistricting authority that does not consider race, as the failure to create majority-minority districts may result in Section 2 liability. But that risk does not translate into a judicially enforceable obligation to conduct an analysis to avoid that risk—any more than the risk of a negligence claim authorizes a court to compel persons to conduct a negligence risk analysis.

86. At worst, Common Cause asks this Court to read the State Constitution into conflict with the Equal Protection Clause. Plaintiffs ask the Court to mandate consideration of race even though the federal "Equal Protection Clause restricts the consideration of race in the districting process." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). Plaintiffs ask that the General Assembly draw VRA districts based on a polarized-voting analysis, but the General Assembly *did that* in 2011, and the *Covington* court found it insufficient. Given that litigation history, it was eminently reasonable for the General Assembly to conclude that the most prudent way to avoid entanglement with the equal-protection rights of millions of State citizens is to end the consideration of race in redistricting. Whether or not that choice ultimately proves sound will be seen if Section 2 litigation

is later filed and succeeds (although it is not clear on the this record that it would). The fact that Plaintiffs would have taken a different risk-management strategy does not authorize a court injunction or declaratory relief.

2. Effects Do Not Equal Intent, and There Is No Adverse Racial Effect

87. The *NCLCV* and *Common Cause* Plaintiffs also attempt to dress up arguments about racial effect as arguments about intent. These efforts, too, fail.

88. The *NCLCV* Plaintiffs contend that their "Optimized Plans" create more minority opportunity than the 2021 Plans. The *Common Cause* Plaintiff asserts that the 2021 Plans destroy functioning cross-over districts.

89. These assertions fail on the law for reasons discussed. Even if more minority opportunity can be created through alternative means, that is not sufficient to show purposeful discrimination. As discussed in the findings of fact, the whole logic of the Section 2 effects test is that racial vote dilution is usually *unintentional*.

90. Further, the *Common Cause* Plaintiff's claim fails for the additional reason that there is no evidence regarding their assertions that minority crossover districts were even destroyed. The record lacks credible evidence of any indication of *what* district and *where* previously afforded minority equal opportunity to elect and now has been replaced with a district that does *not* afford that opportunity. The *Common Cause* Plaintiff has no expert testimony on this subject, and the claim would fail even to survive summary judgment.

91. Meanwhile—although it is unnecessary to the ultimate conclusion—the Court notes that the evidence overwhelmingly shows that there is no adverse racial effect under the 2021 Plans. The Court has already credited the impressive report of Dr. Lewis, who examined hundreds of races and reached the conclusion that the House and Senate Plans have equal-opportunity districts—judged by Dr. Duchin's restrictive and possibly rigged definition of equal opportunity—

in proportion to the Black percentage of the voting-age population in North Carolina. No more is required. *See Johnson v. De Grandy*, 512 U.S. 97, 1014 (1994) ("[W] do not see how these district lines, apparently providing political effectiveness in proportion to voting-age numbers, deny equal political opportunity.") This is overriding evidence that there is no adverse racial impact in the plans.

92. Finally, it bears emphasizing that there is no allegation or evidence to show that the 2021 Plans violate Section 2 of the Voting Rights Act. That the General Assembly has not even been alleged to have violate the more lenient effects test of Section 2 is itself powerful evidence that the more stringent intent test of the State Constitution is not even arguably violated.

C. Plaintiffs' Racial Claims Conflict With the Federal Constitution

93. Plaintiffs ask this Court to read the State Constitution into conflict with the Equal Protection Clause.

94. Plaintiffs ask the Court to mandate consideration of race even though the federal "Equal Protection Clause restricts the consideration of race in the districting process." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). Consideration of race is only appropriate if strict scrutiny can be met, and the Supreme Court has declared that compliance with the VRA is a compelling state interest. *Id.* at 2315.

95. But absent the need to comply with the VRA or the *Gingles* preconditions having been met, or any other compelling state interest that Plaintiffs have failed to identify, it would be unconstitutional for the General Assembly to explicitly consider race in the course of drawing the maps.

96. As noted, there is no evidence that the *Gingles* preconditions are satisfied here. Dr. Duchin effectively admits they are not.

97. Compelling racially predominant redistricting in this context would compel a violation of equal protection and, ironically, force the General Assembly to engage in the very discrimination it is alleged to have committed—and did not commit.

VI. The *NCLCV* Whole County Rule Claim Fails

98. The *NCLCV* Plaintiffs also contend that the 2021 House and Senate Plans violate the WCP. This claim, like the others, fails.

99. The *NCLCV* Plaintiffs' theory of the WCP is legally wrong. *NCLCV* Plaintiffs contend that the 2021 Plans violate the WCP because the plans "traverse more county lines than necessary and contain districts that are less compact than they could be in fairer, more neutral maps." *NCLCV* Compl. ¶ 8. The *NCLCV* Plaintiffs contend that their Optimized House and Senate Plans contain fewer county traversals statewide than do the 2021 Plans and achieve average compactness scores statewide that are better than the 2021 Plans and that, in turn, these facts show that the 2021 Plans contravene the WCP.

100. Plaintiffs misunderstand the WCP as interpreted by *Stephenson* and *Dickson*. These decisions impose no requirement that the maps be drawn to minimize the number of traversals as measured at the statewide level. Nor do these decisions imposed a requirement that compactness scores be maximized on an average basis as the statewide level. These decisions, instead, establish that no unnecessary traversals of county lines occur within county groupings and that each district be reasonably compact. These standards are satisfied.

101. *Stephenson* 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; (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 v. Rucho,* 367 N.C. 542, 571-72, 766 S.E.2d 238, 258 (2014), *cert. granted, judgment vacated*, 575 U.S. 959 (2015). 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.*

102. As relevant here, *Stephenson* 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.

103. 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*. The General Assembly worked off of the county clustering created by nonpartisan scholars from Duke University, who applied *Stephenson* and its progeny to the 2020 Census data to create the only "possible optimum groupings." October 5, House Committee Meeting 8:7–10. 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.

104. The *NCLCV* Plaintiffs, however, seek to add additional rules that the State Supreme Court affirmatively rejected in *Dickson*. *Stephenson* contains no requirement that the entire map be drawn to minimize the number of traversals as measured on a statewide basis. The analysis established in precedent focuses on counties and groupings of counties, and that analysis follows from the WCP 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*).

105. *Stephenson* also does not 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.

106. This claim therefore lacks legal merit and is rejected.

CONCLUSION

All Plaintiffs claims lack merit. The Court should adopt proposed findings set forth above and enter judgment in favor of Legislative Defendants.

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/s/ Phillip J. Strach

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