STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 015426, 21 CVS 500085

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR., et al.,

Plaintiffs,

REBECCA HARPER, et al.,

Plaintiffs,

v.

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

Defendants.

NCLCV PLAINTIFFS' BRIEF ON PROPOSED REMEDIAL PLANS

Pursuant to this Court's February 8, 2022 Order on Submission of Remedial Plans for Court Review ("Feb. 8 Order"), the NCLCV Plaintiffs submit proposed remedial districting plans for North Carolina's congressional delegation, the North Carolina Senate, and the North Carolina House of Representatives—the NCLCV Congressional Map, NCLCV Senate Map, and NCLCV House Map (collectively, the "NCLCV Maps"). These maps are the same maps that were attached to the NCLCV Plaintiffs' Complaint and introduced at trial as PX174, PX175, and PX176.

This submission contains all of the information required by the Court's February 8 Order and its February 16, 2022 Order Appointing Special Masters ("Feb. 16 Order"), including color PDF maps depicting the NCLCV Congressional Map (Exhibit A), NCLCV Senate Map (Exhibit B), and NCLCV House Map (Exhibit C); block-assignment files for the NCLCV Congressional Map (Exhibit D), NCLCV Senate Map (Exhibit E), and NCLCV House Map (Exhibit F); shapefiles for the NCLCV Congressional Map (Exhibit G), NCLCV Senate Map (Exhibit H), and

NCLCV House Map (Exhibit I); population reports for the NCLCV Congressional Map (Exhibit J), NCLCV Senate Map (Exhibit K), and NCLCV House Map (Exhibit L); statistical reports constituting the functional equivalent of a "stat pack" for the NCLCV Congressional Map (Exhibit M), NCLCV Senate Map (Exhibit N), and NCLCV House Map (Exhibit O); and a new affidavit of Dr. Moon Duchin (Exhibit P).

INTRODUCTION

The NCLCV Maps are uniquely suitable as remedial maps. Unlike any other maps the Court will receive, they have been tested via discovery and examination at trial. And as the evidence at trial showed, and as the additional evidence the NCLCV Plaintiffs now submit confirms, the NCLCV Maps were designed—harnessing the power of computational redistricting—to have exactly the features the North Carolina Supreme Court has identified as defining lawful maps: They allow the majority to rule and treat both major political parties and all racial groups fairly—all while excelling on traditional neutral districting principles.

First, the NCLCV Maps fix the key flaw the Supreme Court found in the Enacted Plans, using precisely the approach the Supreme Court approved. The Enacted Plans "systematically devalued" the votes of citizens supporting one party by depriving them of "opportunity to elect representatives to seats, compared to an equal number of voters in the favored party." Opinion ¶¶ 162, *Harper v. Hall*, No. 413PA21, 2022-NCSC-17 (N.C. Feb. 14, 2022) ("*Harper* Op."). By contrast, a plan is "presumptively constitutional" if "there is a significant likelihood that [it] will give the voters of all political parties substantially equal opportunity to translate votes into seats." *Id.* ¶ 163; *Harper* Order ¶ 6; *see* Feb. 8 Order ¶ 2(f). The Supreme Court emphasized that maps can properly rely on "partisan criteria" in the manner the U.S. Supreme Court approved in *Gaffney*

v. Cummings, 412 U.S. 735 (1973)—to "achieve 'political fairness' between the political parties." *Id.* at 736; *see Harper* Op. ¶ 170 & n.16; *Harper* Order ¶ 4.

Those are standards that the NCLCV Plaintiffs, uniquely, advocated for. At trial, the NCLCV Plaintiffs pressed for consideration of "partisan fairness" and "partisan symmetry" and argued that *Gaffney* should provide a North Star. 1/5/22 Tr. 834:4–836:21. In the Supreme Court, too, the NCLCV Plaintiffs proposed a standard that was nearly identical to the one the Court ultimately adopted. *See* Br. of NCLCV Plaintiffs at 79, *NCLCV v. Hall*, No. 413PA21 (N.C. Jan. 21, 2022); N.C. S. Ct. Oral Arg. 17:35–18:00, 20:15–20:30, 21:50–22:06, 26:36–26:51 (Feb. 2, 2022),https://www.youtube.com/watch?v=9UUmzbB05Ro (similar).

The NCLCV Maps fully satisfy the standards that the NCLCV Plaintiffs advocated and which the North Carolina Supreme Court ultimately adopted. Professor Duchin measured the NCLCV Maps against 52 contested statewide partisan elections since 2012—the same set of elections that Chief Justice Newby raised during oral argument, *see* N.C. S. Ct. Oral Arg., 12:39–12:51, 16:05–17:02 (Feb. 2, 2022), https://www.youtube.com/watch?v=9UUmzbB05Ro[1]—and found the NCLCV Maps meet the standards the North Carolina Supreme Court set. On average, in a State that over the last decade has given 49% of statewide votes to Democrats, the NCLCV Maps give Democrats 49% of congressional seats, 46% of Senate seats, and 47% of House seats. Ex. P at 12. Indeed, the work of Dr. Michael Barber—Legislative Defendants' expert—shows that the NCLCV Maps closely align with North Carolina voters' preferences. PX234 at 7–8. Meanwhile, of 156 total elections (52 on each of three maps), the party whose candidates win a majority of votes wins a majority of seats (or a tie) in all but 17 elections. Ex. P at 8. Of the

[1] Although Chief Justice Newby correctly noted that there have been 67 statewide general elections in the last decade, only 52 of those elections were contested partisan elections.

departures, 12 favor Republicans—likely due to the constraints of Whole County Provisions and the *Stephenson*/*Dickson* framework for state-legislative districting—and 5 favor Democrats. *Id.* The NCLCV Maps thus do exactly what the Supreme Court said lawful maps ***should*** do.

Second, the Supreme Court asked whether a districting plan "avoid[s] diluting the voting strength of African American voters" and complies with "Section 2 of the Voting Rights Act" (VRA). *Harper* Order ¶ 8; *see Harper* Op. ¶ 216. The NCLCV Plaintiffs designed their plans to satisfy any requirements Section 2 might impose. The algorithm that created the NCLCV Maps took into account minority electoral opportunity—in conjunction with, and never subordinating, traditional districting principles—and yielded maps that allow Black voters the opportunity to elect their preferred candidates in 4 of 14 congressional districts (29%), 12 of 50 Senate districts (24%), and 36 of 120 house districts (30%). Ex. P at 15. Protected minority groups constitute just over 30% of North Carolina's adult citizen population,[2] and the NCLCV Maps fully vindicate their voting rights. They do so, moreover, while employing the county clusters (or groupings) resulting from the *Stephenson*/*Dickson* framework—rendering it unnecessary to "break" clusters, as *Stephenson I* specifies may be done if necessary to comply with the VRA. *Stephenson v. Bartlett*, 355 N.C. 354, 383–84, 562 S.E.2d 377, 397 (2002) ("*Stephenson I*").

Third, the Supreme Court ordered that remedial plans "shall adhere to traditional neutral districting criteria," including population equality, contiguity, compactness, and compliance with the Whole County Provisions. *Harper* Order ¶ 8; *Harper* Op. ¶¶ 163, 170; Feb. 8 Order ¶ 2(b). The NCLCV Maps do all of that as well. Not only are the NCLCV Maps much fairer to both parties and minority voters than the now-invalidated Enacted Plans, but they are more compact,

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

traverse fewer county lines, and better respect political subdivisions (while being contiguous and having sufficient population equality). Ex. P at 17–19.

For these reasons and others detailed below, the NCLCV Plaintiffs urge the Court to adopt the NCLCV Maps. The NCLCV Plaintiffs will address maps proposed by other parties—including those enacted by the General Assembly—in their February 21 submission.

DISCUSSION

This Submission proceeds in four parts. Part I summarizes how the NCLCV Maps were generated. Parts II, III, and IV address the NCLCV Congressional Map, the NCLCV Senate Map, and the NCLCV House Map, respectively.

I. The NCLCV Maps Have Been Tested In Litigation And Were Created To Target The Standards That The Supreme Court Has Set For Remedial Maps.

This Court's February 8 Order requires the parties to describe the process used to create any remedial maps, including the identity of participants involved and considerations on which the mapmakers relied. Feb. 8 Order ¶¶ 2(c), 3(a)–(c). That is consistent with the Court's previous orders concluding that information regarding the creation of potential remedial maps was crucial and furthered a "compelling public interest." Dec. 30, 2022 Order on (1) NCLCV Pltfs.' Mot. for Protective Order, (2) Legislative Defts.' Mot. for Clarification, and (3) Legislative Defts.' Mot. to Seal at 4, 9 ("Dec. 30 Order").

Of the remedial plans that will be before this Court, only the NCLCV Maps have been tested via discovery, depositions, and cross-examination. To summarize: Pursuant to the Court's December 20 Order, the NCLCV Plaintiffs produced to the Legislative Defendants "the method and means by which [the NCLCV Maps] were formulated and produced, including, but not limited to all source code, source data, input parameters, and all outputted data," as well as the identity of "any and all persons who took part in the drawing or participated in the computerized production"

of the maps. Dec. 20, 2021 Order Granting in Part Legislative Defendants' Motion for Partial Reconsideration & Order Clarifying Case Scheduling Order 4. The NCLCV Plaintiffs produced all of that source code and data, as well as a four-page, single-spaced letter detailing how the NCLCV Maps were created. LDTX189 at 1–4.

Then, the Court ordered Sam Hirsch—who the NCLCV Plaintiffs identified as "direct[ing] the drawing and computerized production" of the NCLCV Maps, *id.* at 4—to sit for a deposition, Dec. 30 Order at 7, and the Legislative Defendants deposed Mr. Hirsch for more than three hours. The Legislative Defendants also examined Mr. Hirsch on the creation of the NCLCV Maps at trial, where Mr. Hirsch spent an hour on the stand. 1/5/22 Tr. 796:17–836:24. Dr. Duchin, too, testified about the NCLCV Maps and how they "give the majority of the body -- the majority of the seats to the party with the majority of the votes," 1/4/22 Tr. 432:3–5, and the Legislative Defendants cross-examined her at length, *id.* at 453:11–479:5. Indeed, the Legislative Defendants' expert, Dr. Barber, also analyzed the NCLCV Maps. He rejected the Legislative Defendants' claim that the NCLCV Maps had been "optimiz[ed] for Democratic advantage" and explained that if he were "given the job of drawing a … Democratic gerrymandered map," he "would … probably try to do the opposite" of the NCLCV Maps—which in myriad places drew districts that were more "pro-Republican" than might have been drawn. 1/5/22 Tr. 700:22–701:5.

This evidence and testimony, tested in the crucible of discovery and trial, addresses virtually all the issues identified in the February 8 Order, which the NCLCV Plaintiffs detail below.

As the NCLCV Plaintiffs have explained, the NCLCV Maps were created through a multi-step process that deployed high-powered computing to generate maps that treat North Carolina voters fairly and equitably. The process was directed by Mr. Hirsch, with the assistance of two consulting experts, Dr. Amariah Becker and Dr. Dara Gold. LDTX189 at 4; 1/5/22 Tr. 801:1–9,

19–22; *see* Feb. 8 Order ¶ 3(c) (directing parties to provide "identity of all participants involved in the process of drawing the Proposed Remedial Plans submitted to the Court").

This process used high-performance computers to create maps optimized based on various traditional districting criteria, including "population balance, contiguity, respect for counties, [and] geographic compactness," as well as "minority electoral opportunity" and "partisan fairness." LDTX189 at 4; *see* 1/5/22 Tr. 818:8–819:1 (algorithm "simultaneously tr[ied] to accomplish a bunch of things," including "population balance, contiguity, compactness, respect for political subdivisions, especially counties, minority electoral opportunity, partisan fairness"); Feb. 16 Order ¶ 2(h) (directing parties to provide the "criteria applied in drawing … districts").

At trial, Mr. Hirsch explained how the algorithm addressed "partisan fairness" and identified three principles the process followed. Feb. 8 Order ¶ 3(b) (directing parties to address "the extent to which partisan considerations and election results data were a factor in the drawing of the Proposed Remedial Plan"). First, "use a broad set of data, don't cherry-pick." 1/5/22 Tr. 805:13–14. The algorithm thus looked at "52 statewide general partisan elections." *Id.* at 805:14–16. Second, the algorithm "weight[ed]" the elections "to give more weight to recent ones than older ones and more weight to closer elections than to landslides." *Id.* at 805:25–806:2. Third, the algorithm pursued "symmetry"—meaning that "no one gets discriminated against based on their political viewpoint or their partisan affiliation." *Id.* at 806:6, 808:5–8.

The evidence presented at trial also identified the specific process used to optimize the criteria described above. The map-creation process began with the compilation and organization of publicly available source data from the U.S. Census Bureau and the North Carolina State Board of Elections. LDTX189 at 2. After data sets were compiled, a script generated a random "seed" map for each of the congressional, Senate, and House maps that complied with certain basic

criteria, such as district contiguity. *Id.*; *see* Feb. 8 Order ¶ 3(a) (directing parties to provide a "description of and explanation for the choice of a base map"); Feb. 16 Order ¶ 2(i) (directing parties to provide "a description of the process followed by the mapmaker").

The random seed maps served as a starting point for a long chain of maps created through a computerized multi-objective "short-burst" generation process. LDTX189 at 2. As part of this process, a computer script, many times a minute, randomly identified two adjoining districts in the map, erased the boundary between those two districts to temporarily create a double-size district, and then randomly re-split that double-size district into two contiguous and roughly equally populated new districts. *Id.* The chain took a series (a "short burst") of random steps, evaluated all the plans it encountered, and chose from among the best plans at that point to start its next burst. Over the course of many steps, the maps changed substantially from the initial seed map. *Id.*

The source code that evaluated the plans to determine the "best" starting point for the next short burst used input parameters that incorporated the criteria described above—that is, "population balance, contiguity, respect for counties, geographic compactness, minority electoral opportunity, and partisan fairness." *Id.* Over time, the chain tended to find maps that performed increasingly better on these criteria. *Id.* Chains were also run with different parameters simultaneously, to identify the best available map. For congressional districts, the chains ran statewide. *Id.* at 3. For Senate and House districts, chains were confined to a particular "county cluster," to conform with the Supreme Court's interpretation of the Whole County Provisions. *Id.*

The results of this process were the NCLCV Congressional, Senate, and House Maps. No amendments or changes were considered, and the NCLCV Plaintiffs did not consider proposing alternative maps besides the NCLCV Maps as potential remedial maps. *See* Feb. 8 Order ¶ 3(a).

The algorithm used to create the NCLCV Senate and House Maps did not take incumbency into account. *Harper* Order ¶ 7; *see Harper* Op. ¶ 170; Feb. 8 Order ¶ 2(c). Reliable locational information for the General Assembly's 170 incumbents' residences was not publicly available, and the NCLCV Plaintiffs received accurate locational information for incumbents' residences only after they filed this lawsuit. 1/5/2022 Tr. 827:17–24, 832:7–13. The algorithm that generated the NCLCV Congressional Map—for which locational information about incumbents' residential addresses is more readily available—was programmed to generally avoid pairing incumbents and did so "evenhandedly," and without regard to partisan affiliation. *Harper* Order ¶ 7; Tr. 831:22–24. As a result, only two congressional incumbents (one Democrat and one Republican) were paired, in NCLCV Congressional District 9. The paired incumbents—Representatives Alma Adams and Dan Bishop—are the only two congressional incumbents who live in the same county (and indeed, in the same city), rendering it more difficult to avoid "double-bunking" without sacrificing traditional neutral districting criteria. Moreover, Members of Congress need not reside in their districts. *See* N.C. State Bd. of Elections, *General Candidate Requirements*, https://www.ncsbe.gov/candidates/filing-candidacy/general-candidate-requirements.

II. The NCLCV Congressional Map Satisfies The Supreme Court's Standards.

The NCLCV Plaintiffs discuss each map—starting with the NCLCV Congressional Plan—as follows. First, we describe each map's partisan fairness and how the map complies with the Supreme Court's directive that maps "give … voters of all political parties substantially equal opportunity to translate votes into seats across the plan." *Harper* Op. ¶ 160, 163; *see Harper* Order ¶ 6; Feb. 8 Order ¶¶ 2(d)–(f). Second, we discuss minority electoral opportunity under the map, including whether racially polarized voting would require the drawing of majority-minority districts in particular areas to comply with Section 2 of the VRA. *Harper* Order ¶ 8; *see Harper*

Op. ¶ 216; Feb. 8 Order ¶ 2(a). Third, we discuss the map's "adhere[nce] to traditional neutral districting criteria." *Harper* Order ¶ 8; *see Harper* Op. ¶¶ 163, 170; Feb. 8 Order ¶ 2(b).

A. The NCLCV Congressional Map Gives All Citizens Substantially Equal Voting Strength And Avoids Diluting Voting Strength Based On Partisan Affiliation.

The Supreme Court, in lieu of "identify[ing] an exhaustive set of metrics or precise mathematical thresholds," announced a core principle to govern whether a plan "compl[ies] with the constitutional limitations contained in the Declaration of Rights." *Harper* Op. ¶¶ 160, 163. A plan deprives citizens of their "right to equal voting power," and triggers "strict scrutiny," if the "voters supporting one political party have their votes systematically devalued by having less opportunity to elect representatives to seats, compared to an equal number of voters in the favored party." *Id.* ¶ 162. One way a plan can violate that principle is if it "systematically makes it harder for individuals because of their party affiliation to elect a governing majority than individuals in a favored party of equal size." *Id.* ¶¶ 160–61; *see Harper* Order ¶¶ 4–5. By contrast, a plan is "presumptively constitutional" if it lacks this skew and "there is a significant likelihood that [it] will give the voters of all political parties substantially equal opportunity to translate votes into seats." *Harper* Op. ¶ 163; *see Harper* Order ¶ 6.

The Supreme Court identified multiple ways of assessing "whether the mapmaker adhered to traditional neutral districting criteria and whether a meaningful partisan skew necessarily results from North Carolina's unique political geography," including "mean-median difference analysis; efficiency gap analysis; close-votes, close-seats analysis; and partisan symmetry analysis." *Harper* Op. ¶ 163. None of those metrics, however, substitute for the core constitutional ***principle*** the Supreme Court announced: Whether "voters of all political parties [have] substantially equal opportunity to translate votes into seats." *Id.*; *see Harper* Order ¶ 6.

The NCLCV Plaintiffs thus first explain how the NCLCV Congressional Plan satisfies the key principle the Supreme Court announced. We then address the specific metrics the Supreme Court identified as potentially probative.

1. The NCLCV Congressional Map Gives Voters Of All Political Parties A Substantially Equal Opportunity To Translate Votes Into Seats.

The NCLCV Congressional Plan satisfies the key principle the Supreme Court set: It gives voters from both major "political parties substantially equal opportunity to translate votes into seats across the plan" and "to elect a governing majority." *Harper* Op. ¶¶ 160, 163. When overlaid against 52 contested statewide partisan general elections that on average gave 49% of the vote to Democratic candidates, the map awards Democratic candidates an average of 49% of the seats. Ex. P at 12. This result is robust across different metrics: Using 14 up-ballot elections (in which Democratic candidates again won 49% of the vote), the map awards Democratic candidates 48% of the seats; Dr. Barber's composite, too, confirms that the NCLCV Congressional Map corresponds nearly exactly with statewide vote shares. *Id.*; *see* PX234 at 8.

Table 1 underscores that the NCLCV Congressional Plan gives both parties an equal chance to translate votes into seats and does not skew outcomes in favor of either party. In 38 elections decided by 6 points or less, the NCLCV Congressional Map results in the winning party receiving 6, 7, or 8 Congressional seats (excepting only one election). Ex. P at 8. So when voters' preferences are closely divided, the map faithfully reflects voters' views. Moreover, under the NCLCV Congressional Plan, in 48 of 52 elections (or 92.3%) the party receiving the most votes receives a majority of seats (or a tie); in up-ballot generals, only one election departs from that standard. *Id.*

Table 1: Voter Preferences & Seats Under Enacted & NCLCV Plans[3]

	D Vote Share	SL-174	NCLCV-Cong	SL-173	NCLCV-Sen	SL-175	NCLCV-House
GOV12	0.4418	4	4	16	18	41	44
AGC16	0.4444	4	4	17	17	40	42
LAC16	0.4475	4	5	18	20	42	45
JHU16	0.4563	4	5	18	19	42	49
AGC20	0.4615	3	4	17	19	40	51
JZA16	0.4619	4	5	19	21	43	50
JDI16	0.4653	4	6	19	21	44	53
LTG16	0.4665	4	6	19	21	44	54
LAC12	0.4674	4	5	20	20	44	51
AGC12	0.4678	4	5	18	18	43	50
SEN16	0.4705	4	6	19	21	43	55
TRS16	0.4730	4	6	19	21	45	53
TRS20	0.4743	4	6	17	20	45	51
JA620	0.4806	4	7	17	21	46	55
PRS16	0.4809	4	7	19	22	48	56
JA420	0.4822	4	7	17	22	47	56
INC20	0.4823	4	7	18	23	47	56
LTG20	0.4836	4	7	18	21	46	55
JA720	0.4842	4	7	17	22	48	56
SUP20	0.4862	4	7	19	23	49	56
JA520	0.4874	4	7	18	22	49	57
JA218	0.4876	4	7	18	22	45	55
JS420	0.4879	4	7	19	24	49	56
J1320	0.4885	4	7	19	23	49	56
PRS12	0.4897	4	6	20	21	46	55
SEN20	0.4910	4	7	20	24	48	56
LAC20	0.4918	4	8	21	25	51	58
SEN14	0.4919	4	6	20	22	46	52
PRS20	0.4932	4	8	20	25	50	60
JS220	0.4934	4	8	21	24	51	59
SUP16	0.4941	4	6	22	23	49	57
JS118	0.4955	4	7	20	25	50	58
INC16	0.4960	4	6	22	22	50	57
JST16	0.4976	4	7	21	23	50	58
LTG12	0.4992	5	7	22	22	50	58
JS120	0.5000	4	8	22	27	52	60
AUD16	0.5007	5	8	22	23	51	56
GOV16	0.5011	4	7	20	27	50	58
ATG20	0.5013	4	8	21	25	51	58
ATG16	0.5027	4	7	20	23	50	57
JA118	0.5078	4	8	22	26	51	58
AUD20	0.5088	4	8	24	28	54	61
JA318	0.5091	4	8	21	26	52	59
SOS20	0.5116	5	8	24	28	53	62
JGE16	0.5131	5	8	22	25	52	59
INC12	0.5186	5	8	22	22	55	61
SOS16	0.5226	5	9	24	24	57	62
GOV20	0.5229	4	8	23	27	58	63
AUD12	0.5371	8	9	27	28	61	65
SOS12	0.5379	7	9	26	26	59	63
TRS12	0.5383	7	9	25	24	59	65
SUP12	0.5424	8	9	28	28	61	66

53 – 47 or closer

[3] AGC = Agriculture Commissioner; ATG = Attorney General; AUD = Auditor; GOV = Governor; INC = Insurance Commissioner; LAC = Labor Commissioner; LTG = Lieutenant Governor; PRS = President; SEN = Senator; SOS = Secretary of State; SUP = Superintendent of Public Instruction; TRS = Treasurer. The prefix JA* refers to judicial elections to the Court of Appeals (so that, for instance, JA118 is the election to Seat 1 on the Court of Appeals in 2018). JS* reflects elections

2. The Additional Metrics Identified By The Supreme Court Confirm That The NCLCV Congressional Map Treats Both Parties Fairly.

The Supreme Court wisely did not "identify an exhaustive set of metrics or precise mathematical thresholds which conclusively demonstrate or disprove the existence of an unconstitutional partisan gerrymander." *Harper* Op. ¶ 163. Multiple metrics exist, and it would be a mistake to give talismanic significance to any one metric. Here, however, the potential metrics identified by the Supreme Court confirm that the NCLCV Congressional Map gives "voters of all political parties substantially equal opportunity to translate votes into seats." *Id.*

i. Partisan Symmetry. The partisan-symmetry standard is closely related to the standards the North Carolina Supreme Court adopted. A symmetry standard "requires that the electoral system treat similarly-situated parties equally, so that each receives the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage [of the vote]."[4] In a perfectly symmetric map, for example, a map that rewarded 3-point Republican victories with 55% of the seats would also reward 3-point Democratic victories with 55% of the seats. This metric does not presuppose any "correct" relationship between seats and votes; rather, "[f]airness is defined in this context by each party's candidate being treated equally under the law by rules that provide an equal opportunity to compete for the seat."[5] The symmetry ideal is thus a nearly verbatim implementation of the Supreme Court's command that all voters have "substantially equal opportunity to translate votes into seats." *Harper* Op. ¶ 163.

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to the Supreme Court. Where there was more than one judicial candidate from a given party on the ballot, they were combined for this analysis. Two-digit suffixes designate election years.

[4] Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after* LULAC v. Perry, 6 Election L.J. 1, 6 (2007); *see* 1/5/22 Tr. 835:3–6 (NCLCV trial testimony citing article).

[5] Grofman & King, *supra* note 4, at 7.

To calculate departures from partisan symmetry, mathematicians and political scientists use the "partisan bias" metric. This metric shows that the NCLCV Congressional Map is evenhanded: Where the Enacted Congressional Plan had a (pro-Republican) bias of 19.2%,[6] the NCLCV Plan's score is just 3.6%. Ex. P at 11. A similar metric of departures from symmetry—the "partisan Gini" score—tells the same story: Where the Enacted Plan's departure from symmetry was 7.8%, the NCLCV Plan is just 2.1%. *Id.* at 12.

ii. Mean-Median Difference. The mean-median difference is the difference between a political party's median vote share and its mean vote share. *Harper* Op. ¶ 166. A divergence between the mean and median can be one indicator of a skewed map; their convergence may be an indicator of a map that "treat[s] the parties with symmetry." *Id.*

The median-mean difference shows that the NCLCV Congressional Plan is evenhanded: The difference is just 0.73% (compared with the Enacted Congressional Plan's score of -4.7%). Ex. P at 11.

iii. Efficiency Gap. The efficiency gap measures "the degree to which more Democratic or Republican votes are wasted across an entire districting plan." *Harper* Op. ¶ 66. Mathematically, the efficiency gap identifies the difference between the parties' "inefficient" votes—that is, all votes that are cast for a losing candidate and all excess votes cast for a winning candidate—and divides that number by the total votes cast. Ex. P at 10. A smaller "efficiency gap" can reflect a more even map. *Id.*

[6] For this figure and others, this brief uses the score averaged over all 52 partisan statewide elections since 2012. *See* Ex. P at 7, 11.

Here, the efficiency gap metric again shows that the NCLCV Congressional Plan is nearly perfectly evenhanded: Its score is just 0.6% (compared with the Enacted Plan's score of -16.7%). *Id.* at 11.

iv. Simulation-based metrics. The Supreme Court also noted—without endorsing—that "[i]t was suggested" that courts might consider whether a plan falls within some margin of the "median" that would result from "computer simulations [that] draw redistricting plans solely on the basis of traditional redistricting criteria." *Harper* Op. ¶ 168; *see id.* (noting that the "Legislative Defendants' … expert witness proposed" that "any adopted redistricting plan with a partisan bias that fell within the middle 50% of simulation results being presumptively constitutional" and that it was "also suggested that the legislature could be required to draw districts 'within 5% of the median outcome expected from nonpartisan redistricting criteria, at a statewide level, across a range of electoral circumstances'").

These simulation-based metrics must be used with caution, and the Supreme Court properly refrained from endorsing them as the metrics for lawful remedial plans. These metrics, to be clear, can provide powerful evidence that the mapmaker intentionally drew maps with particular partisan characteristics. Mapmakers are unlikely to have drawn 99.9% or 99.9999% outliers ***by accident***. Hence, both this Court and the Supreme Court properly relied on simulation-based metrics to find that the General Assembly acted intentionally in drawing pro-Republican gerrymanders. *Id.* ¶¶ 48–49, 187, 199.

These simulation-based metrics do not, however, address the key substantive standard that the Supreme Court has set—namely, whether a plan "give[s] the voters of all political parties substantially equal opportunity to translate votes into seats." *Id.* ¶¶ 160, 163. Take, for example, a plan that falls within "the middle 50% of [Dr. Barber's] simulation results." *Id.* ¶ 168. If the

General Assembly enacts a plan that makes it significantly harder for Democratic voters to translate votes into seats, when the General Assembly could have enacted a different plan that also complies with traditional neutral districting criteria and gives voters of both parties an equal chance to translate votes into seats, then the General Assembly has violated the Supreme Court's mandate that plans must provide "voters of all political parties substantially equal opportunity to translate votes into seats." *Id.* ¶ 163. And that remains true whether or not the plan the General Assembly selected falls within the middle 50% of an expert's simulation results. *Accord* Ex. P at 5–6

All that said, as to the NCLCV Maps, simulation metrics point in the same direction as the other metrics: As the evidence at trial showed, the NCLCV Congressional Map falls near the center of a congressional ensemble created using Dr. Barber's own code and methodology. PX234 at 8.

B. The NCLCV Congressional Map Preserves Minority Electoral Opportunity.

Section 2 of the federal Voting Rights Act ("VRA") prohibits States from diluting minority citizens' voting rights on account of race. 52 U.S.C. § 10301(a); *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986). The NCLCV Congressional Map protects electoral opportunity for North Carolina's minority voters, avoiding the racial vote dilution in the Enacted Congressional Plan.[7]

Dr. Duchin has shown that the NCLCV Congressional Map contains four districts that give Black voters a fair opportunity to nominate and elect their preferred candidates. Ex. P at 15. These districts are "crossover" districts, meaning that Black-preferred candidates can prevail as a result of the joint support of Black voters and White Democratic voters, making it unnecessary for the

[7] Because the Supreme Court invalidated the Enacted Maps and held that the General Assembly "must also conduct racially polarized voting analysis," the Court "decline[d] to determine whether NCLCV Plaintiffs could also prevail on their minority vote dilution claim … at this time." *Harper* Op. ¶ 223 n.17. To the extent a remedial plan failed to protect minority electoral opportunity to the same degree as the NCLCV Maps, however, the NCLCV Plaintiffs would be entitled to challenge the plan as unlawful on that ground.

Black voting-age population in the district to constitute a majority of the district's population. *Id.* at 15–16. While Section 2 does not require States to draw crossover districts, the U.S. Supreme Court has explained that "States that wish to draw crossover districts are free to do so where no other prohibition exists," and in fact, "States can—and in proper cases ***should***—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts." *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (emphasis added). The proportion of Black opportunity districts in the NCLCV Congressional Map (28.6%, or 4 of 14) exceeds Black voters' "rough proportion of the relevant population," which the U.S. Supreme Court has held is "the … baseline for measuring opportunity to elect under § 2." *Id.* at 29.[8]

C. The NCLCV Congressional Map Excels On Traditional Districting Criteria.

The NCLCV Congressional Map also follows the North Carolina Supreme Court's directive to "adhere to traditional neutral districting criteria and not subordinate them to partisan criteria." *Harper* Order ¶ 8; *see Harper* Op. ¶¶ 163, 170. It scrupulously adheres to these criteria and avoids subordinating them to either partisanship or race.

The NCLCV Congressional Map is highly compact—indeed, "significantly more compact" than the Enacted Congressional Plan. Ex. P at 18. The average Polsby-Popper and

[8] The Supreme Court's February 4 Order and this Court's February 8 Order directed mapdrawers to "assess whether, using current election and population data, racially polarized voting is legally sufficient in any area of the state such that Section 2 of the Voting Rights Act requires the drawing of a district to avoid diluting the voting strength of African-American voters." Feb. 4 Order ¶ 8; *see* Feb. 8 Order ¶ 2(a). It did so, however, in the context of discussing the *Stephenson*/*Dickson* framework, which addresses how to reconcile the Whole County Provisions—which apply only to General Assembly districts—with one-person, one-vote requirements and the VRA. Feb. 4 Order ¶ 8. The NCLCV Plaintiffs thus understand this directive to apply only to Senate and House districts, not congressional districts. In any event, for the reasons explained above, the NCLCV Congressional Plan satisfies any requirements the VRA could be understood to impose.

Reock scores of the NCLCV Congressional Plan are 0.38 and 0.47.[9] *Id.* Likewise, there are only 4,124 cut edges[10] in the NCLCV Congressional Map, reflecting relatively simple district boundaries. *Id.*

The NCLCV Congressional Map is also respectful of municipal boundaries. The NCLCV Map splits municipalities into only 58 municipal pieces, only 41 of which are populated. *Id.* at 19.

III. The NCLCV Senate Map Satisfies The Supreme Court's Standards.

As with the NCLCV Congressional Map, the NCLCV Senate Map achieves partisan fairness while avoiding minority vote dilution and advancing traditional districting criteria.

A. The NCLCV Senate Map Gives All Citizens Substantially Equal Voting Strength And Avoids Diluting Voting Strength Based On Partisan Affiliation.

1. The NCLCV Senate Map Gives Voters Of All Political Parties A Substantially Equal Opportunity To Translate Votes Into Seats.

The NCLCV Senate Map complies with the central directive of the North Carolina Supreme Court by protecting the ability of both Democratic and Republican voters to "translate votes into seats across the plan" and to "elect a governing majority." *Harper* Op. ¶¶ 160, 163. In 52 statewide partisan general elections over the last decade, the NCLCV Senate Map awards Democratic candidates an average 46% of the seats, approaching the 49% average two-party vote share that Democratic candidates won in those elections. Ex. P at 12. And in 46 of those 52 elections (88.5%) the party receiving the most votes receives a majority of seats (or a tie); in up-ballot generals, only one election departs from that standard. *Id.* at 8.

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[9] The Polsby-Popper score measures compactness by comparing a region's area to its perimeter. Ex. P at 17. The Reock score is the ratio of a region's area to that of its circumcircle (the smallest circle in which the region can be circumscribed). *Id.* For both scores, a perfectly compact district (represented by a circle) is 1.00. *Id.*

[10] Block cut edges refer to the "scissors complexity" of the districting plan and counts how many adjacent pairs of geographical units receive different district assignments. Ex. P at 17. Lower scores indicate more compact maps with less complex boundaries. *Id.*

Of those exceptions, all but one favor the Republican Party. *Id.* This modest deviation likely results from compliance with the Whole County Provision (including the corresponding requirement to minimize county traversals), which the Supreme Court has noted "may constitute a compelling governmental interest." *Harper* Op. ¶ 181; *see also id.* ¶ 170.

The NCLCV Senate Map, moreover, sets a floor that any other remedial plan—to be lawful—must satisfy: Because the NCLCV Senate Map can achieve this degree of partisan farness while complying with the Whole County Provision (and protecting minority voters and complying with traditional neutral districting principles), there is no compelling governmental interest in tolerating a plan with a ***greater*** pro-Republican deviation.

2. The Additional Metrics Identified By The Supreme Court Confirm That The NCLCV Senate Map Treats Both Parties Fairly.

As discussed below, the NCLCV Senate Map performs well under every partisan-fairness metric identified by the Supreme Court. Each of these metrics shows that the NCLCV Senate Map gives "voters of all political parties substantially equal opportunity to translate votes into seats." *Harper* Op. ¶ 163.

i. Partisan Symmetry. The partisan bias score shows that the NCLCV Senate Map is very close to evenhanded: The score is just 1.5% in favor of Republicans (compared with 7.2% for the Enacted Senate Plan). Ex. P at 11. The partisan Gini score for the NCLCV Senate Map is 2.6% (compared with 5.1% for the Enacted Senate Plan). *Id.* at 12.

ii. Median-Mean Difference. The median-mean difference underscores that the NCLCV Senate Plan comes close to treating both parties very close to evenhandedly. The median-mean difference is just 0.89% pro-Republican, within the 1% historical average identified by the North Carolina Supreme Court (compared with 3.6% in the Enacted Senate Plan). Ex. P at 11; *Harper* Op. ¶ 166.

iii. Efficiency Gap. The efficiency gap of the NCLCV Senate Plan is just 2.0% pro-Republican (compared with 7.5% in the Enacted Senate Plan). Ex. P at 11.

iv. Simulation-Based Metrics. To the extent that simulation-based metrics are relevant to the Court's remedial inquiry, *see supra* p. 15–16, the simulation work performed by Legislative Defendants' expert Dr. Barber shows that the NCLCV Senate Map is not an outlier. PX234 at 7.

B. The NCLCV Senate Map Preserves Minority Electoral Opportunity.

The NCLCV Map preserves Black voters' opportunity to nominate and elect their preferred candidates in 12 "crossover" Senate districts out of 50 total districts. Ex. P at 15. This proportion (24%) exceeds Black voters' "rough proportion of the relevant population." *Strickland*, 556 U.S. at 29.

Dr. Duchin also assessed whether racially polarized voting would compel majority-minority districts in any parts of the State under Section 2. Dr. Duchin found a pattern of racial vote polarization in statewide general elections and even in Democratic primaries. Ex. P at 14. Professor Duchin also found that it is possible to draw 5 majority Black districts (2 around Mecklenburg County, 1 in Guilford County, and 2 in Northeastern North Carolina). Ex. P at 13. In each of these areas, the NCLCV Senate Map draws ***more*** districts that are effective for Black voters (3 around Mecklenburg County, 2 around Guilford County, and 3 in Northeastern North Carolina). *Id.* at 15. Hence, again, the NCLCV Senate Map satisfies any requirement that Section 2 of the VRA might impose.

C. The NCLCV Senate Map Advances Traditional Districting Criteria.

Like the NCLCV Congressional Map, the NCLCV Senate Map creates contiguous districts with a population deviation of less than 5% from the ideal. These districts are compact, with

average Polsby-Popper and Reock scores of 0.37 and 0.43, respectively. Ex. P at 18. There are just 9,249 cut edges in the NCLCV Senate Map. *Id.*

The NCLCV Senate Map also respects county and municipal integrity. The NCLCV Senate Map traverses county boundaries only 89 times. *Id.* at 19. The NCLCV Senate Map splits municipalities into just 125 municipal pieces, only 100 of which are populated. *Id.*

The NCLCV Plaintiffs note that, although the algorithm used to create the NCLCV maps accorded some weight to VTDs, it allowed VTDs to be split in pursuit of other goals. That choice was well-warranted. North Carolina law affords no "special constitutional status to [voting district] lines that would limit" redistricting. *Dickson v. Rucho*, No. 11 CVS 16896, 2013 WL 3376658, at *33 (N.C. Super. Ct. July 8, 2013). VTDs are "established by each county board of elections" in their discretion, are not "based upon equal population," and often "divide neighborhoods" and other communities of interest. *Id.* Nor do split VTDs create insurmountable administrative challenges. VTDs are split in every map, and such splits are routinely managed by issuing multiple ballots within a given voting district (meaning that voting districts effectively "represent a collection of one or more … purely-administrative election precincts"). Supp. Rep. of Legislative Defts.' Expert Douglas Johnson, Ph.D. ¶¶ 12–13, *Common Cause v. Lewis*, No. 18 CVS 014001 (N.C. Super. Ct. May 6, 2019) (attached as Exhibit Q). Moreover, the process of "reassign[ing] voters in split" VTDs occurs separately in "each county." This process thus proceeds in parallel, across the state, which mitigates the work for any particular elections official. Decl. of Gary Bartlett ¶ 18, *N.C. State Conf. of NAACP v. Berger*, No. 21 CVS 014476 (N.C. Super. Ct. Nov. 5, 2021) (attached as Exhibit R); *Dickson*, 2013 WL 3376658, at *33.

IV. The NCLCV House Map Satisfies The Supreme Court's Standards.

The NCLCV House Map also ensures that both Democratic and Republican voters have substantially equal opportunity to translate votes into seats. Like the NCLCV Congressional and Senate Maps, the map also protects minority electoral opportunity and advances the traditional districting objectives of maintaining compactness, county integrity, and municipal integrity.

A. The NCLCV House Map Gives All Citizens Substantially Equal Voting Strength And Avoids Diluting Voting Strength Based On Partisan Affiliation.

1. The NCLCV Congressional Map Gives Voters Of All Political Parties A Substantially Equal Opportunity To Translate Votes Into Seats.

The NCLCV House Map preserves both Democratic and Republican voters' ability to "translate votes into seats across the plan" and to "elect a governing majority." *Harper* Op. ¶¶ 160, 163. In 52 statewide partisan general elections over the last decade, the NCLCV House Map awards Democratic candidates an average 47% of the seats, approaching the 49% average two-party vote share that Democratic candidates won in those elections. Ex. P at 12. And as Table 1 shows, in 45 of those 52 elections (86.7%) the party receiving the most votes receives a majority of seats (or a tie); in up-ballot generals, only three elections departs from that standard.

All seven departures favor the Republican Party. Ex. P at 8. This modest deviation again likely results from compliance with the Whole County Provision, which the Supreme Court has noted "may constitute a compelling governmental interest." *Harper* Op. ¶ 181; *see id.* ¶ 170.

2. The Additional Metrics Identified By The Supreme Court Confirm That The NCLCV House Map Treats Both Parties Fairly.

The NCLCV House Map also performs well under every partisan-fairness metric identified by the Supreme Court. These metrics illustrate that the NCLCV House Map gives "voters of all political parties substantially equal opportunity to translate votes into seats." *Harper* Op. ¶ 163.

i. Partisan Symmetry. The partisan bias score shows that the NCLCV House Map is very close to evenhanded: The score is just 1.8% pro-Republican (compared with 8.2% pro-Republican for the Enacted House Plan). Ex. P at 11. The partisan Gini score is 3.2% (compared with 5.1% for the Enacted House Plan). *Id.* at 12.

ii. Median-Mean Difference. The median-mean difference of the NCLCV House Map is 1.5% (pro-Republican), close to the historical average identified by the Supreme Court (compared with 3.9% in the Enacted House Plan), *Harper* Op. ¶ 166; Ex. P at 11.

iii. Efficiency Gap. The efficiency gap of the NCLCV House Map is just 2.0% pro-Republican (compared with 7.6% in the Enacted House Plan). Ex. P at 11.

vi. Simulation-Based Metrics. Simulation-based metrics, to the extent relevant, *see supra* pp. 15–16, confirm that the NCLCV House Map falls within the middle 50% of Dr. Barber's ensemble. PX234 at 7.

B. The NCLCV House Map Preserves Minority Electoral Opportunity.

The NCLCV House Map protects electoral opportunity for North Carolina's minority voters. The map protects Black voters' opportunity to elect their preferred candidates in 30% of House districts (36 out of 120 districts). Ex. P at 15. This proportion again accords with Black voters' "rough proportion of the relevant population." *Strickland*, 556 U.S. at 29.

Dr. Duchin also assessed whether racially polarized voting would compel majority-minority districts in any parts of the State under Section 2 of the VRA. Again, Dr. Duchin found a consistent pattern of racial vote polarization in statewide general elections and in Democratic primaries. *See supra* p. 20. Professor Duchin also found that it is possible to draw 17 majority Black districts (4-5 around Mecklenburg County, 2-3 around Guilford County, 2 around Cumberland County, 4-6 in Northeastern North Carolina, and 1 each in Wake, Durham, and

Forsyth Counties). Ex. P at 14. In each of these areas, the NCLCV House Map draws ***more*** districts that are effective for Black voters (8 around Mecklenburg County, 5 around Guilford County, 4 around Cumberland County, 7 in Northeastern North Carolina, 4 around Wake County, 2 around Durham County, and 1 around Forsyth County). *Id.* at 15. Hence, again, the NCLCV House Map satisfies any requirement that Section 2 of the VRA might impose.

C. The NCLCV House Map Excels On Traditional Districting Criteria.

The NCLCV House Map creates contiguous districts with a population deviation of less than 5% from the ideal. Ex. P at 17. These districts are compact, with average Polsby-Popper and Reock scores of 0.41 and 0.47, respectively. *Id.* at 18.

The NCLCV House Map also respects counties and municipalities. The NCLCV House Map creates just 66 county traversals. *Id.* at 19. The NCLCV House Map splits municipalities into just 201 municipal pieces, only 173 of which are populated. *Id.*

CONCLUSION

The Supreme Court's decision made a promise to North Carolina's voters: Every voter should have an equal "opportunity to aggregate [his or her] vote with likeminded citizens to elect a governing majority of elected officials who reflect those citizens' views." *Harper* Op. ¶¶ 148, 160, 179; *see Harper* Order ¶ 4. The NCLCV Maps keep that promise. They ensure that every voter—Republican or Democrat, White or Black—has an equal chance to elect their preferred candidates, so that government will truly "originate[] from the people" and be "founded upon their will only." N.C. Const. art I, § 2. "[T]he will of the people,—the majority,—legally expressed, [will] govern." *State ex rel. Quinn v. Lattimore,* 120 N.C. 426, 26 S.E. 638, 638 (1897).

The NCLCV Plaintiffs do not know what maps other parties will propose, and they will address the remedial plans enacted by the General Assembly in their February 21 submission. But

whatever happens, the Court should not approve maps that are ***less fair***—to voters of both parties, and to North Carolina's minority voters—than the NCLCV Maps. To do so would break the promise the Supreme Court made.

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This 18th day of February, 2022.

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