STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NO. 18-CVS-014001

FILED
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WAKE CO., C.S.C.
BY

COMMON CAUSE, et al.,

Plaintiffs,

v.

Representative DAVID R. LEWIS, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, et al.,

Defendants.

MOTION OF DEMOCRACY NORTH CAROLINA FOR LEAVE TO FILE AMICUS BRIEF

Democracy North Carolina (hereinafter, "Democracy NC") respectfully moves under North Carolina Rule of Civil Procedure 7(b) for leave to file the amicus curiae brief in opposition to Defendants' remedial redistricting plans attached hereto as Exhibit A.

In support of this Motion, Proposed Amicus Democracy NC shows the Court its unique and substantial interest in this case, and demonstrates that its views are useful and relevant to the Court's review of Defendants' remedial redistricting plans and the next steps this Court needs to take to ensure fully remedial districts are in place for the 2020 elections.

THE INTEREST OF PROPOSED AMICUS CURIAE DEMOCRACY NC

Democracy NC has spent over twenty-five years advocating for fair elections systems, including the districts which elect members of the North Carolina General Assembly. The thousands of volunteers and advocates that have worked for and with Democracy NC in that time period rely on Democracy NC to continue pushing for the most inclusive and representative electoral systems possible—from weighing in on proposed remedial redistricting plans to advocating for redistricting reform. Indeed, ensuring that districts are put in place for 2020 that

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are fully constitutional is central to Democracy NC's mission. The interests of proposed amicus curiae Democracy NC are explained in even greater detail in the attached brief.

THE VIEWS OF PROPOSED AMICUS CURIAE DEMOCRACY NC ARE USEFUL AND RELEVANT IN ASSISTING THE COURT

Democracy NC has been actively involved in challenges to unconstitutional North Carolina redistricting plans for the entire decade, and the evidence it has garnered has been critical in invalidating previous maps. This perspective and experience allows it to highlight the ways in which voters suffer from an inadequately remedial map. Moreover, Democracy NC is a racial and social justice organization with an enormous statewide presence. This connection to voters on the ground across the entire state allows Democracy NC to rapidly and with particularity identify some of the flaws with the enacted plans that will affect the quality of representation that this State's voters are able to obtain in their state legislature.

WHEREFORE, Democracy NC respectfully requests that this Court:

a. Grant Democracy NC leave to submit the attached amicus curiae brief in opposition to Defendants' remedial redistricting plan; and

b. Grant such other and further relief as the Court deems just and proper.

This the 27th day of September, 2019.

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CERTIFICATE OF SERVICE

I certify that today, I caused the attached motion and notice to be served on all counsel by email and U.S. mail, addressed to:

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This the 27th day of September, 2019.

Allison J. Riggs

EXHIBIT A

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COMMON CAUSE, et al., Plaintiffs, v. Representative DAVID R. LEWIS, in his official capacity as Senior Chairman of the House Select Committee on Redistricting, et al., Defendants.	**AMICUS BRIEF OF DEMOCRACY NORTH CAROLINA**

Proposed Amicus Democracy North Carolina (hereinafter, "Democracy NC"), respectfully submits this brief to aid the Court and its appointed referee in evaluating the adequacy of the 2019 enacted state legislative plans and in drawing fully remedial plans because the enacted plans do not fully cure the constitutional infirmities identified by the Court.

I. Interest of Amicus

Democracy NC is a non-partisan, non-profit organization that uses original research, organizing, advocacy, and training in order to increase voter participation and civic engagement, reduce the influence of big money in politics, and ultimately achieve a government that is transparent and accountable to all North Carolinians. The organization has six regional offices with staff members who train volunteers and engage North Carolina residents throughout the entire State. Democracy NC is committed to protecting the quality and accessibility of democracy in North Carolina, and has spent more than twenty-five years promoting pro-democracy programs and reforms that expand public involvement and increase fairness and equity in the political process. It is among Democracy NC's core values to promote respect for people's fundamental

equality and right to self-determination, and to cultivate a system that puts racial and social justice at the center due to the effect that race, class, gender, sexual orientation and other cultural factors have on North Carolina's governance.

In keeping with its core values of fundamental equality, self-determination, and racial and social justice, Democracy NC has dedicated significant effort to ensure that the redistricting process, and the maps that result from that process, provide all North Carolina voters an equal voice in their government. One component of this effort is Democracy NC's redistricting reform campaign, through which the organization educates North Carolinians on the importance of fair maps, engages the public in the redistricting process, and advocates for changes to that process that would put an end to racial and partisan gerrymandering. In addition to this campaign of education and policy advocacy, Democracy NC has also participated in legal challenges against unfair and illegal district maps, both as a plaintiff and as amicus curiae.

Significantly, Democracy NC has been involved in litigation seeking fair state legislative redistricting plans in North Carolina since the beginning of the current redistricting cycle. Democracy NC was one of the plaintiffs in the consolidated action *Dickson v. Rucho*, No. 11-CVS-16896 (Wake Cnty. Sup. Ct.), the decade's first court challenge against the 2011 state legislative redistricting plans. Democracy NC and others alleged that those plans constituted racial gerrymanders, and violated various provisions of both the United States and North Carolina Constitutions. The evidence developed by Democracy NC and others in *Dickson* was heavily relied upon in the parallel federal court challenge to those plans, *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016) *aff'd* 137 S. Ct. 2211 (2017), which invalidated the challenged 2011 districts as racial gerrymanders. Democracy NC participated in the remedial stage of the *Covington* litigation as amicus, providing perspective to the court about the inadequate legislative process

that the General Assembly employed to draft and enact its "remedial plans." *See* Amici Curiae Brief of Democracy North Carolina and League of Women Voters of North Carolina, *Covington v. North Carolina,* 1:13-cv-399, ECF No. 186 (Sept. 15, 2017). And when those "remedial plans" unnecessarily altered house districts in violation of the North Carolina Constitution, Democracy NC was among the plaintiffs who successfully challenged those changes in State Court. *See* Order, *NC NAACP v. Lewis,* 18-cv-2322 (Wake Cnty. Sup. Ct. Nov. 2, 2018).

Democracy NC has been among those at the forefront of the battle for constitutional state legislative districts throughout this decade, seeking justice for North Carolina's voters each time the General Assembly has twisted the mandates of a remedial order into an opportunity for political gamesmanship. As such, Democracy NC has a unique interest in ensuring that the same machinations that have deprived the State's voters of a fair and equal voice in their democracy since 2011 are not allowed to repeat ad infinitum. Democracy NC contends that the 2019 enacted plains fail to satisfy the General Assembly's legal duties to remedy the unconstitutional partisan gerrymandering. However, even if this Court disagrees, it is critical for the future of fair maps in this State that this Court make clear that process by which the legislature arrived at these plans – drawing districts capped by arbitrary BVAP thresholds and prioritizing the principles of "randomness" and incumbency protection over all else, with a disregard for public input and to the detriment of communities of interest – is not appropriate, let alone mandatory, moving forward.

II. In Both State House and Senate Plans, the Remedy Enacted by the Legislature is Inadequate

a. The Court has a duty to ensure that the constitutional violations have been fully eliminated.

Throughout this entire decade, North Carolina voters have yet to enjoy one election cycle where they have participated in state legislative elections under constitutional districts. This is in

part because whenever the legislature is offered a chance to correct its conduct, it at best offers half measures, never fully writing the wrongs it has committed. In this remedial posture, this Court has both the power and the duty to ensure that the General Assembly's proposed remedial enactments fulfill the Court's mandate to fully correct the constitutional infirmities that the plaintiffs identified. *See Stephenson v. Bartlett,* 355 N.C. 354, 362, 562 S.E.2d 377, 384 (2002) (hereinafter "*Stephenson I"*) ("[w]ithin the context of state redistricting and reapportionment disputes, it is well within the 'power of the judiciary of a State to require *valid* reapportionment . . . .'") (quoting *Scott v. Germano,* 381 U.S. 407, 409 (1965)). Legislative Defendants contend that a presumption of constitutionality must apply "in full force" and that full deference is owed to the 2019 enacted plans "even though the acts were enacted to remedy prior redistricting acts the Court invalidated," Leg. Defs.' Mem. Regarding House and Senate Remedial Maps and Related Materials, *Common Cause v. Lewis,* 18-cvs-14001, at 4 (Sept. 23, 2019) (hereinafter "Leg. Defs.' Br."); however, this proposition is contrary to the precedent of both North Carolina and Federal courts. Rather, "[i]n the remedial posture, courts must ensure that a proposed remedial districting plan completely corrects – rather than perpetuates – the defects that rendered the original districts unconstitutional or unlawful." *Covington v. North Carolina,* 283 F. Supp. 3d 410, 431 (M.D.N.C. 2018). Moreover, given the failure of the legislature to *even once* enact a legal remedial map this decade, the factual posture of this case does not support Legislative Defendants' claims, either.

Once the presumption of validity has been overcome by an established constitutional violation, the usual deference afforded to a legislative enactment is no longer appropriate, as the constitutional violation serves to "justify a judicial intrusion into an area so clearly the province, initially at least, of the legislative . . . branch[]." *Leandro v. State,* 346 N.C. 336, 357, 488 S.E.2d 249, 261 (1997); s*ee also Harvell v. Blythe Sch. Dist. No. 5,* 126 F.3d 1038, 1040 (8th Cir. 1997)

(noting that the trial court "need not defer to a state-proposed remedial plan . . . if the plan does not completely remedy the violation"). The Defendants, therefore, bear the burden of demonstrating to the Court that the redistricting plans they have submitted comply with the Court's mandate and constitute an adequate remedy. *See Stephenson v. Bartlett,* 357 N.C. 301, 308, 582 S.E.2d 247, 251 (2003) (hereinafter "*Stephenson II")* (affirming trial court's finding that defendants "failed to offer any evidence" to justify state constitutional violations in proposed remedial map); s*ee also Swann v. Charlotte-Mecklenburg Bd. of Education,* 402 U.S. 1, 15, 26 (1971) (school authorities crafting segregation remedy have "affirmative duty" to eliminate identified discrimination, and "the burden of showing that such school assignments are genuinely nondiscriminatory"); *Muhammad v. Giant Food,* 108 Fed. Appx. 757 (4th Cir. 2004) (in remedial stage of class action employment discrimination suit, burden falls on employer); *Smith v. Bounds,* 813 F.2d 1299 (4th Cir. 1987) (once systemic constitutional violations found, burden of proving constitutional compliance is on department of corrections).

If the Defendants fail to meet that burden here, it becomes the duty of this Court to craft an appropriate remedy. As this Court noted in its Judgment, *Common Cause v. Lewis,* 18-cvs-14001, Conclusion of Law ¶ 141 (Sept. 3, 2019) (hereinafter "Judgment"), "'[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens.'" (quoting *Corum,* 330 N.C. 761, 782, 413 S.E.2d at 289); s*ee also Leandro,* 346 N.C. at 357, 488 S.E.2d at 261 ("like the other branches of government, the judicial branch has its duty under the North Carolina Constitution"). While the Court should be careful to impose a remedy consistent with the bounds of the violation found, it has the principal duty to ensure that any remedy actually cures the constitutional violation identified. *See id.* (noting that once a denial of fundamental rights is identified, "it will then be the duty of the court to enter judgment granting . . . relief *as needed to*

correct the wrong while minimizing the encroachment upon other branches of government). Indeed, the North Carolina Supreme Court noted in *Hoke County Bd. of Educ. v. State*, that:

> Certainly when the state fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it.

358 N.C. 605, 643, 599 S.E.2d 365, 393 (2004). Despite Defendants' apparent suggestions to the contrary, *see e.g.* Leg. Defs.' Br. at 4, 25, it is this Court's duty to demand that the legislature demonstrate the adequacy of their proposed remedy, to independently assess the plans' constitutionality, and – to the extent it discovers any deficiencies – impose its own remedy.

b. Because the constitutional violation identified here included both discriminatory intent and effect, both harms must be remedied.

As this Court noted in its judgment invalidating the state legislative maps used in 2018 as unconstitutional partisan gerrymanders, the constitutionality of a challenged classification under an equal protection analysis requires proof of both discriminatory purpose and a discriminatory, vote-dilutive effect. *See* Judgment, Conclusion of Law ¶¶ 57-58. By purposefully misconstruing the purpose of Dr. Chen's simulated maps—which were never presented as live redistricting plans, but rather as evidence showing the legislature's discriminatory intent—Legislative Defendants apparently attempt to cleanse their discriminatory intent with randomization. And while that randomization might remove the discriminatory intent in the subsequent legislative enactment,[1] it cannot and does not ensure that the discriminatory effect is fully addressed. Even a small number of Dr. Chen's simulated maps that do not attempt to protect incumbents display significant partisan

[1] And Amicus does not concede that it does, given the unwavering commitment to protecting the incumbents elected from the unconstitutional districts and the changes made to the random base House map to unpair incumbents that, in essence, reconstituted the cores of the prior unconstitutional districts.

skew (although less than the invalidated plans), and the ones that do protect incumbents will incorporate increased partisan bias. In light of this fact, this Court must (and legislature should have) examined persisting partisan bias in the enacted maps.[2] Such an analysis does not require drawing maps with partisan data, but it requires evaluating the persistence of partisan bias after the remedial maps have been drafted.

Numerous scholars and analysts have assessed the extent to which the partisan bias in the 2019 enacted plans compares to the partisan bias in the plans ruled unconstitutional by this Court. Based on Amicus' review, it seems the vast majority, if not all, analysts conclude that while the partisan bias in the newly enacted plans is reduced when compared to the previous plans, it is not eliminated (and is, by some scholars' measure, still quite significant). *See*, Nicholas Stephanopoulos, *The Proposed North Carolina Remedy*, Election Law Blog (Sep. 17, 2019), https://electionlawblog.org/?p=107358 (noting that the House plan maintains approximately half of the partisan skew of the prior plan and that the Senate plan maintains approximately one third of the partisan skew of the prior plan); Will Doran, *New Maps Would Still Give GOP Disproportionate Power in NC Legislature, Analysts Say*, The News & Observer, (Sept. 18, 2019), https://www.newsobserver.com/news/politics-government/article235176992.html; Sam Wang, *North Carolina's New House Plan Still Has at Least Half the Partisan Skew of the Gerrymandered Map*, Princeton Election Consortium, (Sept. 14, 2019), http://election.princeton.edu/2019/09/14/north-carolinas-new-house-plan-contains-over-half-as-much-partisanship-as-the-original-gerrymander/.

[2] This is akin to employers looking at racial data as part of an adverse impact study to either design a constitutional affirmative action plan or create a remedy after a finding of employment discrimination. *See, e.g., Richardson v. City of Hampton,* 1996 U.S. Dist. LEXIS 15437, at *16 (E.D. Va. 1996).

In light of this, the Court should instruct the referee to analyze whether the discriminatory effect—the partisan bias diluting the ability of Democratic voters to effectively elect their candidate of choice—has been fully remedied, and should instruct him to draw districts that would fully remedy the constitutional flaw this Court has already found in the plans.

III. Beyond Failing to Cure the Partisan Gerrymandering, the "Remedial Plans" Demonstrate Other Specific Deficiencies in Process and Results

As explained above, the enacted plans fail to cure the constitutional violation—partisan gerrymandering—identified by this Court in its September 3, 2019 Judgement. Because the Court has a duty to ensure that new maps fully remedy the constitutional violations, and thus must redraw the invalidated districts itself, it should, in this process take care to correct other flaws in districts that must be redrawn anyway.

a. Starting from Dr. Chen's Simulated Maps is Inappropriate

i. Dr. Chen's Maps Were Offered as Evidence of Invidious Partisan Intent, Not as Remedial Alternatives

The General Assembly's decision to utilize Dr. Jowei Chen's simulation maps – which were generated entirely by a computer following an algorithm and created exclusively for evidentiary purposes – as a starting point, and in several cases an endpoint, for their remedial maps is not an acceptable or appropriate way by which to remedy an unconstitutional gerrymander. As an initial matter, Legislative Defendants' insistence that these maps have been "approved by this Court," Leg. Defs.' Br. at 10, and are somehow unimpeachable, finds no basis in Dr. Chen's report, this Court's Judgment, or the reality of the remedial process. Legislative Defendants contend that "what matters for the Court's purposes is that Dr. Chen's maps were found to be constitutional and lawful – or else they could not have served as baselines against which to judge the 2017 plans."

Leg. Defs.' Br. at 13. This statement represents, at best, a misunderstanding of the purpose of Dr. Chen's simulations, and at worst, an intentional misreading of this Court's Judgment.

As this Court explained, Dr. Chen's simulation methodology seeks to ascertain whether invidious partisan intent "predominated in the drawing of the 2017 Plans and subordinated [] traditional nonpartisan redistricting principles." Judgment, Finding of Fact ¶ 82. Dr. Chen instructs his computer to optimize districts with respect to specific criteria – in this case, equalizing population, maximizing geographic compactness, and preserving political boundaries – and ignore all other considerations, including partisan and racial considerations. Chen Report at 3. Aside from these pre-programmed criteria, the computer simulations are generated entirely at random, and the resultant maps are an exercise in probability – that is, the simulations demonstrate the probability of a certain partisan result if the map-drawer strictly adhered to the specified criteria. Chen Report at 10. This process by design does not necessarily create plans that are "better" than the enacted plan, nor does it create plans that are unimpeachably constitutional; rather, it identifies plans with partisan outcomes that are more "plausibl[e] and likely" to occur if traditional redistricting criteria are followed. *Id.* As the Court noted, Dr. Chen's analysis located the 2017 plans far beyond the least plausible partisan outcome in the array of simulations. The fact that it was such an outlier was strong evidence of the predominance of invidious partisan intent. However, Dr. Chen's simulations fall on a bell curve with its own statistical outliers. *See e.g.* Chen Report at 30, Figure 2: House Simulation Set 1: Democratic-Favoring districts in 2017 House Plan Versus 1,000 Simulated Plans (showing that 0.6% of simulations had 43 Democratic-favoring districts, and 0.2% of simulations had 51 Democratic-favoring districts).

Nonetheless, regardless of any misunderstanding that the General Assembly may have had about the purpose of or the appropriate use for Dr. Chen's simulations, it should have become

painfully obvious at least to the members of the House Redistricting Committee and Defendant Representative Lewis that these simulations could not be considered *per se* constitutional when it was discovered that the first randomly selected Chen map for the Franklin-Nash county grouping was "by happenstance" *identical* to the version of that county grouping that this Court held to be an unconstitutional partisan gerrymander. *See* Leg. Defs.' Br. at 18. Algorithmic computer map simulations provide powerful and helpful evidence when compared to an enacted plan, but they should not be used in the manner the legislature used them here.[3]

ii. Dr. Chen's Maps Disregard Necessary Policy Considerations by Design

The Legislative Defendants boast that the maps that resulted from their remedial process, in which they used Dr. Chen's maps either as a starting point or as the remedial substitute, "reflect perhaps the least amount of human input ever involved in a legislative redistricting." Leg. Defs.' Br. at 6. Legislative Defendants are likely correct on this point, but despite what they appear to believe, this is not what is best for North Carolina voters, and it is not what this Court has required. A truly democratic redistricting process is one in which citizen input—whether direct or through elected officials—is considered in the construction of fair electoral districts. Here, all that the General Assembly has done, following a judicial reprimand, is disregard its duty to the people to exercise its helpful discretion on their behalf, and it used Dr. Chen's randomized simulations in an attempt to shield itself from liability rather than to correct its wrong.

Further, the solicitation of public input was rendered meaningless by the General Assembly's rigid reliance on, and unwillingness to depart from, Dr. Chen's simulations. A

[3] Moreover, there have been recent scholarly examinations of the extent to which algorithmic decision-making processes may incorporate discrimination. *See, e.g.* Žliobaitė, I., *Measuring Discrimination in Algorithmmic Decision Making,* 31 Data Min. Knowl. Disc. 1060 (2017) (available at https://doi.org/10.1007/s10618-017-0506-1); Sweeney, L., *Discrimination in Online Ad Delivery*, Data Privacy Lab (January 28, 2013), https://dataprivacylab.org/projects/onlineads/1071-1.pdf.

computer simulation generated as evidence of discriminatory intent for a trial does not ascertain the will of the people or produce redistricting plans that carefully protect cohesive communities of interest. While Dr. Chen's simulations were programmed to preserve political subdivisions to a certain extent, they do not – and cannot – take into account where true communities of interest exist. A randomly generated simulation may be able to reliably split only a certain number of municipalities or fewer, but it cannot asses which communities will suffer a loss of voice or a sense of disunity by virtue of being split, or which communities will be empowered to flourish and thrive if kept whole. While the Legislative Defendants champion the State Lottery Commission for its commitment to "the principle of randomness," Leg. Defs.' Br. at 27, the people of North Carolina deserve more than randomness in the construction of their electoral districts. Employing a remedial redistricting process that – by design, from start-to-finish – excludes the values and perspectives of the voters actually affected by the districts at issue is more than inappropriate – it is a disservice.

b. By making incumbency protection the one criterion that could not give in the remedial redistricting process, the legislature ensured that most of the gains wrought by the unconstitutional partisan gerrymander were maintained.

The Supreme Courts of the United States and North Carolina have both indicated that as a general matter, a legislature may exercise its discretion in the redistricting process to avoid the pairing of incumbents in the same district. *See Karcher v. Daggett,* 462 U.S. 725, 740-42 (1983), *Stephenson I,* 355 N.C. at 371, 562 S.E.2d at 390. However, it is also accepted that "a remedial districting plan cannot be based on considerations that 'would validate the very maneuvers that were a major cause of the unconstitutional districting.'" *Covington v. North Carolina,* 283 F. Supp. 3d 410, 431 (M.D.N.C. 2018) (quoting *Abrams v. Johnson*, 521 U.S. 74, 86 (1997)). To this end, various courts, including four Justices of the United States Supreme Court, have expressed skepticism about whether incumbency protection is an appropriate consideration when the

incumbents in question were elected from unconstitutionally constructed districts. *See Easley v. Cromartie,* 532 U.S. 234, 263 n.3 (commenting that whether "the goal of protecting incumbents is legitimate . . . is a questionable proposition" where the incumbents were elected from unconstitutional racially gerrymandered districts); *Covington,* 283 F. Supp. 3d at 431-33 (noting that "[l]ower courts likewise have expressed concern" about incumbency protection in the remedial context) (collecting cases). Maintaining the core of an incumbent's prior district, while also plausibly within the legislature's discretion when crafting a new redistricting plan also becomes suspect in the remedial context. *See id*. This is because seeking to protect the interests of incumbents elected from unconstitutional districts, either by protecting them from "double-bunking" or by preserving their districts' cores, "may serve to carry forward the discriminatory effect of the original violation." *Id; see also Personhuballah v. Alcorn,* 155 F. Supp. 3d 552, 561 n.8, 564 (E.D. Va. 2016) (holding that political concerns, such as core retention," must give way when there is a constitutional violation that needs to be remedied"). Amicus would argue that these cases, read together, stand for a simple proposition: partisan gerrymandering remedies are incompatible with incumbency protection.

Though this Court advised Defendants in their Judgment that "the drafters of the Remedial Maps *may* take reasonable efforts to not pair incumbents unduly in the same election district," Judgment, Conclusion of Law ¶168 (emphasis added), this Court also acknowledged that "any such considerations 'must' be 'in conformity with the State Constitution." Judgment, Conclusion of Law ¶ 142 (quoting *Stephenson I,* 355 N.C. at 371, 562 S.E.2d at 390). This Court additionally instructed that "no effort may be made to preserve the cores of invalidated 2017 districts." Judgment, Conclusion of Law ¶ 170 (citing *Covington,* 283 F. Supp. 3d at 431-32). However, the General Assembly failed to heed this Court's words of caution related to core retention, and

construed the criterion of incumbency protection as an unyielding mandate. This choice was criticized by members and the public alike during the 2017 process, *see* Judgment, Finding of Fact ¶ 39, and in the legislative process currently at issue. *See, e.g.* Leg. Defs.' Br. at 8 (noting that Sens. Marcus and McKissick expressed concern about starting with Chen Set 2), Transcript of Sept. 13, 2019 House Redistricting Committee at 32 (public comment noting that legislature's effort to un-pair incumbents seemed to result in less compact district that appear to be partisan gerrymanders). Through their nearly exclusive focus on incumbency protection, the General Assembly has elevated the security of incumbents elected under unconstitutional plans over the true goal of the remedial process – crafting districts that correct the extreme partisan favoritism held unconstitutional by this Court.

i. The Senate Process

The Senate began its map-drawing process by baking in at least some of the unconstitutional effects of the partisan gerrymander when it decided to select its "base maps" from Dr. Chen's second set of simulations, where the computer producing the maps was instructed to avoid pairing the incumbents holding office at the time each of the challenged districts were drawn. Judgment, Finding of Fact ¶ 116. Despite the "random" selection of the base map for each county grouping, this starting-point was a problematic choice. Dr. Chen noted in his report that he "initially ignored this portion of the 2017 Adopted Criteria because the intentional protection of incumbent Senators during the redistricting process could cause indirect partisan consequences." Chen Report at 73. As this Court noted when discussing its interpretation of the 2017 legislature's incumbency protection criteria, "[a]t the time of the 2017 redistricting, Republicans held supermajorities in both chambers of the General Assembly. Hence, seeking to enhance the reelection chances of every incumbent, Democrat and Republican alike, would have been a means

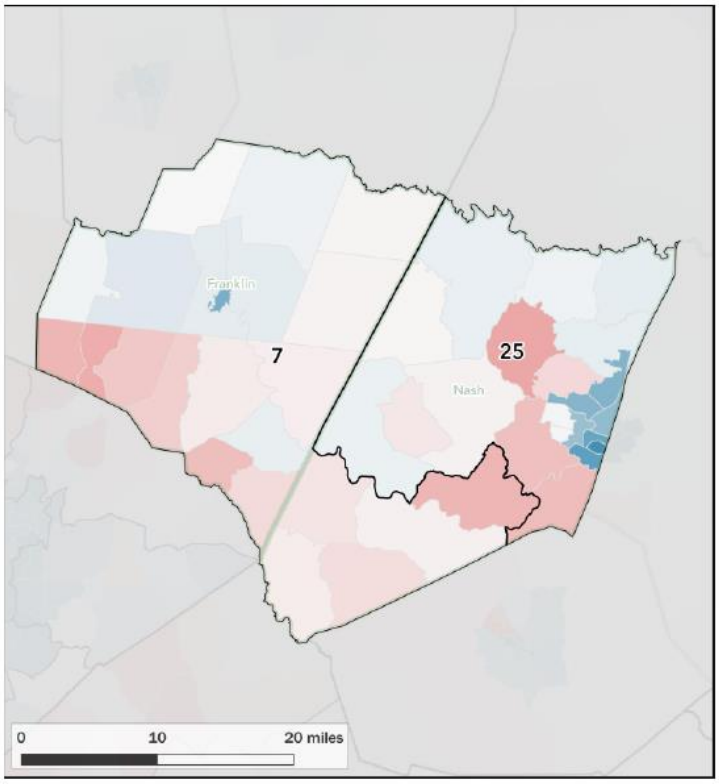
of seeking to lock-in the Republican supermajorities." Findings of Fact ¶ 114. *See also* Chen Report at 73 ("an attempt to protect all incumbents would, in general, encourage the drawing of a plan with districts somewhat similar to the previous districts from which the incumbents had been previously elected, thus indirectly distorting the partisan distribution of voters across districts"). Therefore, even in county groups where the legislature did not endeavor to alter the selected base map, the politically motivated strategy of the 2017 legislature carries forward into the legislature's 2019 enactments. Further, the base maps selected by the Senate did not take into account current incumbency, and thus the committee had to make additional changes to unpair incumbents in Mecklenburg county in districts 38 and 41, which had the effect of reducing the compactness of both districts as compared to the selected base map, and resulted in an enacted version of Senate District 38 that is less compact than both its 2017 and 2011 predecessors – despite this Court's mandate that "the mapmakers *shall* make reasonable efforts to draw legislative districts in the Remedial Maps that improve the compactness of the districts when compared to districts in place prior to the 2017 Enacted Legislative Maps." Decree at 355. *Compare* Senate Consensus Nonpartisan Map – Measures of Compactness Report *with* Senate Base Map – Measures of Compactness Report, 2018 Senate Election Districts – Measures of Compactness Report, *and* Rucho Senate 2 – Measures of Compactness Report.

ii. The House Process

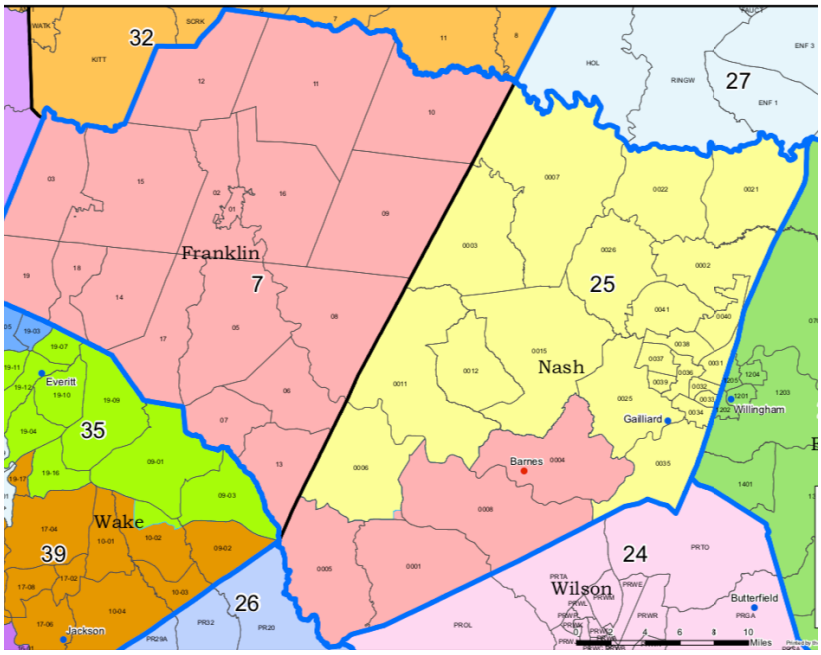
While the House elected to select its base maps from Dr. Chen's first set of simulations, which did not take incumbency into account, the incumbency protection criterion was no less rigid, and the resultant districts are no less problematic. In fact, the House adopted a *more* rigid approach with respect to incumbency protection amendments, in that "Chairpersons Lewis and Hall held to the directive that no changes to the House base maps where no members were double-bunked were

tolerated." Leg. Defs.' Br. at 16 n.5 (noting that members of the Union County delegation had endeavored to make changes, but abandoned their proposal due to the co-chairs' directive). Several of the House maps that resulted from the unpairing of incumbents in the randomly selected base maps demonstrate that incumbency protection was the main priority throughout this "remedial process," which resulted in less compact districts that split VTDs and preserve the cores and other characteristics of unconstitutional districts.

For example, in the Franklin-Nash Grouping, this Court found that "[t]hese district boundaries avoid grouping the more Democratic leaning and competitive VTDs on Nash County's western border in House District 7, instead stretching House District 7 into the southeast corner of Nash County to grab the heavily Republican VTDs there." Judgment, Finding of Fact ¶ 363. The court found that including any other VTD in House District 7 from Nash County would have resulted in a district less favorable to Republicans." *Id.* The second randomly selected base map eliminated the stretch identified by the Court, and included many VTDs not in the original district; however, it double-bunked incumbents, and thus needed to be altered under the House's criteria. By unpairing these incumbents, the House restored this unconstitutional stretch and split a VTD to craft a district that maintained the core shape of its invalidated predecessor. In fact, the only difference between the 2017 and 2019 iterations of these districts is that the 2019 enacted House District contains only part of, rather than all of VTD 0006.

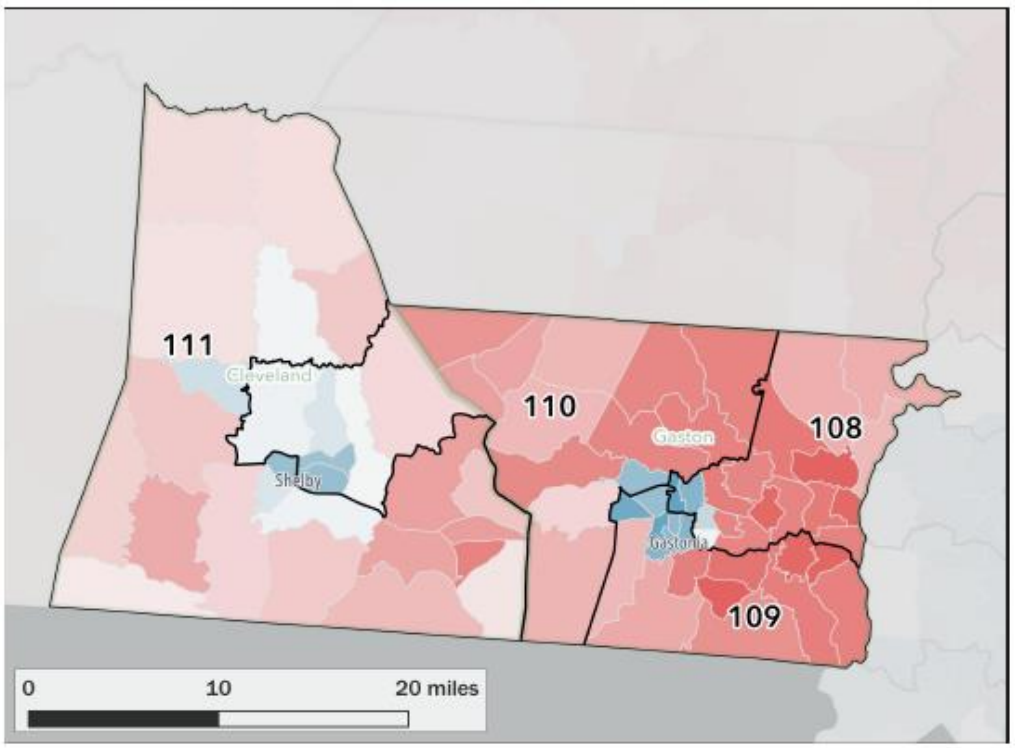


Invalidated Franklin-Nash House County Grouping, Finding of Fact ¶ 362

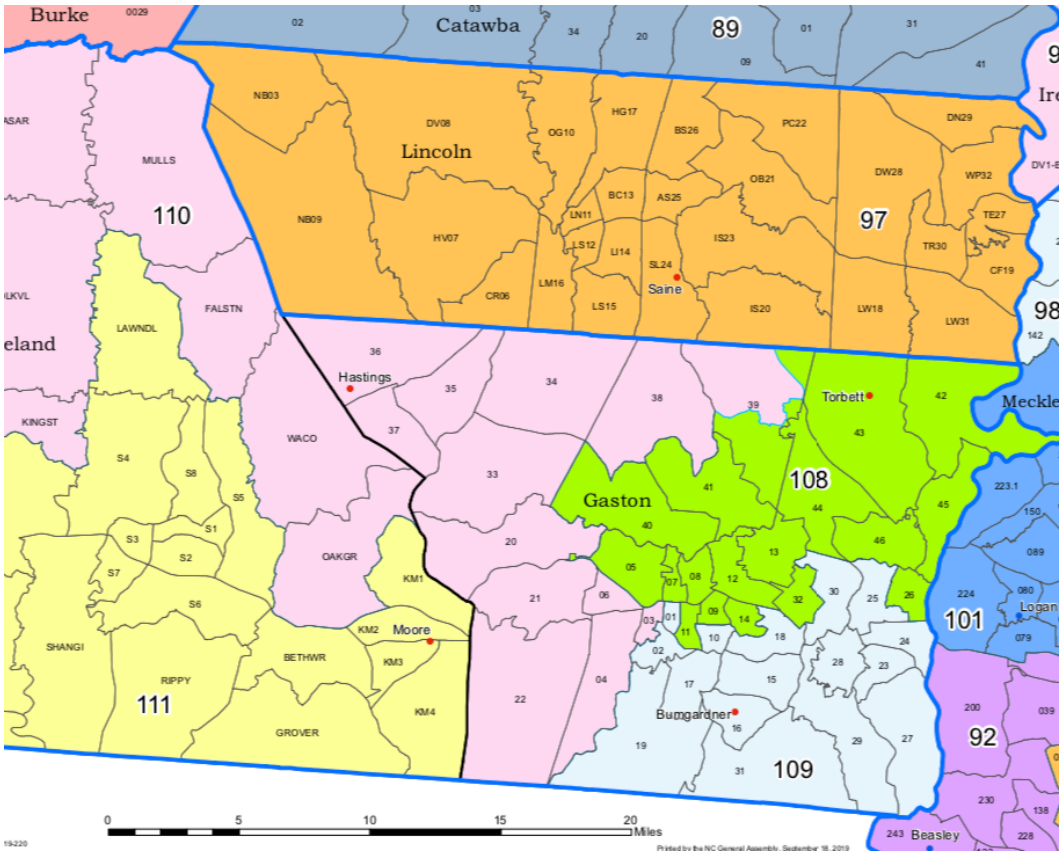


S.L. 2019-220, Franklin-Nash House County Grouping

Similarly, in the Cleveland-Gaston county grouping, this Court found the cracking of the Democratic voters in Gastonia into three House Districts to be compelling evidence that the configuration of those districts was the result of an intentional and unconstitutional partisan gerrymander. The Chen base map that was selected for this county grouping shifted House District 108 substantially such that substantial portions of Gastonia lay in only two House Districts; however, this configuration paired two incumbents and left one district without an incumbent. In endeavoring to un-bunk the incumbents in the Cleveland-Gaston grouping, the General Assembly split two VTDs and shifted House District 108 back to essentially its original position, maintaining the core of the unconstitutional district and once again splitting Gastonia into three different House Districts.



Invalidated Cleveland-Gaston House County Grouping, Finding of Fact ¶ 484



S.L. 2019-220, Cleveland-Gaston House County Grouping

While these are only two of the many egregious examples, the incumbency protection criterion had similar results in nearly all of the districts in which the House sought to unpair incumbents, as evidenced by the disagreements on the Columbus-Robeson county grouping, both in committee and on the House Floor. These examples make plain that the General Assembly's prioritization of incumbency protection, often to the detriment of other traditional redistricting criteria, had the impermissible effect of perpetuating the partisan gerrymander that this Court ordered the General Assembly to remedy.

c. Districts Were Drawn that Undermine the Ability of Voters of Color to Elect Their Candidates of Choice

Just as it did in 2017 when engaged in a remedial process following the *Covington* Court's invalidation of the 2011 state legislative districts, the General Assembly again refused to consider race data at all in drawing the 2019 maps. Amicus would be remiss to not point out that equal protection guarantees, whether federal or state, never require race-blind redistricting, and indeed, such processes can produce unintended harms for communities of color. The United States Supreme Court has long resolved that "redistricting differs from other kinds of state decision-making in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination." *Shaw v. Reno*, 509 U.S. 630, 646, 113 S. Ct. 2816, 2826 (1993). Perpetuating this misconception of the proper use of race in redistricting is harmful to the creation of maps that provide fair opportunities for voters of color. It is now beyond debate that a map-drawer can consider race without racial gerrymandering, and that without considering race, it is likely impossible to ensure that voters of color and communities of interest are not needlessly fractured.

While defendants in voting rights cases often complain about the difficulty of balancing both considerations, when redistricting is conducted in good faith, it is not a hard needle to thread.

But Amicus would like to do more than just emphasize that important truth—that redistricting need not and should not be race-blind. More specifically, Amicus urges the Court to clarify the role of the BVAP cap imposed by the Court for this remedial process. The Court should also, when redrawing two districts that perpetuate the partisan gerrymandering, draw districts that do not undermine minority voting strength.

i. The Court Should Explicitly Limit the Applicability of the BVAP Cap to 2019 Redistricting.

In providing guidance for the remedial process, the Court instructed that "Legislative Defendants are bound by the BVAP threshold-estimates generated by the expert they retained in this case and are estopped from departing from those estimates, which were relied upon by Plaintiffs' experts, at this late stage of the litigation." Judgment, Conclusion of Law ¶ 171. While Amicus certainly understands the Court's motivation in acting to estop repeated racial gerrymandering, Amicus is concerned that without further explication, the legislature may, in the statewide redistricting process set to commence in 2021, cynically misinterpret the guidance of this Court that is applicable only to this 2019 remedial redistricting process. Given the myriad ways in which the legislature has violated the state and federal constitution this decade, it would be completely in line with prior practice for the same actors to say two years from now that, following this Court's guidance, they could not draw any districts with BVAPs greater than whatever threshold an expert they retained found was the threshold for minority voters to have a 50-50 chance of electing their candidate of choice. Such a misinterpretation of this Court's guidance would certainly be inconsistent with federal law and would likely have a devastating

impact on communities of interest and naturally-occurring majority-minority districts. Setting a numerical cap on the number of black voters in a district is just as suspect, from a constitutional perspective, as refusing to draw a district with less than 50% or 55% BVAP. *See Covington,* 316 F.R.D. at 129 ("a legislature's 'policy of prioritizing mechanical racial targets above all other districting criteria . . .' provides particularly strong evidence of racial predominance.") (quoting *Ala. Legis. Black Caucus v. Alabama,* 135 S. Ct. 1257, 1267 (2015)). It would likely entice the legislature to crack communities of color left and right. And that is certainly not this Court's intention. Explicit clarification that the legislature should not read the Court's estoppel directive for this remedial proceeding as applicable or controlling in future redistricting cycles would help to avoid such machinations.

Beyond that, Amicus would also like to highlight for the Court two districts in particular that, as drawn in the enacted 2019 plans, would likely be detrimental to the ability of voters of color to continue electing their candidates of choice.

ii. House District 47

In the House map, the changes made in the Robeson-Columbus-Pender Grouping were the subject of vigorous debate. Districts in this grouping were substantially changed for the purpose of unpairing incumbents, likely as an attempt to perpetuate the partisan gerrymander. Thus, districts in this grouping will need to be redrawn. In making those extensive changes, the House failed to take into consideration the impact on a district that currently elects the only Lumbee member of the North Carolina General Assembly. The chart below indicates the black voting age population and the American-Indian voting age population in House Districts 46 and 47 (both of which are in Robeson County, in part or whole) in the districts used in the 2018 election:

2018 District	Black VAP	American-Indian VAP
46 – B. Jones	24.71%	15.30%

47 – C. Graham	25.84%	47.25%

The next chart shows the black voting age population and the American-Indian voting age population in House Districts 46 and 47 in the 2019 enacted House map:

2019 District	Black VAP	American-Indian VAP
46	28.21%	24.18%
47	23.41%	38.77%

As these data show, the American-Indian population in Robeson County is now significantly cracked between those two districts, and in the district where American-Indian voters were electing their candidate of choice, their voting power is significantly diminished (down by nearly 10%). Robeson County was formerly covered by Section 5 of the Voting Rights Act. Although Section 5 no longer applies because the coverage formula was invalidated in 2013, *Shelby County v. Holder*, 570 U.S. 529, 557 (2013), nothing in federal law prohibits a jurisdiction from willingly implementing a non-retrogression standard—ensuring that no changes are made to a district that would diminish the ability of voters of color to continue electing their preferred candidate—so long as race does not predominate in the construction of districts designed to avoid retrogression. This Court should be careful not to put its stamp of approval on a district that Amicus believes would almost certainly have drawn an objection from the United States Department of Justice for diminishing the ability of American-Indian voters to elect their candidates of choice.

Moreover, neither Dr. Lewis nor any other expert presented at trial in this case examined American-Indian voting patterns in Robeson County or that House county grouping, creating an even more unjustified risk to the voting strength of those voters by drawing a district that so

drastically lowers that group's percentage of the voting age population in the district.[4] If black and American-Indian voters are not voting cohesively, and there is no evidence in the record on this,[5] the ability of American-Indian voters—in particular, members of the Lumbee tribe—to elect their candidate of choice is imperiled.

iii. Senate District 32

Likewise, the 2019 enacted version of Senate District 32 dramatically lowers the black voting age population in that district. In the district in place during the 2018 election, the BVAP was 39.18%. Despite Dr. Lewis' evidence that black voters would need to constitute 29% of the voting population in order to "have an even chance of winning in a hypothetical election in which party and ethnicity are both drivers of candidate preference," the enacted map has drawn the district with only 25.50% BVAP.[6] Even more troubling, apparently in a recognition that the BVAP of this district was too low, Senate leadership considered proposed changes to unite cities and towns that, upon information and belief, would have increased the BVAP. *See* Transcript of Sept. 13, 2019

[4] In post-trial briefing, Dr. Handley did analyze both American-Indian (termed "Native American" in her report) and black voting patterns in Robeson County, but she did so using a bivariate, not multivariate analysis. That is, she may not have been as concerned about bloc voting because she combined black and white voters into one category when analyzing support for American-Indian-preferred candidates. Amicus respectfully suggests that this is not sufficient data to warrant a conclusion that American-Indian voters in Robeson County will not be harmed by the cracking of their population between two districts. Moreover, the Court should not mistake the changes made to District 46 as ones that are likely to create new opportunities for voters of color. The incumbent is a white Republican and upon review of reconstituted election results from recent statewide races, the district will still perform overwhelmingly for Republican voters.

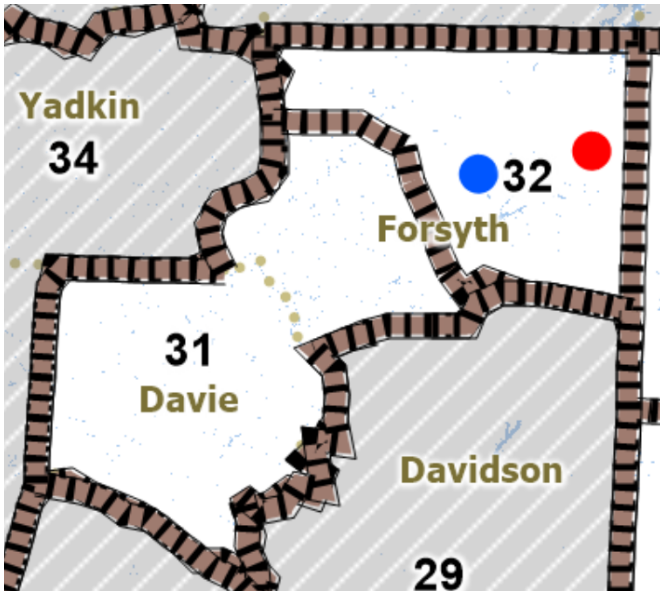
[5] Again, the type of analysis performed by Dr. Handley does not offer information on the level to which black and American Indian voters vote cohesively.

[6] In Plaintiffs' Brief Regarding the Voting Rights Act, Plaintiffs offer the additional expert analysis of Dr. Lisa Handley on the minimum BVAP necessary for black voters in the Davie and Forsyth Senate group to continue electing their preferred candidate. Without offering any critique of Dr. Handley's analysis, Amicus would simply note that no endogenous elections are examined, that the BVAP of enacted Senate District 32 is substantially lower than Dr. Handley found would be necessary for black voters to elect their candidate of choice in two 2016 general elections, is lower than she found would be necessary for black voters to elect their candidate of choice in one 2016 primary election, and is barely above the BVAP she found necessary for black voters to elect their candidates of choice in two 2012 general elections. Handley Report, Table 17. Respectfully, while black voters should not be packed and their voices and votes diminished in that manner, neither should the legislature or this Court engage in a game of redistricting limbo—how low can the BVAP go and still elect the black-preferred candidate?

Senate Committee on Redistricting and Elections at 33-35. The leadership could not reach a bipartisan consensus on these changes, and voters of color ultimately paid the price. *Id.*

Now, of course, with incumbency advantage, Sen. Paul Lowe may continue to be elected in the district, but voting rights concerns are not focused solely on the election of black candidates, but rather on ensuring that voters of color have the ability to elect their candidate of choice. This district configuration puts that ability at unjustifiable risk, and this Court should not endorse it.

Even worse, it is easily demonstrable that such a configuration is not necessary. By not making incumbency protection the one criterion that could not give, *see supra* III.b., one can draw a map from scratch that fully remedies the partisan gerrymandering and has no unintended consequences on minority voting strength. The following map was drawn without racial or partisan data, and simply splits Forsyth County in a sensible and compact manner.



After it was drawn, the racial demographics were checked, and the BVAP was 33.89%—almost 10 percentage points higher than in the enacted plan. Additionally, when looking at political data post-drawing, one notes that this fairly drawn grouping, drawn not to protect

incumbents, produces one likely Democratic district and one competitive district, which, should the grouping be redrawn this way, would aid in remedying the persistent partisan bias in the Senate plan. Amicus does not offer this configuration for the Court's consideration, *per se*, but simply to note that an unwavering commitment to incumbent protection had an adverse impact on black voters in Forsyth County in the 2019 Senate map and has only perpetuated the constitutional violation at issue in this litigation.

d. <u>The county grouping process while not challenged here, bakes in partisan bias, is not consistent with the state constitutional Whole County Provision, and is not consistent with other constitutional provisions that have been determined to guard against partisan gerrymandering</u>

This Court has not been presented with a challenge to the county grouping in effect now, and thus did not consider the effect those groupings may have in baking in partisan bias in the state legislative maps.[7] Nonetheless, Amicus notes that this issue may need to be resolved in future litigation, likely after the next redistricting cycle. One state constitutional provision cannot violate another, but the interpretation of each must be harmonized to avoid conflict. *See Stephenson I,* 355 N.C. at 379, 562 S.E. 2d at 394. This Court has held that the state's equal protection, free speech, and free elections constitutional clauses all prohibit partisan gerrymandering. Accordingly, the Whole County Provision in the state's constitution must, consistent with its first interpretation in *Stephenson*, be interpreted as requiring strict compliance with respect for county lines, thus avoiding any constitutional conflict.

The North Carolina Supreme Court in *Stephenson I* emphasized "the importance of counties as political subdivisions of the State of North Carolina." 355 N.C. at 364, 562 S.E. 2d at

[7] In his report at the trial stage of this litigation, Dr. Chen noted the partisan skew observed in his 1,000 simulations that did not attempt to protect incumbents may "result from the county groupings that the General Assembly created under the 2017 House Plan, as my simulation algorithm simply follows the same county grouping boundaries used in the enacted plan." Chen Report at 36.

385. In this State, counties "serve as the State's agents in administering statewide programs, while also functioning as local governments that devise rules and provide essential services to their citizens." *Id*. at 365. Additionally, "[c]ounties play a vital role in many areas touching the everyday lives of North Carolinians." *Id*. Finally, the Court stressed the "long-standing tradition of respecting county lines during the redistricting process in this State," a tradition that dates back to North Carolina's first Constitution in 1776. *Id*.

The Supreme Court later upheld a trial court's invalidation of remedial redistricting plans that failed to "attain 'strict compliance with the legal requirements set forth' in *Stephenson I* and are unconstitutional." *Stephenson II*, 357 N.C. at 314, 582 S.E.2d at 254 (quoting *Stephenson I*, 355 N.C. at 384, 562 S.E.2d at 398). The most crucial aspect of strict compliance with the *Stephenson* criteria is that counties, rather than groupings, are the dispositive measure of strict compliance. The plain text of the *Stephenson* decisions, along with the Court's later decision in *Pender County v. Bartlett*, 361 N.C. 491, 649 S.E.2d 364 (2007), aff'd, *Bartlett v. Strickland*, 556 U.S. 1 (2009), support this point. Strict compliance with the *Stephenson* decisions is correctly measured by the number of county splits, rather than groupings, in a redistricting plan. In Pender County, the state supreme court invalidated three districts in a two-county grouping for unnecessarily crossing county lines. If maximizing two-county groupings were the ultimate measure of compliance with the state constitution, the two-county grouping should have been immune, as the General Assembly could not have improved on that. Instead, however, the North Carolina high court read the *Stephenson* decisions to mean that counties should not be split unless absolutely necessary, or, the plain language of the Whole County Provision must be enforced to the "maximum extent possible." *Id.* (quoting *Stephenson I*, 355 N.C. at 374, 562 S.E.2d at 391). To the extent the Supreme Court's approval of the different country groupings at issue in the 2011

plans and litigated in *Dickson v. Rucho* creates a constitutional conflict that is not presented by the *Stephenson* and *Pender County* cases, 367 N.C. 542, 572-74, 766 S.E.2d 238, 258-60 (2014), the Court will have to take care, when redistricting arrives at its doorstep again, to adhere to an interpretation of the Whole County Provision consistent with the guarantees provided by the state constitutional equal protection, free speech, and free election clauses.

IV. Conclusion

For the foregoing reasons, Amicus Democracy NC respectfully asks that this Court find that both the Senate and House remedial plans fail to satisfy this Court's directives and order the referee to begin drawing state legislative maps that fully cure the constitutional infirmities in the maps, without causing harm to voters of color, and order those maps into effect for the 2020 elections.

Respectfully submitted this the 27th day of September, 2019.

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