No. COA24-1109

No._____ TENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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BEVERLEY BARD, RICHARD LEVY SUSAN KING COPE, ALLEN WELLONS, LINDA MINOR, THOMAS W. ROSS, SR., MARIE GORDON, SARAH KATHERINE SCHULTZ, JOSEPH J. COCCIA, TIMOTHY S. EMERY, AND JAMES G. ROWE, Plaintiffs,	)	
v.	)	From Wake County File No. 24CV003534-910
NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as chair of the North Carolina State Board of Elections, JEFF CARMON III, in his official capacity as Secretary of the North Carolina State Board of Elections, STACY "FOUR" EGGERS,in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O'DUFFY MILLEN, in her official capacity as a member of the North Carolina State Board of Elections, KEVEN N. LEWIS, in his official capacity as a member of the North Carolina State Board of Elections, PHILIP E. BERGER, in his official capacity as President *Pro Tem* of the North Carolina Senate, and TIMOTHY K. MOORE in his official capacity as Speaker of the North Carolina house of representatives. Defendants.	)	

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PRINTED RECORD ON APPEAL

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INDEX

STATEMENT OF ORGANIZATION OF TRIAL COURT

Plaintiffs-Appellants appeal from Orders of the Trial Court dismissing claims as to Legislative Defendants-Appellees on 28 June 2024 and as to the remaining State Board of Election Defendants-Appellees on 22 July 2024. A three-judge panel so designated by the Honorable Chief Justice Paul Newby consisting of the Honorable Jeffery B. Foster, the Honorable Angela B. Puckett, and the Honorable C. Ashley Gore heard argument as to Legislative Defendants-Appellees' Motion to Dismiss at a Special Superior Court Civil Session of Wake County at Campbell Law School on 13 June 2024. Plaintiffs-Appellants filed and served written notice of appeal on 19 July 2024 and an amended notice of appeal on 13 August 2024. Legislative Defendants-Appellees filed and served a written notice of cross-appeal on 20 August 2024.

The record on appeal was filed in the Court of Appeals on _____.

STATEMENT OF JURISDICTION

This action commenced by the filing of a complaint and issuance of summons on 31 January 2024. The parties dispute whether the Trial Court, a three-judge panel so designated by the Honorable Chief Justice Paul Newby, had personal and subject-matter jurisdiction.

24CV003534-910

NORTH CAROLINA

WAKE COUNTY

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24-CVS-_____

BEVERLY BARD, RICHARD LEVY, SUSAN KING COPE, ALLEN WELLONS, LINDA MINOR, THOMAS W. ROSS, SR., MARIE GORDON, SARAH KATHERINE SCHULTZ, JOSEPH J. COCCIA, TIMOTHY S. EMRY, and JAMES G. ROWE,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, JEFF CARMON III in his official capacity as Secretary of the North Carolina State Board of Elections, STACY "FOUR" EGGERS in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O'DUFFY MILLEN in her official capacity as a member of the North Carolina State Board of Elections, KEVIN N. LEWIS in his official capacity as a Member of the North Carolina State Board of Elections, PHILLIP E. BERGER in his official capacity as President Pro Tem of the North Carolina Senate, and TIMOTHY K. MOORE in his official capacity as Speaker of the North Carolina House of Representatives.

Defendants.

COMPLAINT
(Three-Judge Panel pursuant to G.S. 1-267.1)

Plaintiffs, complaining of Defendants, allege the following:

INTRODUCTION

This case presents a major question of first impression for the courts of this State impacting the very foundation of our constitutional Republic's underlying principles of democracy. The issues presented deal with elections, the vehicle by which the citizens of the State, authorized to vote in those discrete elections, choose their officials to administer the government created by the people through their state constitution and the U.S. Constitution. As our Supreme Court has made clear, "[t]he people are entitled to have their elections conducted honestly and in accordance with the requirements of the law. To require less would result in a mockery of the democratic processes for nominating and electing public officials." *Ponder v. Joslin*, 262 N.C. 496, 500, 138 S.E.2d 143, 147 (1964).

In Article I of the North Carolina Constitution, the "Declaration of Rights," elections are specifically recognized as bestowing upon the citizens of the state certain enumerated rights: the right to "frequent" elections is protected in Section 9 and the right to "free" elections is protected in Section 10. If the citizens of North Carolina are guaranteed by their State Constitution the right to "frequent" and "free" elections, then surely the Constitution guarantees them the right to "fair" elections. After all, what good are "frequent" elections if those elections are not "fair?" Likewise, what good are "free" elections if those elections are not "fair?"

Plaintiffs, individually, and on behalf of all the citizens of North Carolina contend that they are guaranteed "fair" elections or else the other constitutional

guarantees are of little or no value and that the elections in specific districts as set forth below violate their constitutional right to fair elections.

Article I, Section 36 of the North Carolina Constitution provides "*Other rights of the people,*" stating that "[t]he enumeration of rights in this Article shall not be construed to impair or deny others retained by the people." This guarantee first adopted by North Carolina's 1868 Constitution is modeled on the Ninth Amendment in the U.S. Bill of Rights.

Therefore, Plaintiffs contend that the right to "fair" elections is an unenumerated right reserved by the people and fundamental to the very concept of elections and the underpinnings of democracy. Without "fair" elections, the framework of our government would rest not on principle and the will of the people, but instead, on partisan politics, exercised not by political parties or particular entities, but by the heavy hand of government itself, in this case the General Assembly. By intentionally manipulating the electoral odds and stacking the electorate to give an unfair electoral advantage to a particular political party and its candidates in selected districts, the General Assembly has attempted to preordain the outcome of elections in certain districts as set out below.

The Plaintiffs seek a declaration of their constitutional right to "fair" elections in North Carolina and a determination that the legislative apportionment of citizens into districts for the election of Congress, the North Carolina Senate, and the North Carolina House as alleged below violate the citizens' right to "fair" elections.

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to Articles 26 and 26A of Chapter 1 of the North Carolina General Statutes.

2. Pursuant to N.C. Gen. Stat. § 1-81.1, the exclusive venue for this action is the Wake County Superior Court.

3. A three-judge court must convene in this matter pursuant to N.C. Gen. Stat. § 1-267.1 because this action challenges the validity of the reapportionment acts in SB 757, SB758 and HB898 as enacted by General Assembly.

PARTIES

4. Beverly Bard is a citizen and resident of Guilford County, North Carolina. In 2022, she was a resident of Congressional District 6. She is registered to vote as a member of the Democratic Party. She voted in the 2022 elections, including the congressional race in NC 6. With the reapportionment done by the General Assembly in SB 757, she remains a registered voter in NC 6 although the District has been significantly altered.

5. Richard Levy is a citizen and resident of Guilford County, North Carolina. In 2022, he was a resident of Congressional District 6 (NC 6). He is registered to vote as Unaffiliated. He voted in the 2022 elections, including the congressional race in NC 6. With the reapportionment enacted by the General Assembly in SB 757, he is now removed from NC 6 and apportioned to vote in Congressional District 5 (NC 5) although he has not changed his residency.

6. Susan King Cope is a citizen and resident of Wake County, North Carolina. In 2022, she was a resident of Congressional District 13 (NC 13). Ms. King Cope is registered to vote as a member of the Democratic Party. She voted in the 2022 elections, including the congressional race in NC 13. With the reapportionment enacted by the General Assembly in SB 757, Ms. King Cope is now removed from NC 13 and apportioned to vote in Congressional District 4 (NC 4) although she has not changed her residency.

7. Allen H. Wellons is a citizen and resident of Johnston County, North Carolina. In 2022, he was a resident of Congressional District 13. Mr. Wellons is registered to vote as a member of the Democratic Party. He voted in the 2022 elections, including the congressional race in NC 13. With the reapportionment enacted by the General Assembly in SB 757, Mr. Wellons remains a registered voter in NC 13 although the District has been significantly altered.

8. Linda Minor is a citizen and resident of Mecklenburg County, North Carolina. In 2022, she was a resident of Congressional District 14 (NC 14). She is registered to vote as a member of the Democratic Party. She voted in the 2022 elections, including the congressional race in NC 14. With the reapportionment enacted by the General Assembly in SB 757, she is now removed from NC 14 and apportioned to vote in Congressional District 12 (NC 12) although she has not changed her residency.

9. Thomas W. Ross, Sr. is a citizen and resident of Mecklenburg County, North Carolina. In 2022, he was a resident of Congressional District 12. Mr. Ross is

registered to vote as a member of the Democratic Party. He voted in the 2022 elections, including the congressional race in NC 12. With the reapportionment enacted by the General Assembly in SB 757, Mr. Ross is now a voter in NC 14 although he still resides in the same precinct as in 2022.

10. Marie L. Gordon, is a citizen and resident of New Hanover County, North Carolina. In 2022, she was a resident of State Senate District 7 (SD 7). She is registered to vote as a member of the Democratic Party. She voted in the 2022 elections, including the state senatorial race in SD 7. With the reapportionment done by the General Assembly in SB 758, she is now removed from SD 7 and apportioned to vote in State Senate District 8 (SD 8) although she has not changed her residency.

11. Sarah Katherine Schultz is a citizen and resident of New Hanover County, North Carolina. In 2022, she was a resident of State Senate District 7 (SD 7). She is registered to vote as a member of the Democratic Party. She voted in the 2022 elections, including the state senatorial race in SD 7. With the reapportionment enacted by the General Assembly in SB 758, she remains apportioned to vote in SD 7 although the District has been significantly altered.

12. Joseph J. Coccia is a citizen and resident of Mecklenburg County, North Carolina. In 2022, he was a resident of State House District 105 (HD105). He is registered to vote as a member of the Democratic Party. He voted in the 2022 elections, including the State House race in HD 105. With the reapportionment

enacted by the General Assembly in SB 898, he remains apportioned to vote in HD 105 although the District has been significantly altered.

13. Timothy S. Emry is a citizen and resident of Mecklenburg County, North Carolina. In 2022, he was a resident of State House District 105 (HD 105). He is registered to vote as a member of the Democratic Party. He voted in the 2022 elections, including the state House race in HD 105. With the reapportionment enacted by the General Assembly in HB 898, he is now removed from HD 105 and apportioned to vote in State House District 103 (HD 103) although he has not changed his residency.

14. James G. Rowe, is a citizen and resident of Buncombe County, N.C. and is a registered voter in Congressional District 11 (NC 11) for the 2024 election and has been registered to vote in North Carolina since 1972. Mr. Rowe is registered to vote as an Unaffiliated voter and has over the years voted for both Republican and Democratic candidates for office. Candidates elected in districts where he is not eligible to vote still vote on issues of concern to him and issues that affect him. He believes that a fair election is a fundamental right of the citizens of North Carolina.

15. Defendant North Carolina State Board of Elections (NCSBE) is an agency of the State of North Carolina statutorily charged with administering the election laws of the State.

16. Defendant Allen Hirsch is the Chair of the NCSBE and is named in his official capacity only.

17. Defendant Jeff Carmon is the Secretary of the NCSBE and is named in his official capacity only.

18. Defendant Stacy "Four" Eggers IV is a Board member of the NCSBE and is named in his official capacity only.

19. Defendant Siobhan O'Duffy Millen is a Board member of the NCSBE and is named in her official capacity only.

20. Defendant Kevin N. Lewis is a Board member of the NCSBE and is named in his official capacity only.

21. Defendant Philip E. Berger is the President Pro Tem of the North Carolina Senate and is named in his official capacity only.

22. Defendant Timothy K. Moore is the Speaker of the North Carolina House of Representatives and is named in his official capacity only.

FACTUAL ALLEGATIONS

23. In apportioning citizens in congressional and legislative districts, the General Assembly has previously set forth criteria that will be applied in the process.

24. In October 2023, the General Assembly of North Carolina submitted a "2023 Congressional Plan Criteria" (*see* Exhibit A) and a "2023 Senate Plan Criteria" (*see* Exhibit B). In those plans, the General Assembly included criteria for apportioning voters that states in part: "Political Considerations. Politics and political considerations are inseparable from districting and apportionment. (Citation omitted). The General Assembly may consider partisan advantage and

incumbency protection in the application of its discretionary redistricting decisions . . . *but it must do so in conformity with the State Constitution.*" Defendants did, in fact, consider partisan advantage and incumbency protection in the apportioning of NC 6, NC 13, NC 14, SD 7 and HD 105, as well as other districts, but in violation of the North Carolina Constitution as alleged herein. Upon information and belief, the House Redistricting Committee never adopted criteria in 2023, unlike in past redistricting efforts. Instead, in August of 2023, the Redistricting Chair instructed their taxpayer-funded expert to draw lines in secret using "guidelines." *See* Exhibit C. No one saw these guidelines or the resulting map until it was introduced and passed in October of 2023.

25. In complying with the required apportionment of citizens to various districts, the governmental entities performing this function in the 21st century have extraordinary technological and data resources to rely on in apportioning those citizens into discrete districts for discrete elections.

26. This technology and data provide those governmental entities with the ability to pick and choose which pools of voters, usually defined by precincts or by census blocks, are apportioned into each distinct district.

27. Each pool of voters has substantial information associated with it including party registration, race, ethnicity, and the voting tendencies for that precinct. This information fully provides those governmental entities in control of the apportionment, the capacity to determine to a reasonable degree of certainty,

the ultimate voting tendency of each voting block in the form of precincts in the newly apportioned district.

28. By using this information, the governmental entities in control of the apportionment can effectively predict to a substantial degree the election results for future elections within each newly apportioned district and can predict to a degree certain the election results in the most immediate election.

29. In the adoption of SB 757 "Congressional Districts 2023," the members of the General Assembly controlling the apportionment process used technology and data in such a way as to reapportion voters so as to create an unfair advantage for their political party in the ensuing elections in those districts.

30. While the previous redistricting process was noted for its transparency in the apportionment and the creation of congressional districts, State Senate districts, and State House districts, the process utilized by the Defendants to apportion citizens into electoral districts in 2023 was largely void of transparency.

31. Upon information and belief, the apportionment conducted in 2023 for the 2024 congressional and legislative elections was conducted in secrecy by representatives of Defendants Berger and Moore in consultation with a redistricting consultant from Ohio. Neither the public nor representatives of the minority party leadership were allowed to participate in the apportionment process or observe the process determining which citizens in which precincts or census blocks would be aggregated together to form electoral districts.

32. The 2023 information on apportionment showing the congressional and legislative districts and the underlying population data was released to the public by Defendants Berger and Moore or their agents on October 18, 2023. There were three limited public hearings over the course of the next few weeks and several technical amendments to the map were adopted shortly thereafter by the General Assembly. However, 95 percent of the census blocks utilized in the preparation of the map remained as originally created by the secret process with only minor technical changes taking place prior to passage.

33. Upon information and belief, for at least some of the congressional districts created, in particular NC 6, NC 13 and NC 14, it was the intent of Defendants Berger and Moore and their allies and agents to take a substantial numbers of voters likely to support their party's candidates and move them into the above referenced districts; take certain voters likely to not support their party's candidates out of their district and move them into districts where their votes would be negated or minimized so as to not be determinative in deciding the outcome of the election; and to generally reapportion the voters in NC 6, NC 13, NC 14, SD 7 and HD 105 in such a way as to turn the districts from competitive to favoring one political party's candidates, in this case the Republican Party.

North Carolina Congressional District 6

34. In the apportionment of congressional districts to be used in the 2022 elections as ordered by a three-judge panel of the Wake County Superior Court, Congressional District 6 (NC 6) consisted of all of Guilford County, Rockingham

County, most of Caswell County other than a small part in the northeast portion of that county, and a portion of Forsyth County. *See* Exhibit D1-D2.[1]

35. As such, NC 6 in the 2022 congressional map met the federal constitutional mandate for equal population, was contiguous, and was compact.

36. In the 2022 congressional election in NC 6, Kathy Manning, a resident of Guilford County and the Democratic nominee for the office won with a total vote of 139,553. The Republican nominee Christian Castelli received 116,635 votes and the Libertarian candidate, Thomas Watercott, received 2,810 votes.

37. In the county breakdown of the votes, Manning received the vast majority of her margin of victory in Guilford County: Manning 110,418; Castelli 74,501; and Watercott 1986.

38. In the other counties within NC 6, the results were as follows: In Rockingham County: Castelli 21,654; Manning 10,482; and Watercott 391. In Caswell County: Castelli 4724; Manning 3,075; and Watercott 74. In the portion of Forsyth County included in NC 6: Castelli 15,756; Manning 15,578 and Watercott 359.

39. In the North Carolina Supreme Court's April 28, 2023 decision in *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393 (2023), the North Carolina General Assembly was authorized to reapportion the voters to form congressional election

[1] The maps exhibited herein were generated using the NCGA Redistricting website (see "2023 Redistricting" resources for current maps and "District Plans Enacted or Ordered by the Court" for the 2022 maps). Each district map from 2022 and 2024 includes the clear outline of the district ([Exhibit]-1) and a highlighted version of the same district ([Exhibit]-2).

districts for subsequent elections. The Court did not mandate different districts but simply authorized the General Assembly to do so if it chose to do so.

40. In October 2023, the General Assembly enacted a new reapportionment plan, SB 757.

41. In the new reapportionment plan, voters in substantial portions of NC 6 as constituted in the 2022 districts were intentionally removed from NC 6 including all of Rockingham County and all of the portion previously included from Caswell County. In addition, the General Assembly removed substantial portions of Guilford County from NC 6, moving them to newly reapportioned congressional districts 5 and 9.

42. In order to comply with the federal constitutional requirement of "one person, one vote" after having removed voters from NC 6, the General Assembly added voters to NC 6 in such a way as to increase the vote totals for the Republican nominee for Congress by: adding all of Davie County; all of Davidson County; all of Rowan County; part of Cabarrus County; and changing the portion of Forsyth County that was a part of NC 6. *See* Exhibit E1-E2.

43. Both the registration figures in these additions to NC 6 and voting patterns in those additions demonstrate the intentional stacking of Republican leaning voters in the newly reapportioned NC 6 so as to unfairly skew the election results for Congress to favor the Republican nominee. By way of example and using vote totals for the presidential election in 2020, the voting pattern of voters in NC 6

in 2022 versus the voting pattern of voters in the newly apportioned NC 6 show as follows:

(a) In the 2020 election for President, voters in the 2022 NC 6 voted for Biden: 217,981 to Trump: 169,348.

(b) In the 2024 version of NC 6, voters in the 2020 election for President voted Biden: 157,275 to Trump: 219,142.

44. As a result of the addition and removal of precincts and census blocks of voters apportioning NC 6, the Defendants intentionally changed the voter composition of NC 6 for the purpose of unfairly giving the Republican candidate for Congress in the 2024 election a significant advantage in winning the election over the Democratic nominee.

45. As the result of the apportionment of voters in NC 6, upon the close of filing for congressional office, the Democratic incumbent for Congress Kathy Manning declined to file for the office and, in fact, no Democratic candidate filed for the office, nor were candidates offered by the Libertarian Party or the Green Party. On the other hand, six Republicans filed in the primary for NC 6, thus guaranteeing no choice for voters regardless of their political party in the general election and guaranteeing that a Republican will win the congressional seat in 2024.

46. As the direct result of the apportionment of NC 6, that Congressional District went from a competitive election district to a non-competitive district, guaranteeing a general election win for the nominee of the Republican Party and

thus depriving the voters of NC 6 of a fair election in violation of their constitutional right to fair elections.

North Carolina Congressional District 13

47. In the apportionment of congressional districts to be used in the 2022 elections as ordered by a three-judge panel of the Wake County Superior Court, Congressional District 13 (NC 13) was comprised of voters in all of Johnston County; the southern portion of Wake County; the eastern portion of Harnett County; and the western portion of Wayne County. *See* Exhibit F1-F2.

48. As such, NC 13 in the 2022 congressional map met the federal constitutional mandate for equal population, was contiguous, and was compact.

49. In the 2022 congressional election in NC 13, Wiley Nickel, a resident of Wake County and the Democratic nominee for the office won the general election with a total vote of 143,090. The Republican nominee, Bo Hines, received 134,256 votes.

50. In the counties in NC 13, the results were as follows: In Johnston County: Hines 46,215; Nickel 29,170; in Wayne County: Hines 12,378; Nickel 8,736; in Harnett County: Hines 16,389; Nickel 8,522; and in Wake County: Nickel 96,662; Hines 59,274.

51. In the North Carolina Supreme Court's April 28, 2023 decision in *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393, the North Carolina General Assembly was authorized to reapportion the voters to form congressional election districts for

subsequent elections. The Court did not mandate different districts but simply authorized the General Assembly to do so if it chose to do so.

52. In October 2023, the General Assembly enacted a new reapportionment plan SB 757.

53. In the new reapportionment plan, voters in substantial portions of NC 13 as constituted in the 2022 district were intentionally removed from NC 13, including approximately half of the portion in Wake County, and added to a newly apportioned Congressional District 4 (NC 4), which included Durham and Orange Counties. In addition, voters in part of Wayne County were removed from NC 13.

54. In order to comply with the federal constitutional requirement of "one person, one vote" after removing voters from NC 13, the General Assembly added voters to NC 13 by including all of Harnett County; all of Lee County to the south; created a crescent shaped pool of voters running from southeast Wake County with a long, narrow sliver on the eastern county line of Wake County connecting it with pockets of voters in the northern portions of Wake County; added Caswell County; added Person County; added Franklin County; and added most of Granville County. *See* Exhibit G1-G2.

55. Both the registration figures in these additions and removals from the 2022 NC 13 District and the voting patterns of those voters demonstrate the intentional apportionment of Republican leaning voters into the new NC 13 so as to unfairly skew future election results for Congress to favor the Republican nominee. By way of example and using vote totals for the presidential election in 2020, the

voting pattern of voters in NC 13 in 2022 versus the voting pattern of voters in the newly apportioned NC 13 show as follows:

(a) In the 2020 election for President, voters in the 2022 NC 13 voted for Biden: 198,202 to Trump: 191,529.

(b) In the 2024 version of NC 13, voters in the 2020 election for President voted Biden: 156,867 to Trump: 224,486.

56. As a result of the addition and removal of precincts and census blocks of voters apportioning NC 13, the Defendants intentionally changed the voter composition of NC 13 for the purpose of unfairly giving the Republican candidate for Congress in the 2024 election a significant advantage in winning the election over the Democratic nominee.

57. As the result of the apportionment of voters in NC 13, upon the close of filing for congressional office, the Democratic incumbent for Congress Wiley Nickel declined to file for the office. One Democratic candidate filed for this seat, Jeremiah Frank Lee Pierce, a teacher and landscaper. No Libertarian or Green Party candidates filed. On the other hand, 14 Republicans filed for the primary election in NC 13.

58. As the direct result of the apportionment of NC 13, that Congressional District went from a competitive election district to a non-competitive district, reliably guaranteeing a general election win for the nominee of the Republican Party and depriving the voters of NC 13 of a fair election in violation of their constitutional right to fair elections.

North Carolina Congressional District 14

59. In the apportionment of congressional districts to be used in the 2022 elections as ordered by a three-judge panel of the Wake County Superior Court, Congressional District 14 (NC 14) consisted of the southern portion of Mecklenberg County and approximately two-thirds of the eastern portion of Gaston County. *See* Exhibit H1-H2.

60. As such, NC 14 in the 2022 congressional map met the federal constitutional mandate for equal population, was contiguous, and was compact.

61. In the 2022 congressional election in NC 14, Jeff Jackson, a resident of Mecklenburg County and the Democratic nominee for the office, won with a total vote of 148,738. The Republican nominee Pat Harrigan received 109,014 votes.

62. In the county breakdown of the votes, Jackson received the majority of his votes in Mecklenburg County: Jackson 124,710; Harrigan 69,363. In Gaston County the results were: Harrigan 39,651; Jackson 24,028.

63. In the North Carolina Supreme Court's April 28, 2023 decision in *Harper v. Hall,* 384 N.C. 292, 886 S.E.2d 393, the North Carolina General Assembly was authorized to reapportion the voters to form congressional election districts for subsequent elections. The Court did not mandate different districts but simply authorized the General Assembly to do so if it chose to do so.

64. In October 2023, the General Assembly enacted a new reapportionment plan SB 757.

65. In the new reapportionment plan, voters in substantial portions of NC 14 as constituted in the 2022 district were intentionally removed from NC 14, including substantial portions of Mecklenburg County, and added into Congressional District 12 and Congressional District 8.

66. In order to comply with the federal constitutional requirement for "one person, one vote" after having removed voters from NC 14, the General Assembly added voters in the northwest quadrant of Mecklenburg County; added Cleveland County; added Rutherford County; added Burke County; and added the eastern half of Polk County. *See* Exhibit I1-I2.

67. Both the registration figures in these additions and deletions to NC 14 and the voting patterns of those voters demonstrate the intentional apportionment of Republican leaning voters in the newly apportioned NC 14 so as to unfairly skew the election results for Congress in the 2024 election to favor the Republican nominee. By way of example and using vote totals for the presidential election in 2020, the voting pattern of voters in NC 14 in 2022 versus the voting pattern of voters in the newly apportioned NC 14 show as follows:

(a) In the 2020 election for President, voters in the 2022 NC 14 voted for Biden: 224,502 to Trump: 160,413.

(b) In the 2024 version of NC 14, voters in the 2020 election for President voted Biden: 157,275 to Trump: 227,359.

68. As a result of these removals and additions of precincts and census blocks of voters in NC 14, the Defendants intentionally changed the voter

composition of NC 14 for the purpose of unfairly giving the Republican candidate for Congress in the 2024 election a significant advantage in winning the election over the Democratic nominee.

69. As the result of the apportionment of voters in NC 14, upon the close of filing for congressional office, the Democratic incumbent for Congress Jeff Jackson declined to file for the office. Two Democrats filed for NC 14, Pam Genant and B.K. Maginnis. No Libertarian or Green Party candidates filed. Three Republicans filed for the office including the current Speaker of the N.C. House.

70. As the direct result of the apportionment of NC 14, that Congressional District went from a competitive election district to a non-competitive district virtually guaranteeing a general election win for the nominee of the Republican Party and depriving the voters of NC 14 of a fair election in violation of their constitutional right to fair elections.

State Senate District 7

71. In the apportionment of state senate districts to be used in the 2022 elections as ordered by a three-judge panel of the Wake County Superior Court, State Senatorial District 7 (SD 7) consisted of virtually the entire county of New Hanover excepting a small portion on the western boundary of the County. *See* Exhibit J1-J2.

72. As such, SD 7 in the 2022 State Senatorial Map met the federal and state constitutional mandates for equal population, was contiguous, was compact,

and complied with the North Carolina Constitution's "Whole County" requirement to the extent necessary.

73. In the 2022 State Senate election in SD 7, Michael Lee, a resident of New Hanover County and the Republican nominee for the office, won with a total vote of 44,908. The Democratic nominee Marcia Morgan received 43,198 votes.

74. In the North Carolina Supreme Court's April 28, 2023 decision in *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393, the North Carolina General Assembly was authorized to reapportion the voters to form state senatorial election districts for subsequent elections. The Court did not mandate different districts but simply authorized the General Assembly to do so if it chose to do so.

75. In October 2023, the General Assembly enacted a new reapportionment plan SB 758.

76. In the new reapportionment plan, voters in portions of SD 7 as constituted in the 2022 district were intentionally removed from SD 7, including substantial portions of SD 7 that were comprised of Democratic leaning voters. Those voters, many of whom were minority voters, were move into Senatorial District 8 (SD 8) comprised of Columbus County, Brunswick County, and a small portion of New Hanover County. *See* Exhibit K1-K2.

77. As the result of the apportionment of voters in SD 7, upon the close of filing for office for 2024, one Democrat, David L. Hill, and one Libertarian, John Evans, filed for SD 7. One Republican filed for the office, incumbent State Senator Mike Lee.

78. As the direct result of the apportionment of SD 7, that State Senatorial District went from a competitive, toss-up election district to a district leaning Republican for the general election, depriving the voters of SD 7 of a "fair" election in violation of their constitutional right to "fair elections."

State House District 105

79. In the apportionment of State House districts to be used in the 2022 elections as ordered by a three-judge panel of the Wake County Superior Court, State House District 105 (HD 105) consisted of a district in the southeastern corner of Mecklenburg County. *See* Exhibit L1-L2.

80. As such, HD 105 in the 2022 State House Map met the federal and state constitutional mandates for equal population, was contiguous, was compact, and complied with the North Carolina Constitution's "Whole County" requirement to the extent necessary.

81. In the 2022 State House election in HD 105, Democrat Wesley Harris won the election with 17,545 votes to his Repubican opponent Joshua Niday's 13,307.

82. In the North Carolina Supreme Court's April 28, 2023 decision in *Harper v. Hall*, 384 N.C. 292, 886 S.E.2d 393, the North Carolina General Assembly was authorized to reapportion the voters to form State House election districts for subsequent elections. The Court did not mandate different districts but simply authorized the General Assembly to do so if it chose to do so.

83. In October 2023, the General Assembly enacted a new reapportionment plan HB 898.

84. In the new reapportionment plan, voters in portions of House District 105 (HD 105) as constituted in the 2022 district, were intentionally removed from HD 105 including substantial portions of HD 105 that were comprised of Democratic leaning voters and added voters to HD 105 who were Republican leaning voters. *See* Exhibit M1-M2.

85. As the result of the apportionment of voters in HD 105, upon the close of filing for office for 2024, three Democrats filed for HD 105, Yolando Holmes, Terry Lansdell and Nicole Sidman. One Republican filed for the office, incumbent House member Tricia Cotham who currently represents House District 112.

86. As the direct result of the apportionment of HD 105, that State House District went from a competitive, Democratic leaning district to a district leaning Republican for the general election and by doing so deprived the voters of HD 105 of a "fair" election in violation of their constitutional right to "fair elections".

87. The allegations pertaining to SD 7 and HD 105 are representative of the manipulation of the voter pool in apportioning both the State Senate and the State House of Representatives.

88. The John Locke Foundation is a conservative leaning, non-profit think tank in North Carolina. The John Locke Foundation's Civitas Center for Public Integrity focuses in part on elections in North Carolina, including publishing the

Civitas Partisan Index, which measures the partisan leaning of state legislative districts.

89. The Civitas Partisan Index for 2022 showed that SD 7 had a partisan lean of "Democratic +8, lean Democratic." After the reapportionment for 2024, the Civitas Partisan Index has SD 7 with a partisan lean of "Republican +2, lean Republican."

90. The Civitas Partisan Index for 2022 showed that HD 105 had a partisan lean of "Democratic +7, likely Democratic.".After the reapportionment for 2024, the Civitas Partisan Index has HD 105 with a partisan lean of "Republican +2, lean Republican."

91. SD 7 and HD 105 are not the only districts reapportioned to provide an unfair advantage in the 2024 elections. They are indeed representative of other districts reapportioned to provide an unfair election advantage in violation of the constitutional right of voters in North Carolina to fair elections.

CLAIM FOR RELIEF

N.C. Const. art. I, § 36
Violation of the Right to Fair Elections

92. Plaintiffs re-allege and incorporate by reference the above paragraphs of this complaint.

93. Article I, Section 36 of the North Carolina Constitution secures unenumerated rights to the people of North Carolina, which shall not be impaired or denied.

94. The people of North Carolina have a constitutional right to "frequent" elections and to "free" elections which includes a "*fair* count" (emphasis added) of the ballots. *Harper v. Hall*, 384 N.C. at 363, 886 S.E.2d at 439 (quoting *Swaringen v. Poplin*, 211 N.C. 700, 702, 191 S.E. 746, 747 (1937)). To have any value, those "frequent" and "free" elections must also be "fair." Thus, there is a right to "fair" elections secured as an unenumerated right in the North Carolina Constitution.

95. "Fair" elections have a judicially discernible and manageable standard. This standard consists of factual determinations that: (1) the governmental action complained of was intentionally taken; (2) evidence is produced that factually shows the specific upcoming election was affected by government action, in this case the North Carolina General Assembly's apportionment legislation; and (3) the governmental action at issue gives a specific political party or candidate a determinative advantage in the election by intentionally "apportioning" voters favorable to that specific political party into the specific district or "apportioning" voters unfavorable to that specific political party out of the specific district.

96. In the case at hand, the first concrete step in an election for a congressional seat or for legislative seats in the State Senate and State House is a determination of which voters will be eligible to vote for that office. As described above with respect to NC 6, NC 13, NC 14, SD 7, and HD 105, when there is an intentional aggregation and apportionment of voters in a district that tilts the election towards one political party or candidate and, therefore, potentially

preordains the outcome of the election, then a "fair" election cannot take place and the constitutional rights of the voters have been violated.

97. As described above, the enactment of SB 757 in establishing a newly constituted NC 6, NC 13, and NC 14 violates the constitutional rights of the plaintiffs to a "fair" election in that the voters newly aggregated in those districts and removed from those districts were apportioned intentionally to assure, to the extent possible, a political victory in the 2024 election for candidates of one political party, in this case the Republican Party.

98. As described above, the enactment of SB 758 and HB 898 in establishing SD 7 and HD 105 and other districts violates the constitutional right of the plaintiffs to a "fair" election in that the voters newly aggregated in those districts and removed from those districts were apportioned intentionally to assure, to the extent possible, a political victory in the 2024 election for candidates of one political party, in this case the Republican Party.

REQUEST FOR RELIEF

Plaintiffs respectfully request that the Court:

(1) declare that the citizens of North Carolina have an unenumerated constitutional right to fair elections under Article I, Section 36 of the North Carolina Constitution;

(2) declare that SB 757 violates the Plaintiffs' right to a fair election in North Carolina Congressional Districts, 6, 13, and 14.

(3) declare that SB 758 and HB 858 violate the Plaintiffs' right to a fair election in SD 7, HD 105, and such other legislative districts as the Court may find violative of the North Carolina Constitution;

(4) grant preliminary and permanent injuctive relief barring Defendants, as well as their agents and successors in office, from enforcing or giving effect to the newly apportioned congressional districts in NC 6, NC 13, NC 14 and the newly apportioned legislative districts in SD 7 and HD 105, including ordering Defendants to not conduct any elections in those districts as constituted by SB 757, SB 758 and HB 858 until constitutionally compliant districts are apportioned;

(5) take such actions necessary to order the adoption of a constitutionally fair and valid reapportionment of NC 6, NC 13, NC 14, SD 7, HD 105, and any other districts so found to be unconstitutional for the 2024 election and subsequent elections;

(6) take such actions as necessary to reapportion the remaining eleven North Carolina congressional districts so as to comply with federal constitutional requirements including "one person, one vote" and the Voting Rights Act; and

(7) take such actions as necessary to reapportion the remaining State Senate and State House districts so as to comply with federal and state constitutional requirements; and

(8) grant such other or further relief as the Court deems appropriate, including but not limited to an award of Plaintiffs' attorneys' fees and costs as allowed by law.

Respectfully submitted the 31st day of January, 2024.

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Counsel for Plaintiffs

EXHIBIT INDEX

2023 CONGRESSIONAL PLAN CRITERIA

October 2023

- Equal Population. The Committee chairs will use the 2020 federal decennial census data as the sole basis of population for the establishment of districts in the 2023 Congressional Plan. The number of persons in each congressional district shall equal be as nearly as is practicable, as determined under the most recent federal decennial census. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

- Traditional Districting Principles. We observe that the State Constitution's limitations upon redistricting and apportionment uphold what the United States Supreme Court has termed "traditional districting principles." These principles include factors such as "compactness, contiguity, and respect for political subdivisions." *Stephenson v. Bartlett*, 357 N.C. 301 (2003) (*Stephenson II*) (quoting *Shaw v. Reno*, 509 U.S. 630 (1993).

- Compactness. The Committee chairs shall make reasonable efforts to draw districts in the 2023 Congressional Plan that are compact.

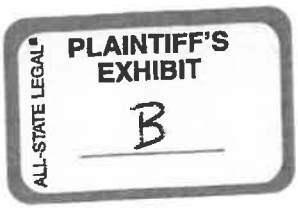
- Contiguity. Congressional districts shall be comprised of contiguous territory. Contiguity by water is sufficient.

- Respect for Existing Political Subdivisions. County lines, VTDs and municipal boundaries may be considered when possible in forming districts that do not split these existing political subdivisions.

- Racial Data. Data identifying the race of individuals or voters shall *not* be used in the drafting of districts in the 2023 Congressional Plan.

- Political Considerations. Politics and political considerations are inseparable from districting and apportionment. *Gaffney v. Cummings*, 412 U.S. 735 (1973). The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions…but it must do so in conformity with the State Constitution. *Stephenson II*. To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. *Rucho v. Common Cause,* 588 U.S.____(2019).

- Incumbent Residence. Candidates for Congress are not required by law to reside in a district they seek to represent. However, incumbent residence may be considered in the formation of Congressional districts.



2023 SENATE PLAN CRITERIA

October 2023

- Equal Population. The Committee chairs will use the 2020 federal decennial census data as the sole basis of population for the establishment of districts in the 2023 Senate Plan. In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements. *Stephenson v. Bartlett*, 357 N.C. 301 (2003) (*Stephenson II*).

- County Groupings and Traversals. The Committee chairs shall draw legislative districts within county groupings as required by *Stephenson v. Bartlett*, 355 N.C. 354 (2002) (*Stephenson I*), *Stephenson II*, *Dickson v. Rucho*, 367 N.C. 542 (2014) (*Dickson I*) and *Dickson v. Rucho*, 368 N.C. 481 (2015) (*Dickson II*). Within county groupings, county lines shall not be traversed except as authorized by *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*.

- Traditional Districting Principles. We observe that the State Constitution's limitations upon redistricting and apportionment uphold what the United States Supreme Court has termed "traditional districting principles." These principles include factors such as "compactness, contiguity, and respect for political subdivisions." *Stephenson II* (quoting *Shaw v. Reno*, 509 U.S. 630 (1993).

- Compactness. Communities of interest should be considered in the formation of compact and contiguous electoral districts. *Stephenson II.*

- Contiguity. Each Senate district shall at all times consist of contiguous territory. N.C. CONST. art. II, § 3. Contiguity by water is sufficient.

- Respect for Existing Political Subdivisions. County lines, VTDs and municipal boundaries may be considered when possible in forming districts that do not split these existing political subdivisions.

- Racial Data. Data identifying the race of individuals or voters shall *not* be used in the drafting of districts in the 2023 Senate Plan.

- Political Considerations. Politics and political considerations are inseparable from districting and apportionment. *Gaffney v. Cummings*, 412 U.S. 735 (1973). The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions…but it must do so in conformity with the State Constitution. *Stephenson II*. To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. *Rucho v. Common Cause,* 588 U.S.____(2019).

- Incumbent Residence. Incumbent residence may be considered in the formation of Senate districts.

GUIDANCE FOR DRAWING STATE HOUSE AND CONGRESSIONAL DISTRICTS

Draw House districts to be within plus or minus 5% of the ideal district population.

Draw Congressional districts to comply with federal standards for equal population.

Draw House and Congressional districts that are contiguous. Contiguity by a point is not permitted but contiguity by water is permissible.

Draw House districts within county groupings as described by *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) and subsequent decisions by the NC Supreme Court. The county groupings used in the 2022 House Plan are sufficient.

Within county groupings, only draw House districts that traverse county lines one time at most.

New districts will be drawn and the map drawer will not be bound by the location of prior district lines.

Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2023 Congressional and House plans.

To the extent feasible, draw districts that are visually reasonably compact. No mathematical tests are required.

Take reasonable measures to draw districts that respect and follow contiguous municipal boundaries.

Take reasonable measures to draw districts that do not split VTDs.

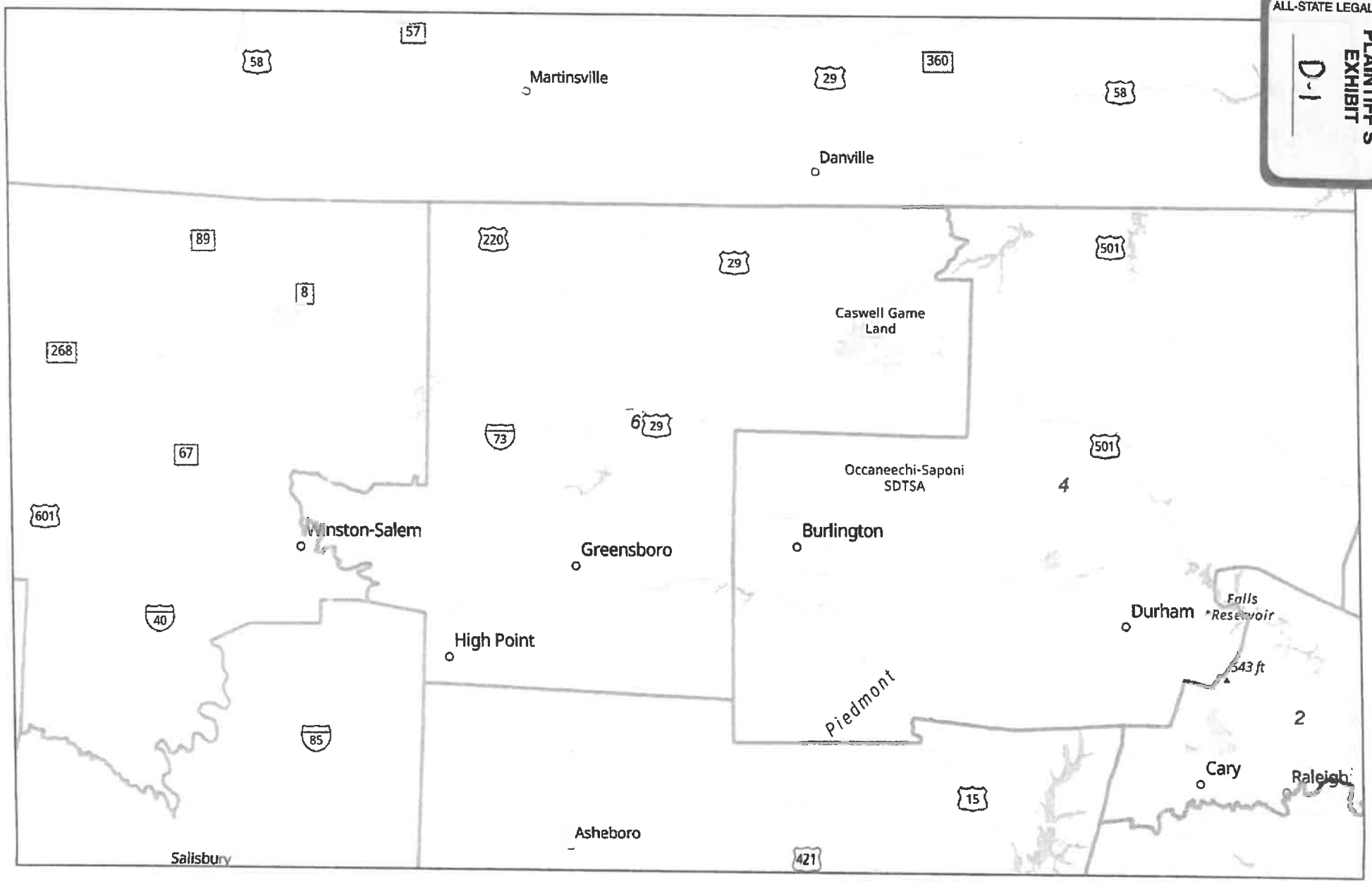
Election results from the following elections may be considered:

- 2020 Presidential; 2020 Governor of North Carolina; 2020 Lieutenant Governor of North Carolina; 2020 U.S. Senator from North Carolina; 2020 Attorney General of North Carolina.
- 2022 U.S. Senator from North Carolina; both 2022 elections for Supreme Court of North Carolina.

To the extent feasible, do not doublebunk incumbents of any party into the same district.

An incumbent House member's local knowledge of communities of interest may be considered.

NC Congressional Map - Court-Ordered 2022



January 28, 2024

District Boundaries

1:964,015

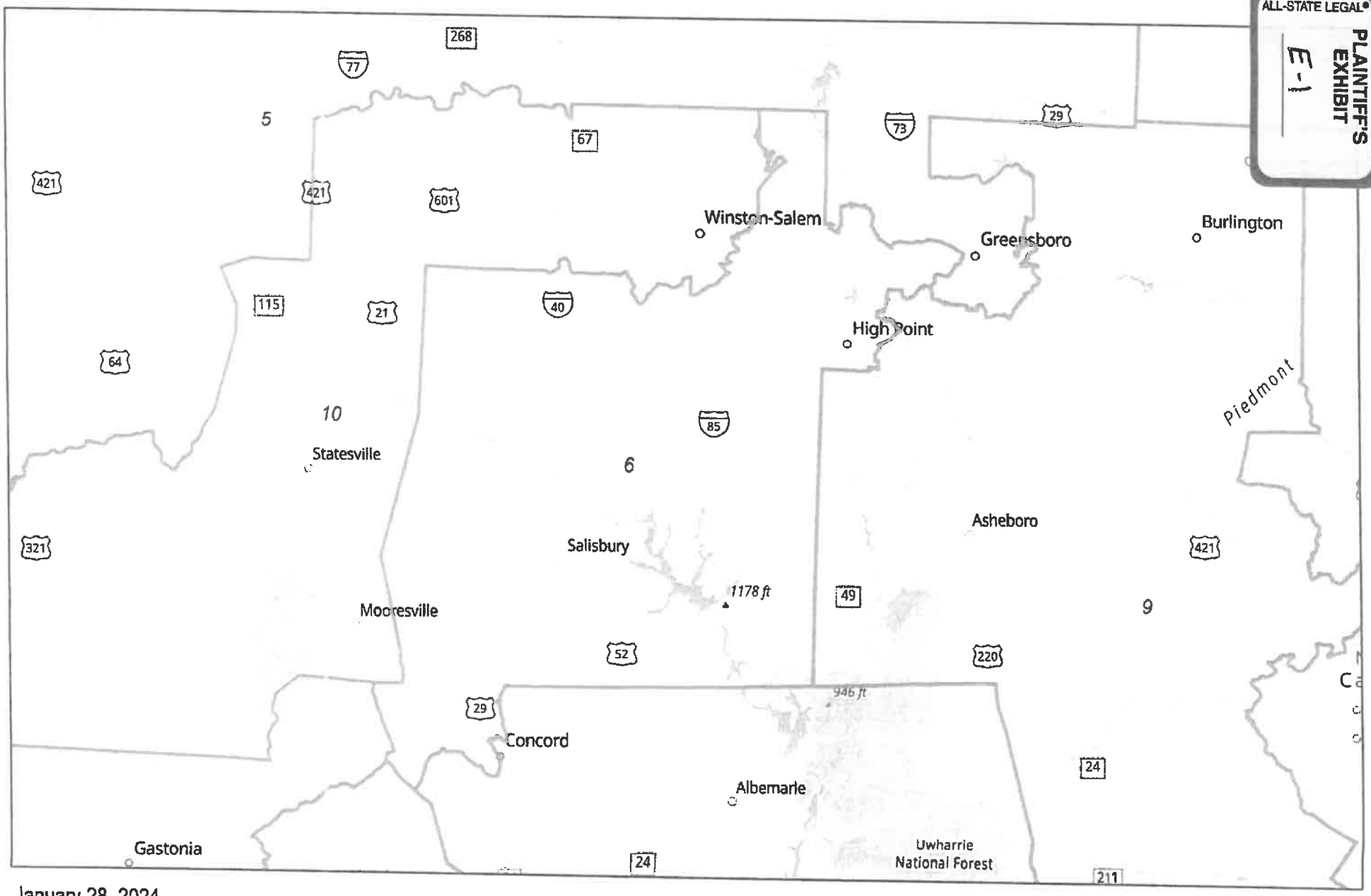
0 5 10 20 mi

0 10 20 40 km

Esri, TomTom, Garmin, SafeGraph, FAO, METI/NASA, USGS, EPA, NPS, USFWS, Esri, USGS

Ordered in 2022, used for the 2022 election

NC Congressional Map - Enacted 2023



ALL-STATE LEGAL

PLAINTIFF'S EXHIBIT

E-1

January 28, 2024

District Boundaries

1:967,756

0 5 10 20 mi

0 10 20 40 km

Esri, TomTom, Garmin, SafeGraph, FAO, METI/NASA, USGS, EPA, NPS, USFWS, Esri, USGS

NORTH CAROLINA CONGRESSIONAL DISTRICT PLAN

Enacted in 2023. to be used for the 2024 election

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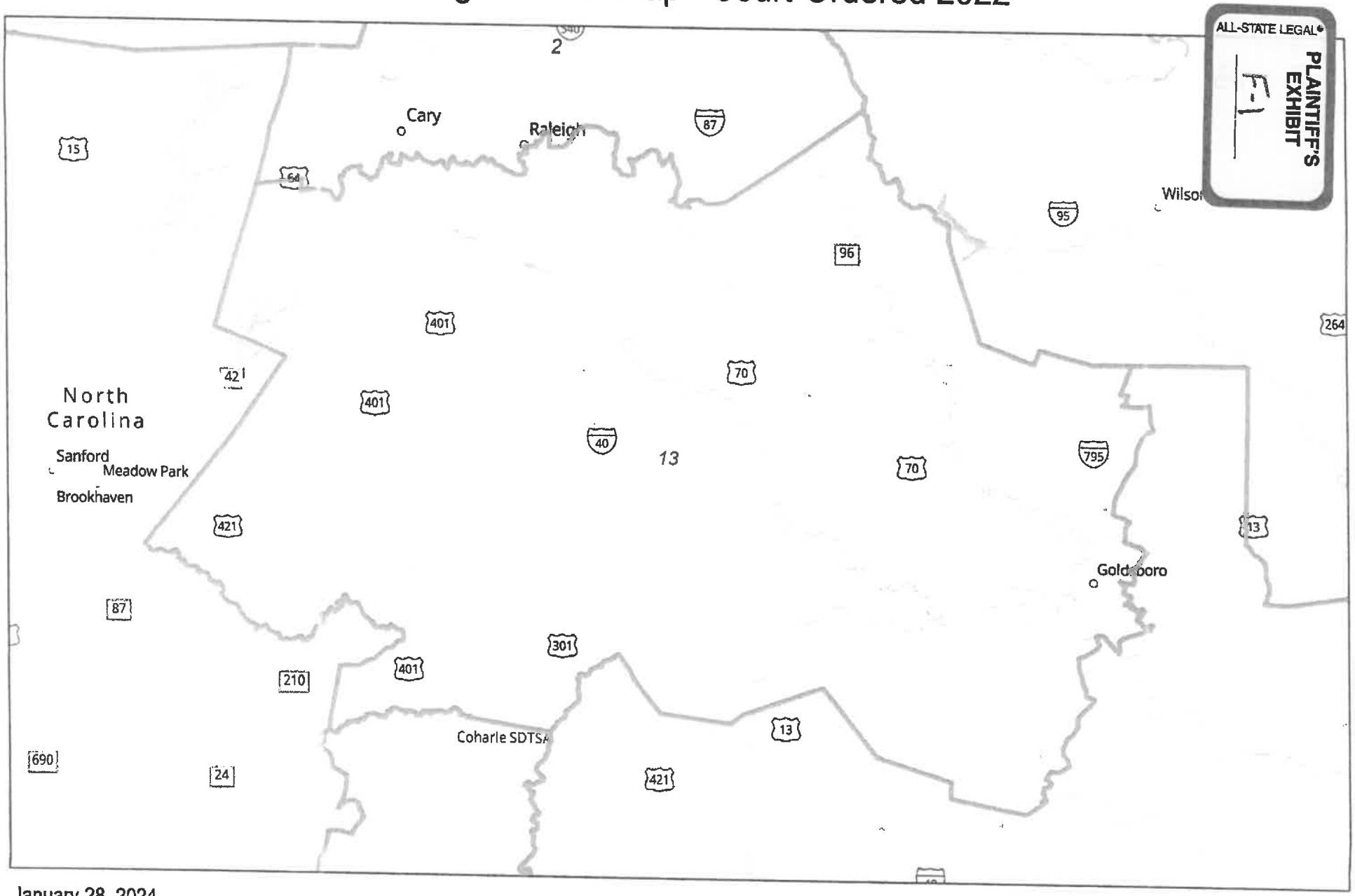
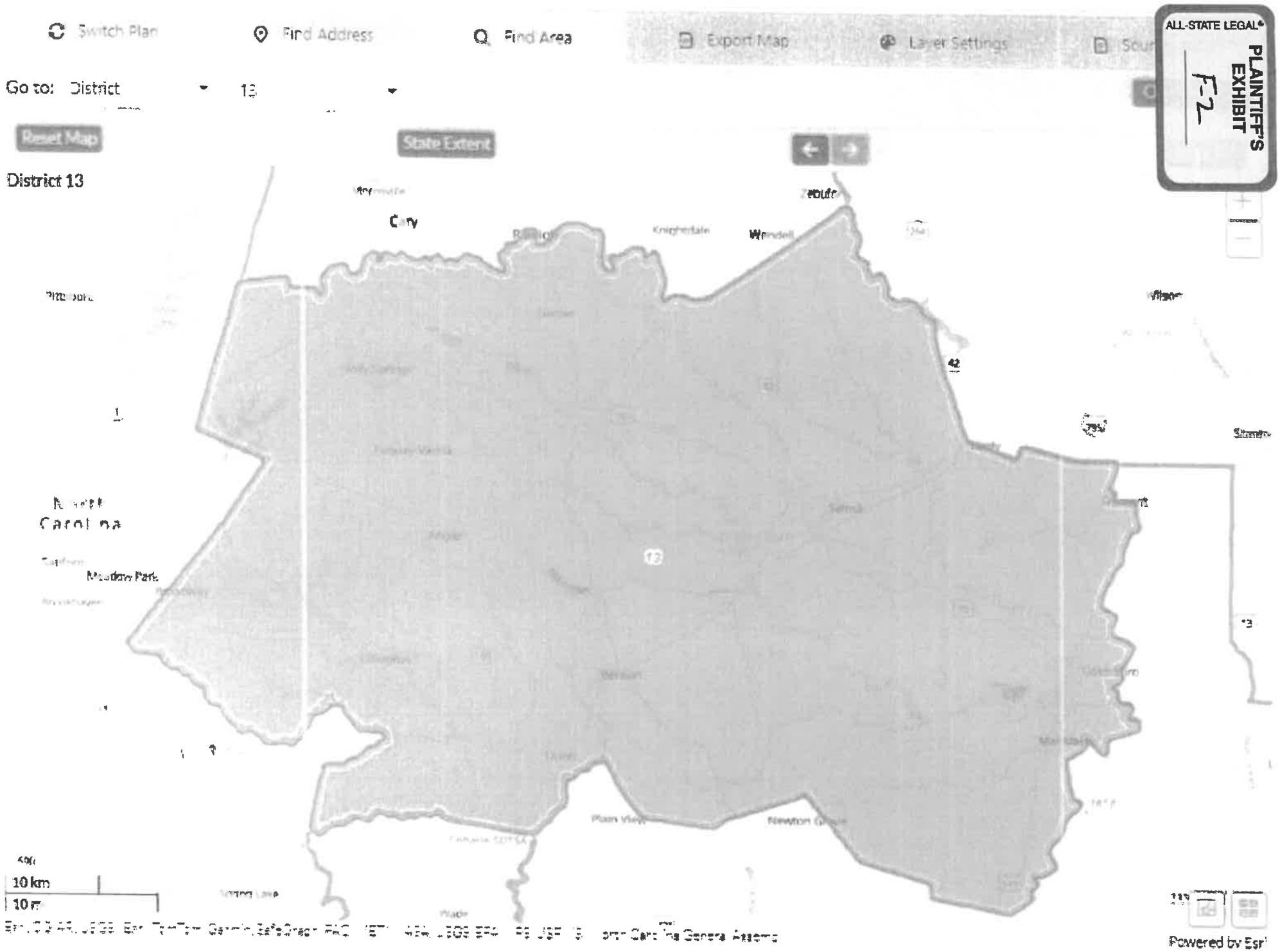
PLAINTIFF'S EXHIBIT
E-7

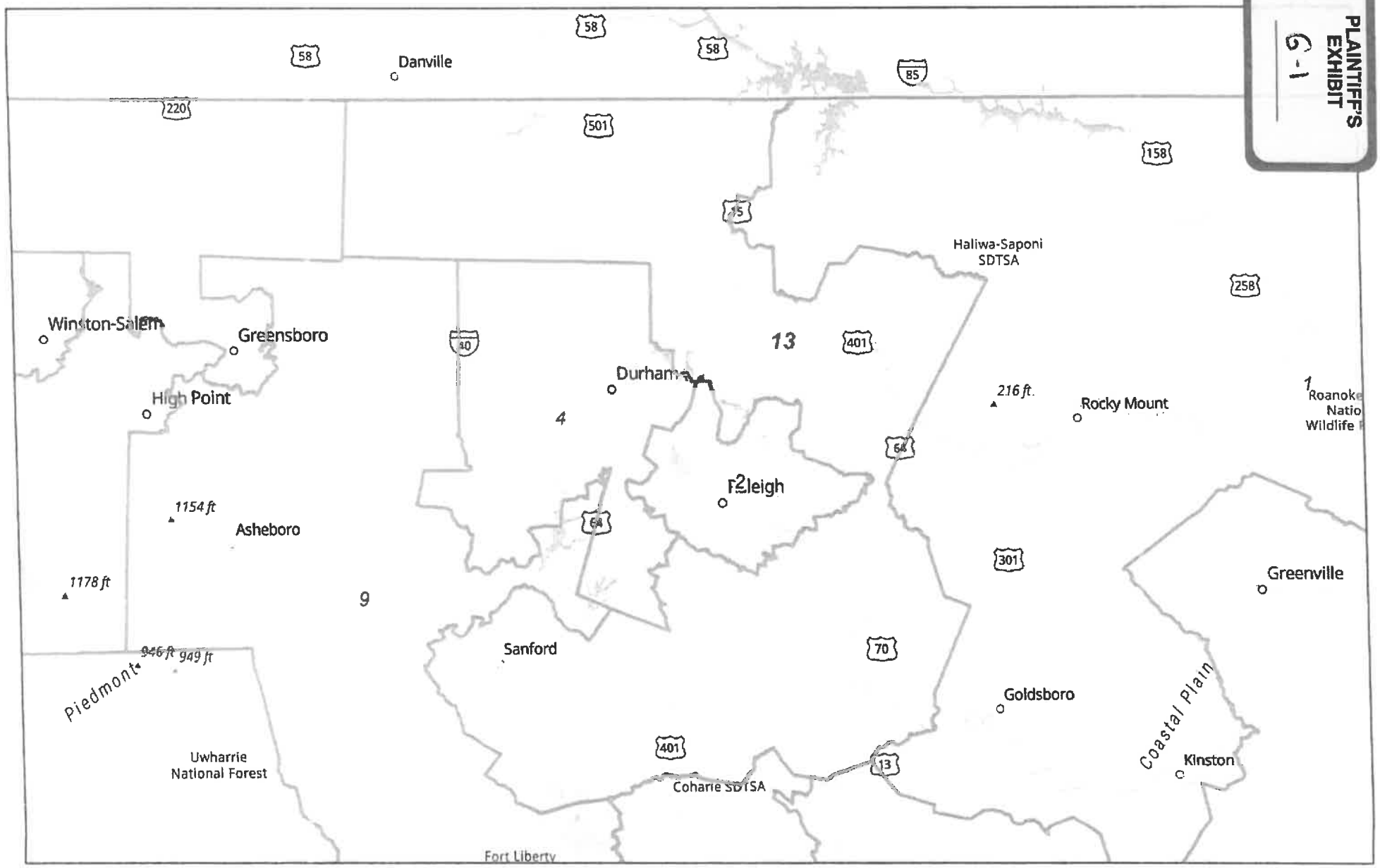
NC Congressional Map - Court-Ordered 2022



Court-Ordered in 2022, used for the 2022 election



NC Congressional Map - Enacted 2023



January 28, 2024

District Boundaries

1:1,398,512

0 5 10 20 mi

0 15 30 60 km

Esri, TomTom, Garmin, FAO, NOAA, USGS, EPA, NPS, USFWS, Esri, USGS

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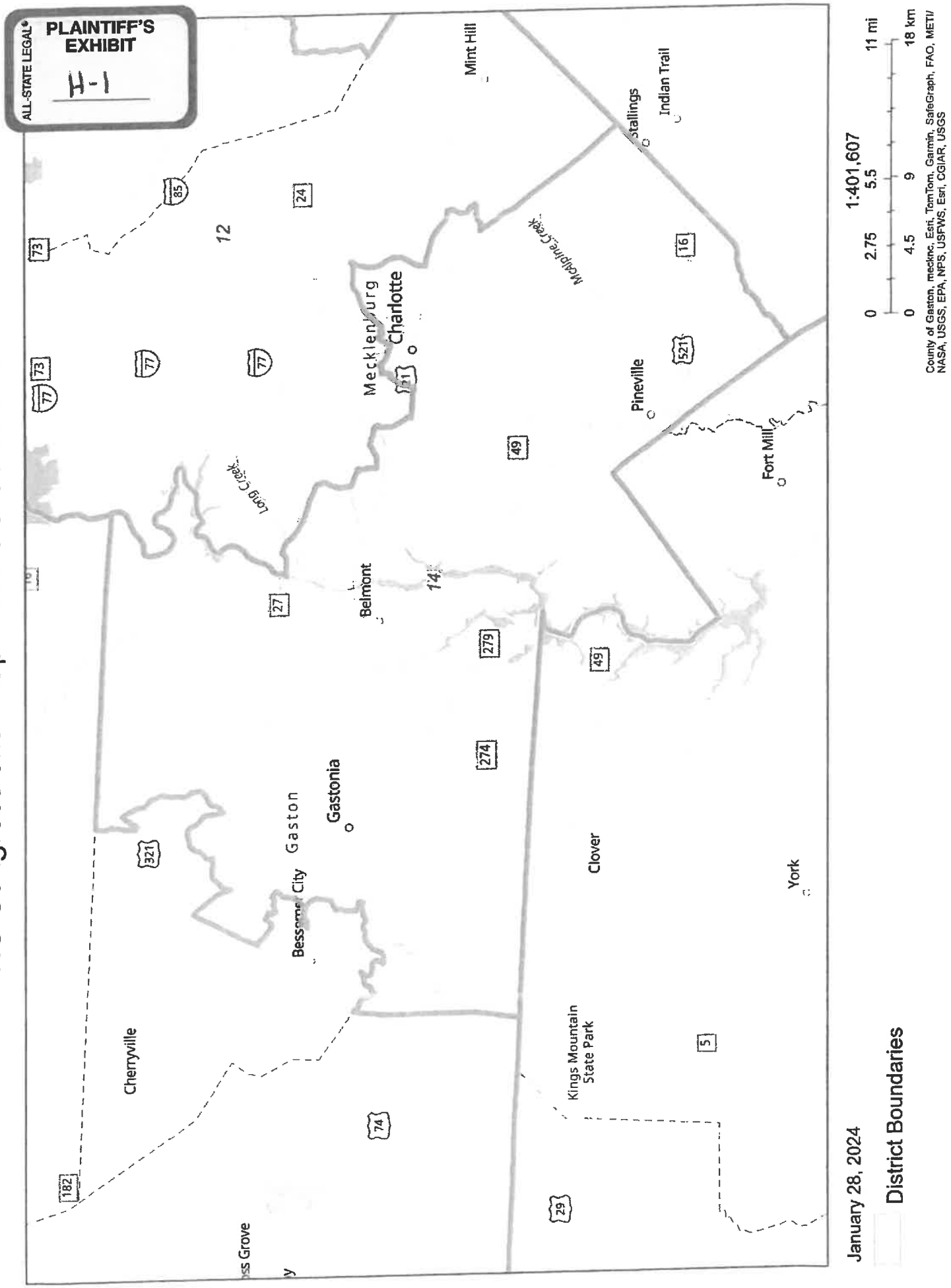
PLAINTIFF'S EXHIBIT

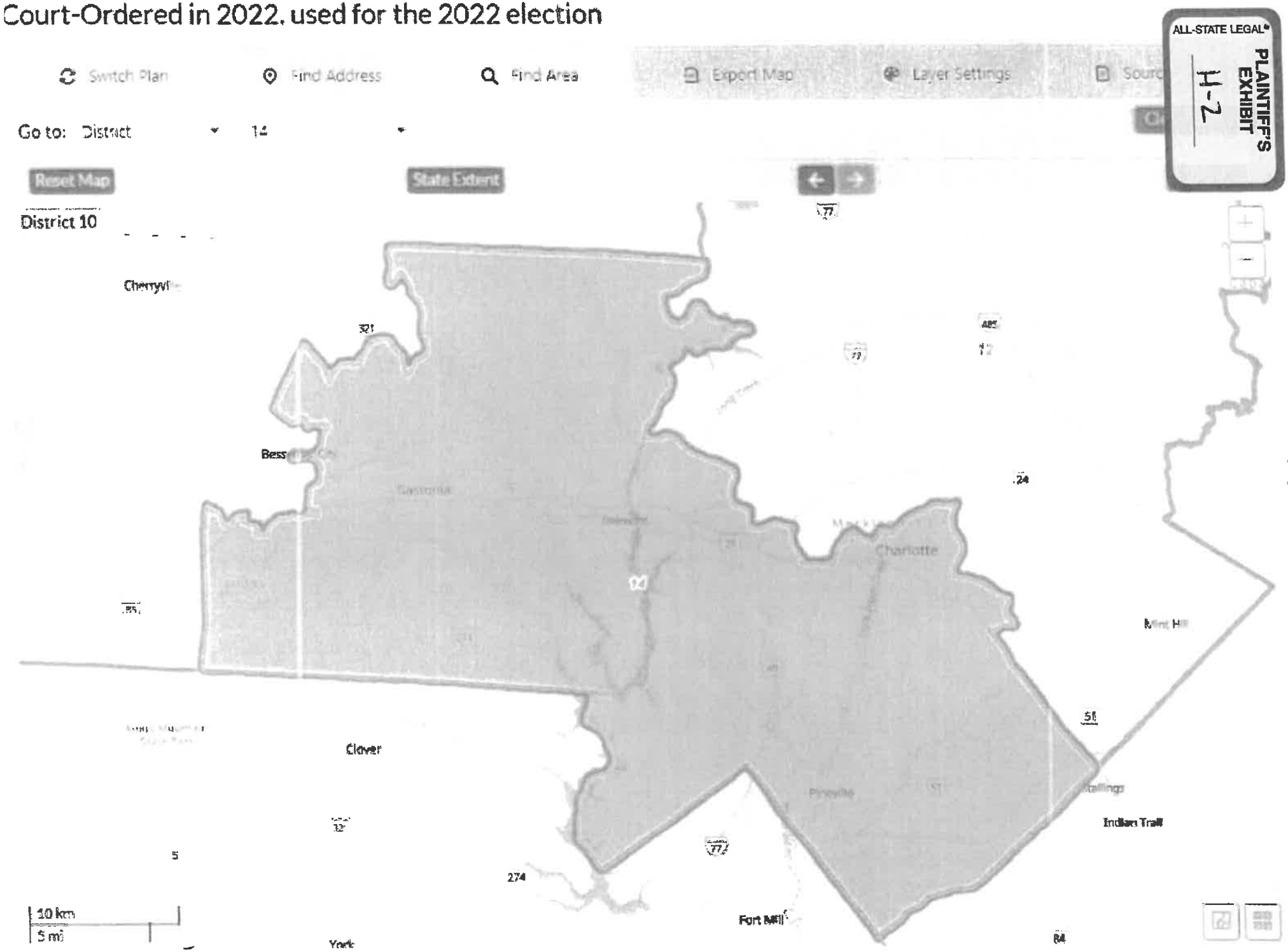
6-1

cted in 2023, to be used for the 2024 election

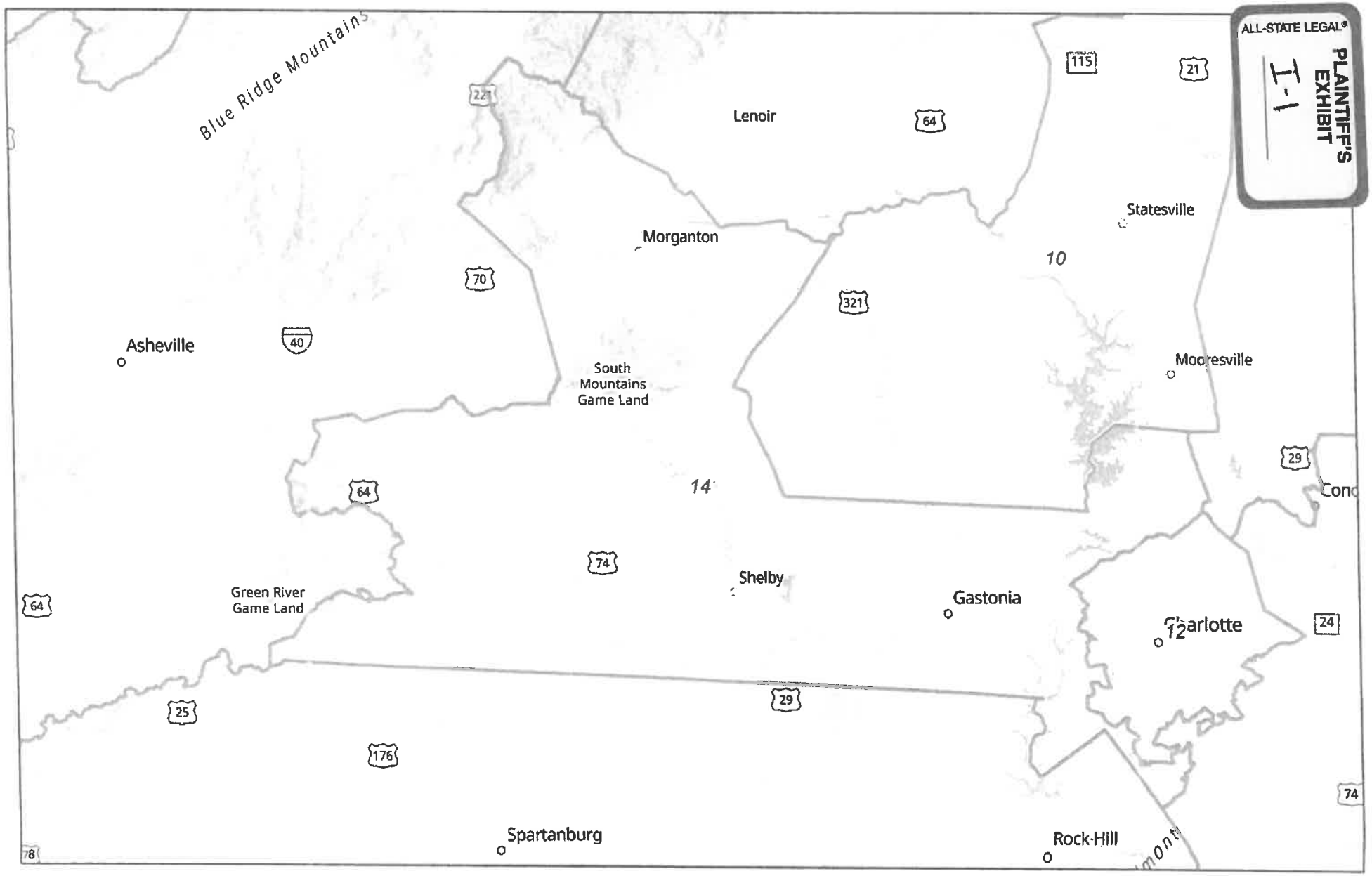
ALL-STATE LEGAL®
PLAINTIFF'S EXHIBIT
6-2


ALL-STATE LEGAL®
PLAINTIFF'S EXHIBIT
H-1
NC Congressional Map - Court-Ordered 2022
Mint Hill
Stallings
Indian Trail
Charlotte
Mecklenburg
McAlpine Creek
Long Creek
Pineville
Fort Mill
Belmont
Gastonia
Gaston
Bessemer City
Cherryville
Clover
York
Kings Mountain State Park
12
14
1:401,607
0 2.75 5.5 9 11 mi
0 4.5 9 18 km
County of Gaston, mecklnc, Esri, TomTom, Garmin, SafeGraph, FAO, METI/NASA, USGS, EPA, NPS, USPWS, Esri, CGIAR, USGS
January 28, 2024
District Boundaries

Court-Ordered in 2022. used for the 2022 election



NC Congressional Map - Enacted 2023



ALL-STATE LEGAL®
PLAINTIFF'S EXHIBIT
I-1

January 28, 2024

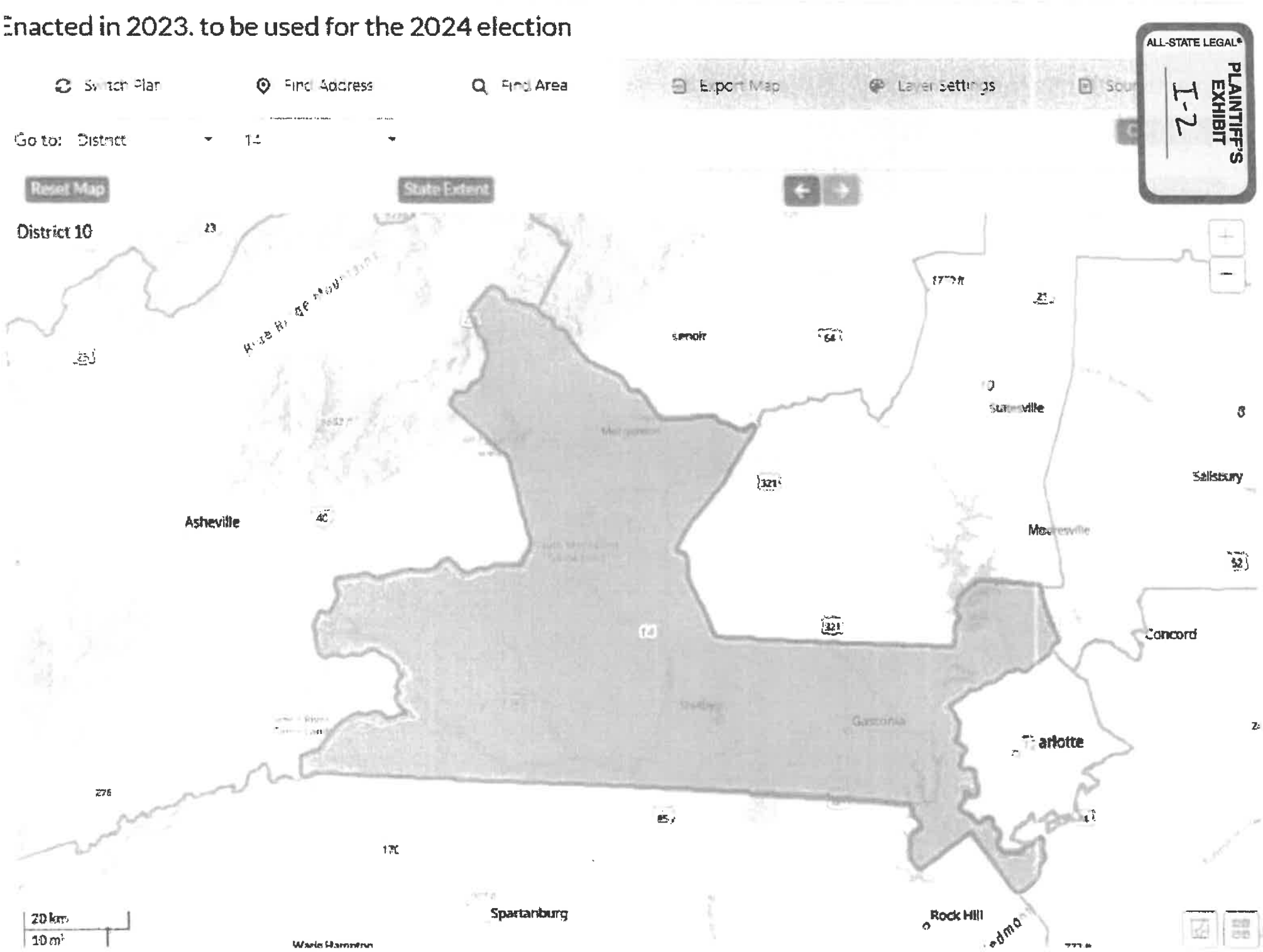
District Boundaries

1:974,312

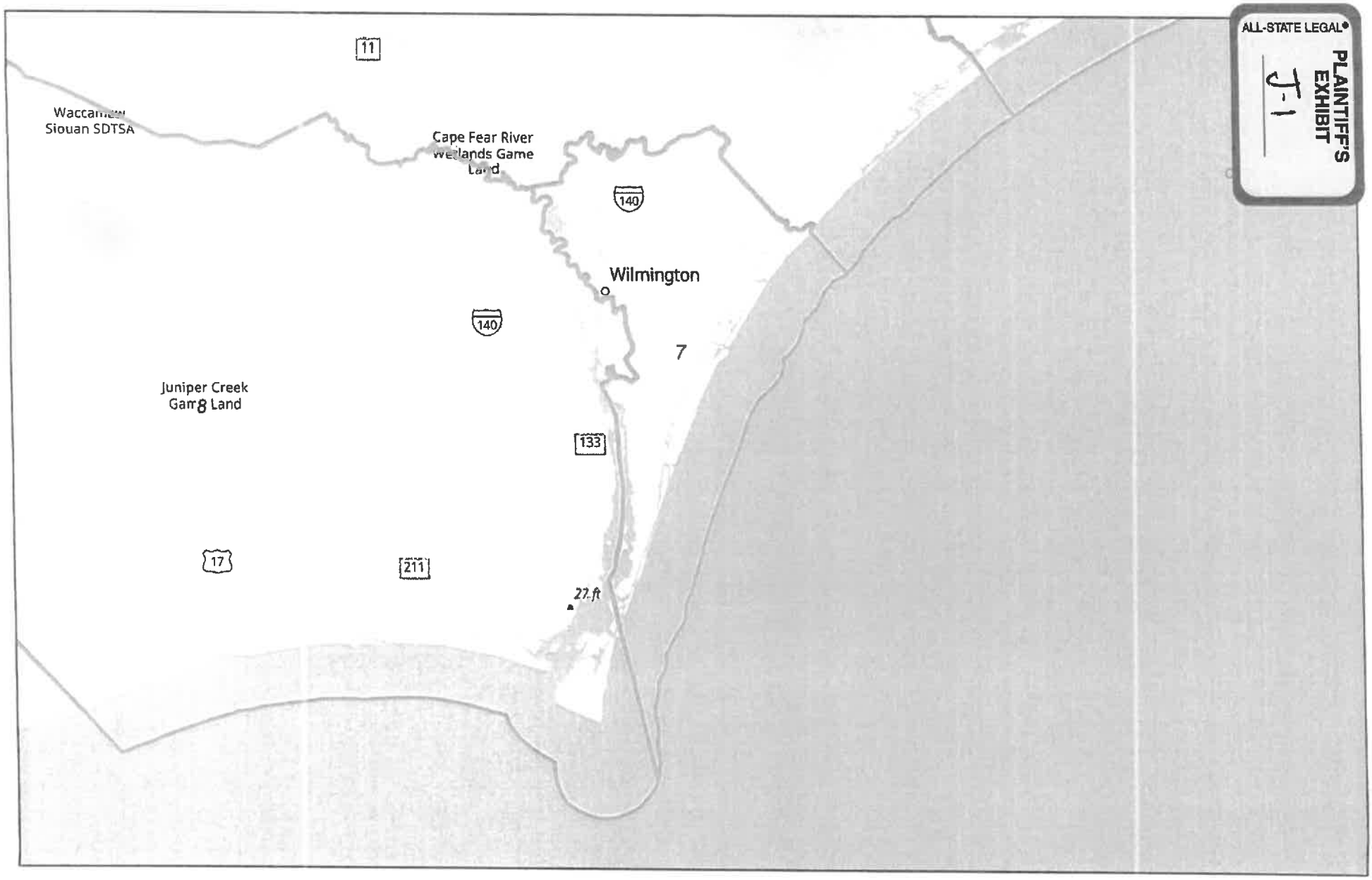
0 5 10 20 mi

0 10 20 40 km

Esri, TomTom, Garmin, SafeGraph, FAO, METI/NASA, USGS, EPA, NPS, USFWS, Esri, USGS


Enacted in 2023. to be used for the 2024 election
Switch Plan
Find Address
Find Area
Export Map
Layer Settings
Go to: District
Reset Map
State Extent
District 10
Asheville
Concord
Spartanburg
Rock Hill
20 km
10 mi
ALL-STATE LEGAL®
PLAINTIFF'S EXHIBIT
I-2

NC Senate Map - Enacted 2022



ALL-STATE LEGAL®
PLAINTIFF'S EXHIBIT
J-1

January 28, 2024

District Boundaries

1:663,601
0 4.75 9.5 19 mi
0 5 10 20 km

Esri, TomTom, Garmin, SafeGraph, FAO, METI/NASA, USGS, EPA, NPS, USFWS, Esri, USGS

Enacted in 2022. used for the 2022 election

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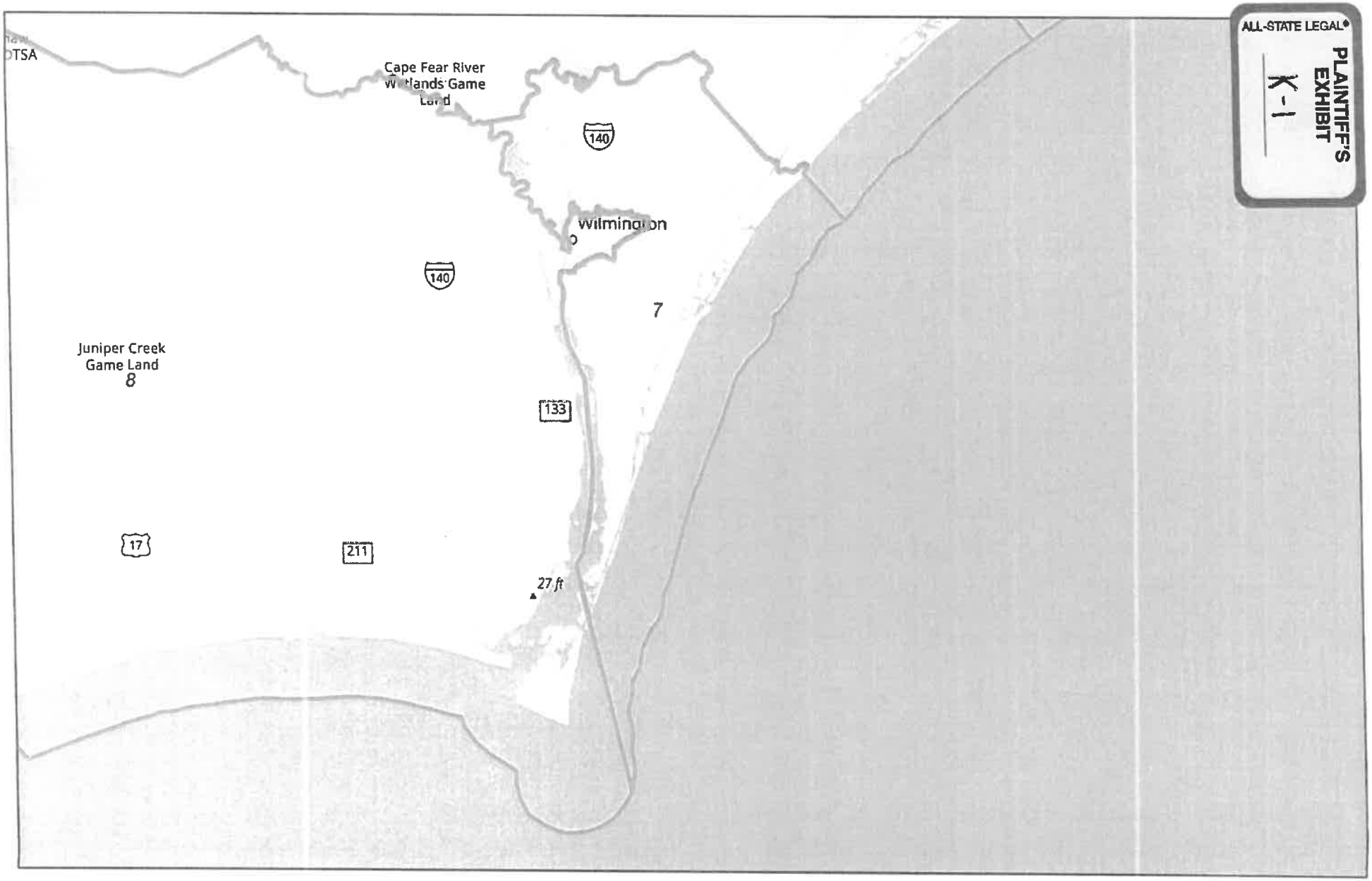
PLAINTIFF'S EXHIBIT
J-2

NC Senate Map - Enacted 2023



ALL-STATE LEGAL®
PLAINTIFF'S EXHIBIT
K-1

January 28, 2024

District Boundaries

1:589,416
0 4.25 8.5 17 mi
0 5 10 20 km

Esri, TomTom, Garmin, SafeGraph, FAO, METI/NASA, USGS, EPA, NPS, USFWS, Esri, USGS

Enacted in 2023. to be used for the 2024 election

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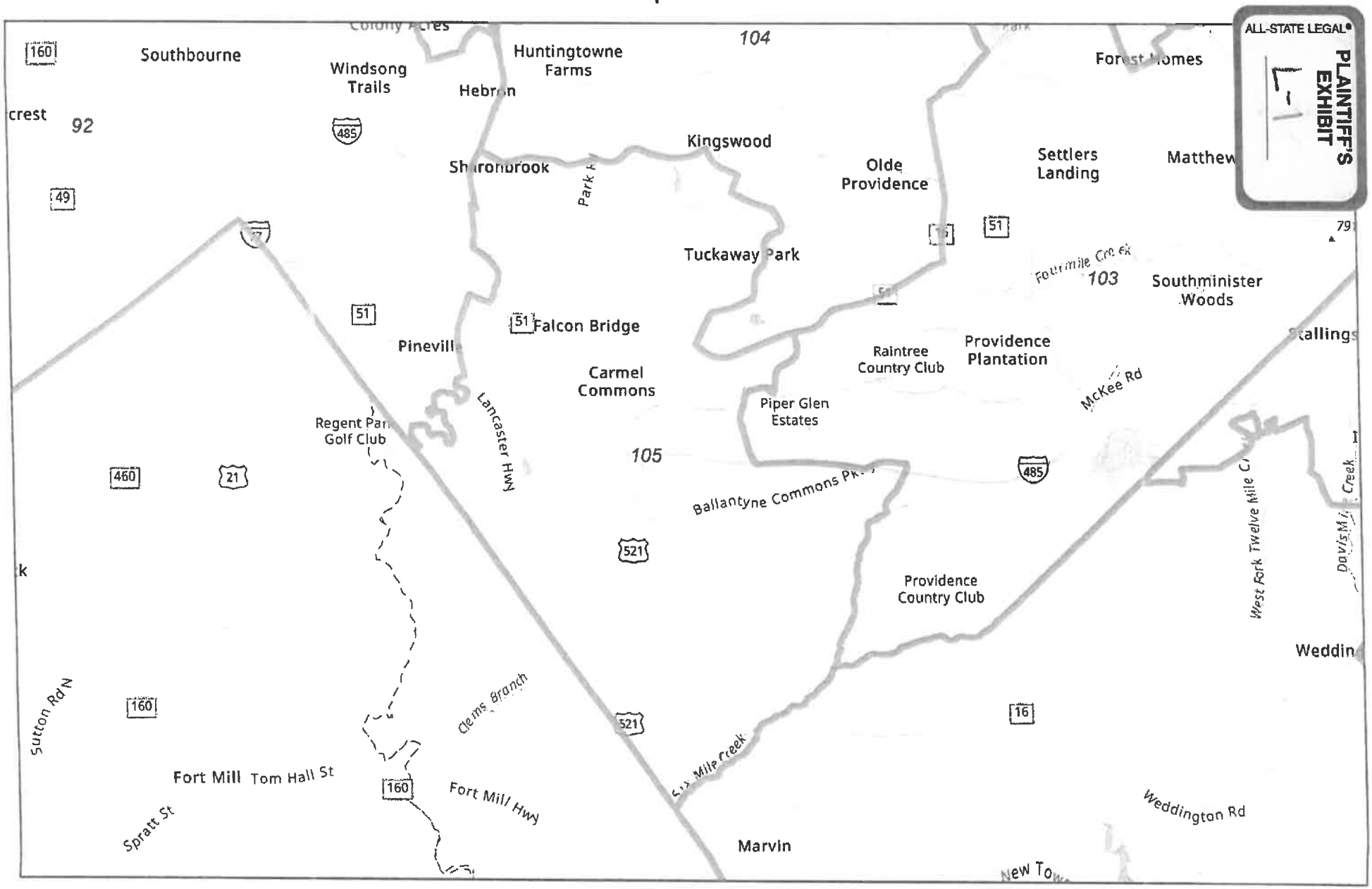
PLAINTIFF'S EXHIBIT
K-2

NC House Map - Enacted 2022



January 28, 2024

District Boundaries

1:130,713

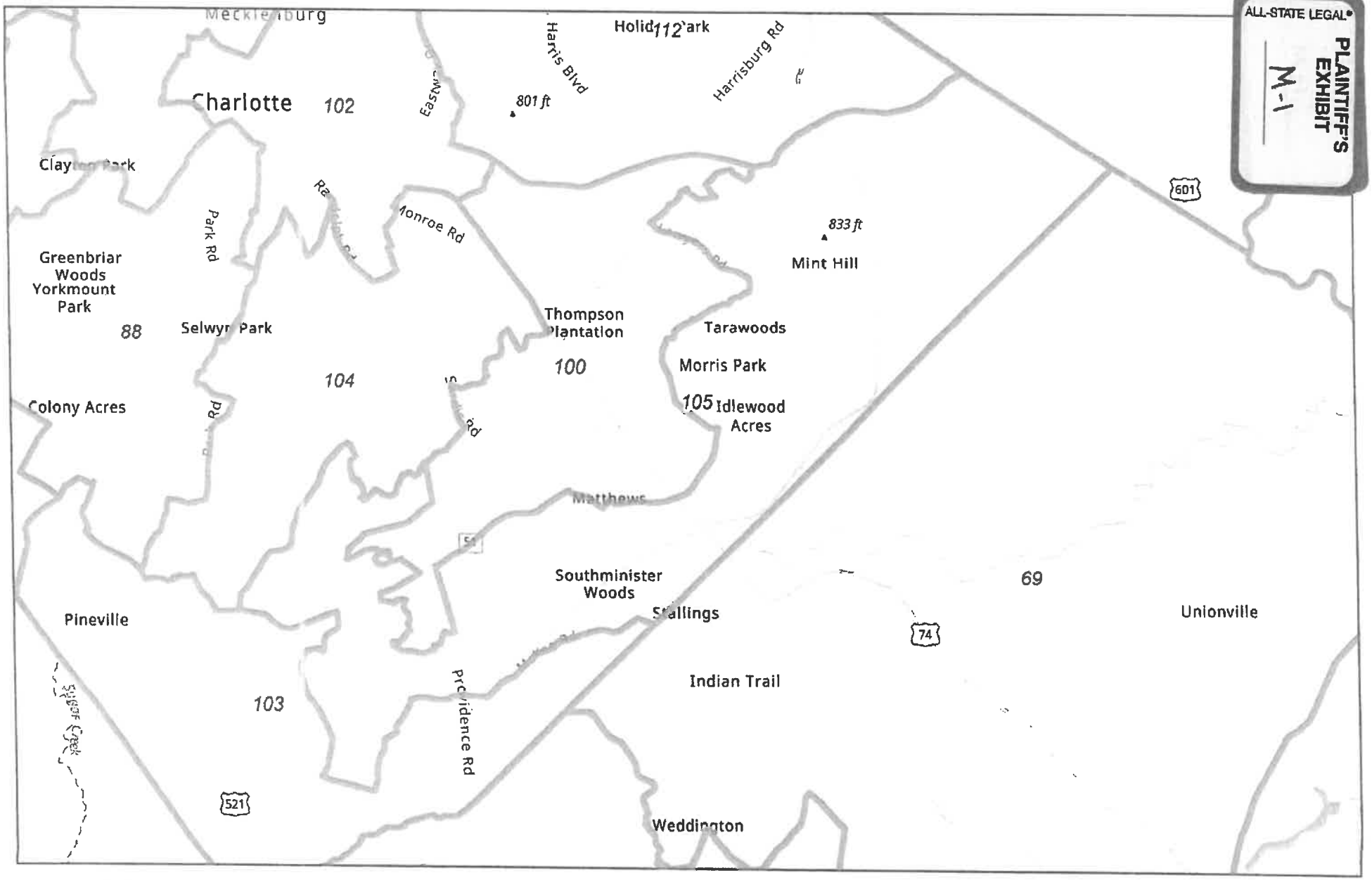
0 0.75 1.5 3 mi

0 1.5 3 6 km

Esri, NASA, NGA, USGS, mecknc, State of North Carolina DOT, Esri, TomTom, Garmin, SafeGraph, GeoTechnologies, Inc, METI/NASA, USGS,

Enacted in 2022. used for the 2022 election

NC House Map - Enacted 2023



January 28, 2024

District Boundaries

1:197,171

0 1.25 2.5 5 mi

0 2.25 4.5 9 km

Esri, CGIAR, USGS, mecknc, Esri, TomTom, Garmin, SafeGraph, METI/NASA, USGS, EPA, NPS, USDA, USFWS

ALL-STATE LEGAL

PLAINTIFF'S EXHIBIT

M-1

Enacted in 2023, to be used for the 2024 election

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PLAINTIFF'S EXHIBIT
M-2

STATE OF NORTH CAROLINA
COUNTY OF WAKE

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 24-CVS-003534-910

BEVERLY BARD, RICHARD LEVY, SUSAN KING COPE, ALLEN WELLONS, LINDA MINOR, THOMAS W. ROSS, SR., MARIE GORDON, SARAH KATHERINE SCHULTZ, JOSEPH J. OCCIA, TIMOTHY S. EMRY, and JAMES G. ROWE,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, JEFF CARMON III in his official capacity as Secretary of the North Carolina State Board of Elections, STACY "FOUR" EGGERS in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O'DUFFY MILLEN in her official capacity as a member of the North Carolina State Board of Elections, KEVIN N. LEWIS in his official capacity as a Member of the North Carolina State Board of Elections, PHILLIP E. BERGER in his official capacity as President Pro Tem of the North Carolina Senate, and TIMOTHY K. MOORE in his official capacity as Speaker of the North Carolina House of Representatives,

Defendants.

LEGISLATIVE DEFENDANTS' MOTION TO DISMISS

NOW COME Defendants Philip E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House ("Legislative Defendants"), by and through the undersigned counsel, and without waiving any motions or defenses not set out herein, respectfully move the Court to dismiss Plaintiffs' Complaint in the above-captioned matter pursuant to Rule 12(b)(1) and 12(b)(6)

of the North Carolina Rules of Civil Procedure. Plaintiffs' Complaint should be dismissed with prejudice for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted as Plaintiffs' Claim for Relief is non-justiciable.

Respectfully submitted, this the 6th day of March, 2024.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Phillip J. Strach
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North Carolina State Bar no. 10871
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North Carolina State Bar no. 52366
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kmcknight@bakerlaw.com
rraile@bakerlaw.com

Counsel for Legislative Defendants
** Motion for pro hac vice forthcoming*

CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have served a copy of the foregoing document upon counsel of record by depositing a copy thereof in the United States Mail, postage prepaid and addressed as follows:

Robert F. Orr
3434 Edwards Mill Road, Suite 112-372
Raleigh, NC 27612

Thomas R. Wilson
Greene Wilson Crow & Smith, P.A.
401 Middle Street
New Bern, NC 28563

Andrew M. Simpson
107 Lavender Street
Carrboro, NC 27514

This the 6th day of March, 2024.

NELSON MULLINS RILEY & SCARBOROUGH LLP

/s/ Phillip J. Strach
Phillip J. Strach
NC State Bar No. 29456

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 24CV003534-910
BEVERLY BARD, et al., Plaintiffs, v. NORTH CAROLINA STATE BOARD OF ELECTIONS, et al., Defendants.	**STATE DEFENDANTS' ANSWER**

Defendants, the North Carolina State Board of Elections; its members in their official capacity, Alan Hirsch, Jeff Carmon, Stacy Eggers, IV, Kevin N. Lewis, Siobhan O'Duffy Millen; its Executive Director, Karen Brinson Bell; and the State of North Carolina (collectively, the "State Defendants"), hereby answer Plaintiffs' Complaint as follows:

INTRODUCTION

Plaintiffs' Introduction provides a summary of the allegations in their Complaint and, therefore, no response is required. To the extent a response is necessary, State Board Defendants respond to the Introduction by incorporating their individual responses below.

JURISDICTION AND VENUE

1. Admitted.

2. Admitted.

3. Admitted.

PARTIES

4. Admitted to the extent this paragraph alleges that Beverly Bard is a citizen and resident of Guilford County, North Carolina; that her residence was within Congressional District 6 under the districting plan used in the 2022 elections and is currently within the same district under the plan being used in the 2024 elections; that she is registered as affiliated with the Democratic Party; and that she voted in the 2022 primary and general elections. Otherwise, State Defendants lack sufficient information to admit or deny the allegations in this paragraph.

5. Admitted to the extent the paragraph alleges that Richard Levy is a citizen and resident of Guilford County, North Carolina; that his residence was within Congressional District 6 in the districting plan used in the 2022 elections and is currently within Congressional District 5 under the plan being used in the 2024 elections; that he is registered as unaffiliated; and that he voted in the 2022 primary and general elections. Otherwise, State Defendants lack sufficient information to admit or deny the allegations in this paragraph.

6. Admitted to the extent the paragraph alleges that Susan King Cope is a citizen and resident of Wake County, North Carolina; that her residence was within Congressional District 13 in the districting plan used in the 2022 elections and is currently within Congressional District 4 under the plan being used in the 2024 elections; that se is registered as a Democrat; and that she voted in the 2022 primary and general elections.

Otherwise, State Defendants lack sufficient information to admit or deny the allegations in this paragraph.

7. Admitted to the extent this paragraph alleges that Allen H. Wellons is a citizen and resident of Johnson County, North Carolina; that his residence was within Congressional District 13 in the districting plan used in the 2022 elections and is currently within the same district under the plan being used in the 2024 elections; that he is affiliated with the Democratic Party; and that he voted in the 2022 primary and general elections. Otherwise, State Defendants lack sufficient information to admit or deny the allegations in this paragraph.

8. Admitted to the extent this paragraph alleges that Linda Minor is a citizen and resident of Mecklenburg County, North Carolina; that that her residence was within Congressional District 14 in the districting plan used in the 2022 elections and is currently within Congressional District 12 under the plan being used in the 2024 elections; that she is affiliated with the Democratic Party; and that she voted in the 2022 primary and general elections. Otherwise, State Defendants lack sufficient information to admit or deny the allegations in this paragraph.

9. Admitted to the extent this paragraph alleges that Thomas W. Ross is a citizen and resident of Mecklenburg County, North Carolina; that his residence was within Congressional District 12 in the districting plan used in the 2022 elections and is currently within Congressional District 14 under the plan being used in the 2024 elections; that he is registered as affiliated with the Democratic Party; and that he voted in the 2022 primary

and general elections. Otherwise, State Defendants lack sufficient information to admit or deny the allegations in this paragraph.

10. Admitted to the extent this paragraph alleges that Marie L. Gordon is a citizen and resident of New Hanover County, North Carolina; that her residence was within State Senate District 7 in the districting plan used in the 2022 elections and is currently within State Senate District 8 under the plan being used in the 2024 elections; that she is registered as affiliated with the Democratic Party; and that she voted in the 2022 primary and general elections. Otherwise, State Defendants lack sufficient information to admit or deny the allegations in this paragraph.

11. Admitted to the extent this paragraph alleges that Sarah Katherine Schultz is a citizen and resident of New Hanover County, North Carolina; that her residence was within State Senate District 7 in the districting plan used in the 2022 elections and is currently within the same district under the plan being used in the 2024 elections; that she is registered as affiliated with the Democratic Party; and that she voted in the 2022 primary and general elections. Otherwise, State Defendants lack sufficient information to admit or deny the allegations in this paragraph.

12. Admitted to the extent this paragraph alleges that Joseph J. Coccia is a citizen and resident of Mecklenburg County, North Carolina; that his residence was within State House District 105 in the districting plan used in the 2022 elections and is currently within the same district under the plan being used in the 2024 elections; that he is registered as affiliated with the Democratic Party; and that he voted in the 2022 primary and general

elections. Otherwise, State Defendants lack sufficient information to admit or deny the allegations in this paragraph.

13. Admitted to the extent this paragraph alleges that Timothy S. Emry is a citizen and resident of Mecklenburg County, North Carolina; that his residence was within State House District 105 in the districting plan used in the 2022 elections and is currently within State House District 103 under the plan being used in the 2024 elections; that he is registered as affiliated with the Democratic Party; and that he voted in the 2022 primary and general elections. Otherwise, State Defendants lack sufficient information to admit or deny the allegations in this paragraph.

14. Admitted to the extent this paragraph alleges that James G. Rowe is a citizen and resident of Buncombe County, North Carolina; that his residence is currently within Congressional District 11 under the plan being used in the 2024 elections; and that he is registered as unaffiliated with the Democratic Party. Denied to the extent that the paragraph alleges Mr. Rowe has been registered to vote in North Carolina since 1972. Review of information available through the State Election Information Management System ("SEIMS") indicates that Mr. Rowe has been registered to vote in North Carolina since 1968. Otherwise, State Defendants lack sufficient information to admit or deny the allegations in this paragraph.

15. Admitted.

16. Admitted.

17. Admitted.

18. Admitted.

19. Admitted.

20. Admitted.

21. Admitted upon information and belief.

22. Admitted upon information and belief.

FACTUAL ALLEGATIONS

23. Neither admitted nor denied to the extent that the materials referenced are matters of public record, speak for themselves, and are the best evidence of their content.

24. Neither admitted nor denied to the extent that the materials and matters referenced and cited are matters of public record, speak for themselves, and are the best evidence of their content. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

25. State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

26. State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or

conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

27. State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

28. State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

29. Neither admitted nor denied to the extent that the materials and matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

30. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

31. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

32. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

33. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

North Carolina Congressional District 6

34. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content.

35. To the extent that this paragraph states a legal conclusion, no response is necessary. Otherwise, State Defendants are without sufficient information to admit or deny the allegation.

36. Admitted.

37. Admitted this accurately states the vote totals in Guilford County.

38. Admitted.

39. Neither admitted nor denied to the extent that the case cited is a matter of public record, speaks for itself, is the best evidence of its content, and contains legal conclusions.

40. It is admitted that the North Carolina General Assembly enacted legislation in October 2023 which established new state senate, state house, and congressional districts.

41. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

42. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

43. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or

conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

44. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

45. Admitted to the extent the paragraph alleges that Kathy Manning did not notice her candidacy for the 2024 Democratic Party primary election for Congressional District 6; that no individuals noticed candidacies for the 2024 Democratic Party, Libertarian Party, or Green Party primary election for Congressional District 6; and that there were six individuals who noticed candidacies for the 2024 Republican Party primary for Congressional District 6. To the extent that this paragraph otherwise contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

46. To the extent that this paragraph states argument, conclusory allegations, or legal conclusions, no response is necessary. Otherwise, State Defendants are without sufficient information to admit or deny the allegation.

North Carolina Congressional District 13

47. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content.

48. To the extent that this paragraph states a legal conclusion, no response is necessary. Otherwise, State Defendants are without sufficient information to admit or deny the allegation.

49. Admitted.

50. Admitted.

51. Neither admitted nor denied to the extent that the case cited is a matter of public record, speaks for itself, is the best evidence of its content, and contains legal conclusions.

52. It is admitted that the North Carolina General Assembly enacted legislation in October 2023 which established new state senate, state house, and congressional districts.

53. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or

conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

54. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

55. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

56. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or

conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

57. Admitted to the extent the paragraph alleges that Wiley Nickel did not notice his candidacy for the 2024 Democratic Party primary election for Congressional District 13; that Jeremiah Frank Lee Pierce noticed his candidacy for the 2024 Democratic Party primary for Congressional District 13; that no individuals noticed candidacies for the 2024 Libertarian Party or Green Party primary election for Congressional District 13; and that fourteen individuals did notice their candidacies for the 2024 Republican Party primary election for Congressional District 13. To the extent that this paragraph otherwise contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

58. To the extent that this paragraph states argument, conclusory allegations, or legal conclusions, no response is necessary. Otherwise, State Defendants are without sufficient information to admit or deny the allegation.

North Carolina Congressional District 14

59. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content.

60. To the extent that this paragraph states a legal conclusion, no response is necessary. Otherwise, State Defendants are without sufficient information to admit or deny the allegation.

61. Admitted.

62. Admitted.

63. Neither admitted nor denied to the extent that the case cited is a matter of public record, speaks for itself, is the best evidence of its content, and contains legal conclusions.

64. It is admitted that the North Carolina General Assembly enacted legislation in October 2023 which established new state senate, state house, and congressional districts.

65. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

66. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not

directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

67. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

68. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

69. Admitted to the extent the paragraph alleges that Jeff Jackson did not notice his candidacy for the 2024 Democratic Party primary for Congressional District 14; that Pam Genant and B.K. Maginnis noticed their candidacies for the 2024 Democratic Party

primary for Congressional District 14; that no individuals noticed candidacies for the 2024 Libertarian Party or Green Party primary election for Congressional District 14; and that there were three individuals who noticed candidacies for the 2024 Republican Party primary for Congressional District 14, including Timothy K. Moore, who is, upon information and belief, the same Timothy K. Moore currently serving as Speaker of the North Carolina House. To the extent that this paragraph otherwise contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

70. To the extent that this paragraph states argument, conclusory allegations, or legal conclusions, no response is necessary. Otherwise, State Defendants are without sufficient information to admit or deny the allegation.

State Senate District 7

71. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content.

72. To the extent that this paragraph states a legal conclusion, no response is necessary. Otherwise, State Defendants are without sufficient information to admit or deny the allegation.

73. Admitted.

74. Neither admitted nor denied to the extent that the case cited is a matter of public record, speaks for itself, is the best evidence of its content, and contains legal conclusions.

75. It is admitted that the North Carolina General Assembly enacted legislation in October 2023 which established new state senate, state house, and congressional districts.

76. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

77. Admitted to the extent the paragraph alleges that David L. Hill noticed his candidacy for the 2024 Democratic Party primary for State Senate District 7; that John Evans noticed his candidacy for the 2024 Libertarian Party primary for State Senate District 6; and that Mike Lee, who is upon information and believe the incumbent state senator for State District 7, noticed his candidacy for the 2024 Republican Party primary for State Senate District 7.

78. To the extent that this paragraph states argument, conclusory allegations, or legal conclusions, no response is necessary. Otherwise, State Defendants are without sufficient information to admit or deny the allegation.

State House District 105

79. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content.

80. To the extent that this paragraph states a legal conclusion, no response is necessary. Otherwise, State Defendants are without sufficient information to admit or deny the allegation.

81. Admitted

82. Neither admitted nor denied to the extent that the case cited is a matter of public record, speaks for itself, is the best evidence of its content, and contains legal conclusions.

83. It is admitted that the North Carolina General Assembly enacted legislation in October 2023 which established new state senate, state house, and congressional districts.

84. Neither admitted nor denied to the extent that the matters referenced are matters of public record, speak for themselves, and are the best evidence of their content. Otherwise, State Board Defendants neither admit nor deny this allegation as it is not directed at State Board Defendants. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State

Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

85. Admitted to the extent the paragraph alleges that three individuals, Yolando Holmes, Terry Lansdell, and Nicole Sidman, noticed their candidacies for the 2024 Democratic Party primary for State House District 105; and that one individual, Tricia Cotham, noticed her candidacy for the 2024 2024 Republican Party primary for State House District 105. It is further admitted, upon information and belief, that Ms. Cotham is currently the representative for State House District 112.

86. To the extent that this paragraph states argument, conclusory allegations, or legal conclusions, no response is necessary. Otherwise, State Defendants are without sufficient information to admit or deny the allegation.

87. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

88. Neither admitted nor denied to the extent that the materials referenced are matters of public record, speak for themselves, and are the best evidence of their content.

89. Neither admitted nor denied to the extent that the materials referenced are matters of public record, speak for themselves, and are the best evidence of their content.

90. Neither admitted nor denied to the extent that the materials referenced are matters of public record, speak for themselves, and are the best evidence of their content.

91. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

CLAIM FOR RELIEF

N.C. Const, art. I, § 36
Violation of the Right to Fair Elections

92. State Board Defendants incorporate their previous responses.

93. Neither admitted nor denied to the extent that Article I, Section 36 of the North Carolina Constitution speaks for itself and is the best evidence of its content.

94. Neither admitted nor denied to the extent that the case cited is a matter of public record, speaks for itself, is the best evidence of its content, and contains legal conclusions. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

95. Neither admitted nor denied to the extent that the allegation references the content of legal authority that is a matter of public record, speaks for itself, and is the best evidence of its content. To the extent that this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

96. Because this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

97. Because this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

98. Because this paragraph contains argument or conclusory allegations, no response is required. To the extent a response is required, State Board Defendants lack sufficient information to admit or deny the argument, conclusory allegations, or any remaining allegations.

ANY AND ALL OTHER ALLEGATIONS MADE IN PLAINTIFFS' COMPLAINT, INCLUDING THE RELIEF REQUESTED, EXCEPT AS SPECIFICALLY ADMITTED ABOVE, ARE HEREBY DENIED.

FURTHER ANSWERING THE COMPLAINT AND AS FURTHER DEFENSES THERETO, DEFENDANTS ASSERT THE FOLLOWING:

State Board Defendants reserve the right to assert defenses against Plaintiff that may become apparent during the course of litigation and discovery.

Respectfully submitted, this the 12th day of March, 2024.

NORTH CAROLINA
DEPARTMENT OF JUSTICE

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Counsel for State Board Defendants

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel for the Plaintiffs and the other Defendants by and through the use of the Court's electronic filing system electronically mailing the same in PDF format using the following addresses:

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Counsel for Legislative Defendants
** Motion for pro hac vice forthcoming*

This the 12th day of March, 2024.

NORTH CAROLINA
DEPARTMENT OF JUSTICE

/s/ Mary Carla Babb
Mary Carla Babb
Special Deputy Attorney General

NORTH CAROLINA

WAKE COUNTY

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24-CVS-3534

BEVERLY BARD, RICHARD LEVY, SUSAN KING COPE, ALLEN WELLONS, LINDA MINOR, THOMAS W. ROSS, SR., MARIE GORDON, SARAH KATHERINE SCHULTZ, JOSEPH J. COCCIA, TIMOTHY S. EMRY, and JAMES G. ROWE,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, JEFF CARMON III in his official capacity as Secretary of the North Carolina State Board of Elections, STACY "FOUR" EGGERS in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O'DUFFY MILLEN in her official capacity as a member of the North Carolina State Board of Elections, KEVIN N. LEWIS in his official capacity as a Member of the North Carolina State Board of Elections, PHILLIP E. BERGER in his official capacity as President Pro Tem of the North Carolina Senate, and TIMOTHY K. MOORE in his official capacity as Speaker of the North Carolina House of Representatives.

Defendants.

MEMORANDUM IN OPPOSITION TO LEGISLATIVE DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

This case presents a major question of first impression for the courts of this State. Our state Constitution established a republican form of government under which the people are sovereign and through periodic elections they choose or remove their servants in the legislature, judiciary, and executive. It is often said that our Constitution cannot contradict itself, and so it is absurd to suppose that the people surrendered their rights to control their government by empowering the legislature to enact discrete election regulations that are not "fair". Our Supreme Court has expressed what every North Carolinian regards as their birthright: "[t]he people are entitled to have their elections conducted honestly and in accordance with the requirements of the law. To require less would result in a mockery of the democratic processes for nominating and electing public officials." *Ponder v. Joslin*, 262 N.C. 496, 500, 138 S.E.2d 143, 147 (1964). The essence of this Complaint is that an unfair election is unconstitutional, and that the judiciary has an obligation to right the wrong.

The Declaration of Rights in Article I of the North Carolina Constitution sets out these core principles: elections are to be frequent (§ 9), free (§ 10), and fair (an implicit unenumerated right). It is indisputable that the right to "fair" elections is a precondition to the guarantees "of frequent" and "free" elections. After all, what good are "frequent" or "free elections if those elections are not "fair?"

A synonym to "fair" is "impartial." "Impartial" is defined by the Merriam-Webster Dictionary as "not partial or biased: treating or affecting all equally," a concept with which the judiciary is very familiar. The oath of office taken by members of the judiciary of this state obligates them to "impartially discharge all the duties" of their office. Even the Code of Judicial Conduct, Canon 3 is titled: "A judge should perform the duties of his office *impartially* (emphasis added) and diligently." Applying the concept of fair or impartial is neither novel or difficult nor beyond the scope of decision making by the judiciary.

Plaintiffs, individually, and on behalf of all the citizens of North Carolina contend that they are guaranteed "fair" elections—otherwise their other constitutional guarantees are of little or no value. Article I, § 36 of the North Carolina Constitution captioned "Other rights of the people" explicitly provides "[t]he enumeration of rights in this Article shall not be construed to impair or deny others retained by the people." N.C. Const. Art. I, § 36. This guarantee first adopted by North Carolina's 1868 Constitution is modeled on the Ninth Amendment in the U.S. Bill of Rights. The

right to "fair" elections is an unenumerated right reserved by the people of North Carolina and fundamental to the very concept of elections and the underpinnings of democracy.

While Plaintiffs frame this unenumerated right in the context of the term "fair", Roger Polin, Senior Fellow in Constitutional Studies at the CATO Institute, and a national expert on unenumerated rights, proposes this approach to delineating unenumerated rights—"far more useful would be to ask simply what right(s) the statute or executive action at issue is protecting, or what compelling state interest is served by upholding the statute or action...." CATO Institute Commentary, May 9, 2023. In this case, the compelling state interest served by upholding the right to a fair election is effective representative democracy in North Carolina. The source of this protection is the common law of North Carolina and the Declaration of Rights of the North Carolina Constitution, which is a limitation of the powers of the General Assembly.

The facts of this case raise the fundamental question whether citizens have a right to have the election of their representatives free from governmental efforts to purposefully "fix" or "preordain" the result of those elections. The facts alleged in the Complaint state a claim for relief which is fundamental to our constitutional republic system of government.

Without "fair" elections, the framework of our government would rest not on principle and the will of the people, but instead on partisan politics exercised not by political parties or particular entities, but by the heavy hand of government itself—in this case, that hand being that of the General Assembly. By intentionally manipulating the electoral odds and stacking the electorate to give an unfair electoral advantage to a particular political party and its candidates in selected districts, the General Assembly has attempted to preordain the outcome of elections in certain districts as set out in the Complaint and violate the constitutional right of its citizens to a fair election.

Here, Plaintiffs seek an affirmative declaration of their constitutional right to "fair" elections in North Carolina and a determination that the legislative apportionment of citizens into districts for the election of Congress, the North Carolina Senate, and the North Carolina House violate the right to "fair" elections. Taking the allegations as true for purposes of Defendants' Motion to Dismiss, each Plaintiff suffered specific and traceable injury in their voting district at the direct hand of the Legislative Defendants. Upon this constitutional unenumerated right as discussed more fully herein, the elections in specific district as forth below violate Plaintiffs' constitutional rights to fair elections.

FACTUAL BACKGROUND

For brevity, Plaintiffs incorporate by reference the allegations of their Complaint, but the following is a short summary of those allegations:

In October 2023, the General Assembly of North Carolina submitted a "2023 Congressional Plan Criteria" (see attached Exhibit A) and a "2023 Senate Plan Criteria" (see attached Exhibit B). In those plans, the General Assembly included criteria for apportioning voters that states in part:

> "Political Considerations. Politics and political considerations are inseparable from districting and apportionment. (Citation omitted). The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions . . . but it must do so in conformity with the State Constitution."

Id. Defendants did, in fact, consider partisan advantage and incumbency protection in the apportioning of NC 6, NC 13, NC 14, SD 7 and HD 105, as well as other districts, in violation of the North Carolina Constitution. As alleged in the Complaint, the House Redistricting Committee never adopted criteria in 2023, unlike in past redistricting efforts. Instead, in August of 2023, the Redistricting Chair instructed their taxpayer-funded expert to draw lines in secret using "guidelines." (See attached Exhibit C). No one saw these guidelines or the resulting map until it was introduced and passed in October of 2023.

In complying with the required apportionment of citizens to various districts, the governmental entities performing this function in the 21st century have extraordinary technological resources and data upon which they can rely to apportion citizens into discrete districts for discrete elections. Using these technology resources and data, governmental entities are able to pick and choose which pools of voters, usually defined by precincts or by census blocks, are apportioned into each distinct district. Further, this technology and data provides substantial information about each pool of voters including, in part: party registration, race, ethnicity, and the voting tendencies for that precinct. All of this information fully provides those governmental entities in control of the apportionment, the ability to predict to a reasonable degree of certainty the election results for future elections within each newly apportioned district.

In the adoption of SB 757 "Congressional Districts 2023," the members of the General Assembly controlling the apportionment process used technology and data to reapportion voters, creating a demonstrable advantage for their political party in the ensuing elections in those

districts. Likewise, in SB 758 "Realign NC Senate Districts 2023" and HB 898 "House Redistricting Plan 2023", the members of the General Assembly controlling the apportionment process used technology and data to reapportion voters, creating a demonstrable advantage for their political party ensuring the outcome of the elections in those districts.

The process utilized by the Legislative Defendants to apportion citizens into these electoral districts in 2023 was largely void of transparency and created in secret consultation with a redistricting expert from Ohio. Shockingly, neither the public nor representatives of the minority party leadership were allowed to participate in the apportionment process or observe the process to determine which citizens in which precincts or census blocks would be aggregated together to form electoral districts. Despite subsequent process of superficial transparency, a full ninety-five percent of the census blocks utilized in the preparation of the map remained unchanged from the original created by the secret process with only minor, technical changes taking place prior to passage.

Most clearly as to Congressional districts NC 6, NC 13, NC 14, and legislative districts SD 7 and HD 105, Defendants Berger and Moore and their allies and agents preordained the outcome of the election in at least three ways:

1. They took substantial numbers of voters likely to support their party's candidates and moved them into these districts;
2. They took certain voters likely to oppose their party's candidates out of their district and moved them into districts where their votes would be negated or minimized so as to not be determinative in deciding the outcome of the election; and,
3. They generally reapportioned the voters in NC 6, NC 13, NC 14, SD 7 and HD 105 in such a way as to turn the districts from competitive to favoring one political party's candidates, in this case the Republican Party.

Plaintiffs incorporate for purposes of this brief the specific allegations in the Complaint as to the actions of Defendants in reapportioning voters for NC 6, NC 13, NC 14, SD 7 and HD 105.

GOVERNING STANDARDS

The issue on a Rule 12 motion "is not whether [the] plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support the claim." *Howe v. Links Club Condo. Ass'n, Inc.*, 263 N.C. App. 130, 137, 823 S.E.2d 439, 447 (2018). Thus, the "essential question" is

"whether the complaint, when liberally construed, states a claim upon which relief can be granted on any theory." *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 266, 827 S.E.2d 458, 465 (2019).

For these reasons, a Rule 12 motion should not be granted unless "it appears certain that [the plaintiff] could prove no set of facts which would entitle [it] to relief under some legal theory." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010); see also, e.g., *Energy Invs. Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000.) ("Rule 12(b)(6) generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.").

When courts are called upon to interpret a provision in Article I of the North Carolina Constitution which the Defendants' motion asks the Court to do here, these rules apply with even greater force. The North Carolina Supreme Court has repeatedly cautioned which trial courts must "give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions [in Article I of the North Carolina Constitution]," because these provisions "were designed to safeguard the liberty and security of the citizens in regard to both person and property." *Tully v. City of Wilmington*, 370 N.C. 527, 533, 810 S.E.2d 208, 214 (2018) (quoting *Corum v. Univ. of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992)).

Under these legal standards and governing constitutional principles, Defendants' motion fails for the reasons that follow.

ARGUMENT

I. The citizens of North Carolina have unenumerated rights under the N.C. Constitution which are judicially enforceable.

The first core question raised by the Complaint is whether the Plaintiffs, and in essence, all citizens of North Carolina, have "unenumerated" rights under the North Carolina Constitution. As the majority in *Harper v. Hall, 384 N.C. 292, 886 S.E.2d 393 (2023)* (referred to herein as *"Harper III"*) stated:

> [T]he constitution is interpreted based upon its plain language. The people used that plain language to express their intended meaning of the text when they adopted it. The historical context of our constitution confirms this plain meaning. As the courts apply the constitutional text, judicial interpretation of that text should consistently reflect what the people agreed the text meant when they adopted it.

Harper III at 297. Article I, § 36 of the North Carolina Constitution undeniably recognizes the citizens of this state retain certain unenumerated rights. Specifically, Article I, § 36 provides that: "*[t]*he enumeration of rights in this Article shall not be construed to impair or deny others retained by the people." N.C. Const., Art. I, Section 36.

In their treatise on *The North Carolina State Constitution,* the authors including the current Chief Justice of the North Carolina Supreme Court, Chief Justice Paul Martin Newby, describe this section as follows:

> Although the people of North Carolina have expressly declared many rights in Article I, they have not attempted a complete enumeration. This section may have been rendered necessary by the introduction to the declaration of rights, also added in 1868, describing its purpose as the recognition and establishment of '*the* great, general, and essential principles of liberty and free government'. The fact that the section harks back to Section 1, which recognizes 'inalienable rights' and then lists four 'among these.' *Section 36 reminds us that the whole declaration of rights, despite its great importance, is no more than that: a selection only, not a complete catalog.*

John V. Orth & Paul Martin Newby, *The North Carolina State Constitution*, Oxford University Press 2nd Ed. 2013, pg. 92 (emphasis added). This point is further echoed in the *Harper III* majority opinion: "The Declaration of Rights is an expressive, *yet non-exhaustive list of protections* afforded to citizens against government intrusion, along with 'the ideological premises that underlie the structure of government.'" *Harper III* at 351. (emphasis added).

In analyzing whether a North Carolina citizen's fundamental rights include the right to fair elections under the state Constitution's unenumerated rights clause, it is critical to understand the historical context presented. As the Court in *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 3 N.C. 42, 1 Martin 48 (1787) stated in that seminal decision:

> "...at the time of our separation from Great Britain, we were thrown into a similar situation with a set of people, ship-wrecked and cast on a maroon'd island—without laws, without magistrates, without government, or any legal authority—that being thus circumstanced, the people of this country, with a general union of sentiment by their delegates, met in Congress, and formed that system. Or those fundamental principles comprised in the constitution...."

Id. Bayard anchored its decision in the fundamentals of a republican form of government that animate and perpetuate stable society. *Bayard* noted the Constitution does not expressly prohibit legislators from "render[ing] themselves the Legislatures of the State for life, without further election of the people." *Id.* However, such acts would be invalid because the unenumerated right

to a fair election and transition of power otherwise would improperly empower the legislature to "repeal or alter the Constitution" and "dissolve the government thereby established." *Id. Bayard* stands for the principle that it is the judiciary's obligation to not permit *expressio unius* arguments to subvert the Constitution's proper functioning. Taken to its logical end, *Bayard* in essence reflects the time-honored judicial remedy under the constitution against otherwise unchecked, self-perpetuating power of a branch of government.

What was implicit since North Carolina's founding was made explicit in 1868 when the "Reconstruction Constitutional Convention" included a provision in the Declaration of Rights which explicitly recognized the people of the state retained unenumerated rights in addition to those expressly stated.

These ideas continue to the present. As the *Harper III* majority states, "The constitution is our fundamental social contract and an agreement among the people regarding *fundamental principles*. The state constitution is different from the Federal Constitution: the Federal Constitution is a limited grant of power while the state constitution is a limitation on power." *Harper III* at 297 (emphasis added). Thus, the rights protected by the North Carolina Constitution, both enumerated and unenumerated, serve as the people's protection against abuses by government which violate these fundamental rights. The North Carolina Constitution limits the power of state government, including legislative acts, which violate the rights of the people.

The *Bayard* decision established for the first time in our state's history the concept of judicial review and predated the U.S. Supreme Court decision in *Marbury v. Madison*, 5 U.S. 137 (1803). *Bayard* firmly declared the judiciary's duty to strike down a law passed by the General Assembly that violates the rights of the people: "Consequently, the constitution (which the judicial power was bound to take notice of as much as any other law whatever,) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect." *Bayard*, 1 N.C. 5, pp 7-8.

The challenge in addressing the question of unenumerated rights as opposed to a claim under an enumerated right, is determining what right or rights the framers of the Constitution would have expected but not specifically included in the text. One guide for this determination can be found in Ninth Amendment jurisprudence under the U.S. Constitution. The Ninth Amendment

provides: "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const., 9th Amend.

Anthony Sanders, Director of the Center for Judicial Engagement for the Institute for Justice, recently argued: "[protecting unenumerated rights] is the story of Americans recognizing the dangers that governments pose and expansively shackling those governments into the future." Anthony B. Sanders, *Baby Ninth Amendments – How Americans Embraced Unenumerated Rights and Why it Matters*, University of Michigan Press, 2023, pg. 7 (addressing state constitutions' incorporation of an unenumerated rights savings clause similar to that of the Ninth Amendment). Sanders goes on to quote North Carolina's first United Supreme Court Justice: "[t]o quote just one Founder, future Supreme Court justice, Jame Iredell, speaking at the North Carolina ratifying convention: 'Let anyone make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it." *Id.* Roger Pilon, previously quoted, stated in response to Sanders:

> [w]e have done that through constitutions that not only grant power but say also what governments 'shall not' do. Their etcetera clauses state plainly that rights not enumerated in a constitution shall not be 'denied, disparaged, or impaired.' And because they are found in *written* constitutions, it falls to the judiciary to enforce them, just as is done with clauses protecting enumerated rights."

CATO Institute Commentary, May 9, 2023, by Roger Pilon.

Therefore, it is unquestionable the citizens of North Carolina have reserved, unenumerated fundamental rights pursuant to Article I, Section 36 which cannot be impaired or denied. And it is the judiciary's absolute responsibility to protect those rights.

II. The citizens of North Carolina have an unenumerated right to fair elections and to be protected from government action which attempts to compromise those elections by purposeful legislation which preordain the outcome of those elections.

As stated in the FOREWORD TO FIRST EDITION (1993) of the Professor Orth and Chief Justice Newby treatise: "State constitutions generally and North Carolina's constitution in particular are rich sources of fundamental principles of democratic government and guarantees of individual liberties." Orth & Newby, *The North Carolina State Constitution, 2nd Ed.*, Forward to First Edition.

Indeed, these fundamental principles and guarantees of individual liberties were recognized from the very inception of independence from Great Britain when the people of North Carolina by

the adoption of the original state constitution and the prefatory Declaration of Rights in December 1776 created a system of government for the new State of North Carolina. Critical to this new structure of government and the declaration of powers which the new government would have was the election of the representatives elected by the people who would exercise the powers granted.

Throughout the constitutional developments of the State of North Carolina from 1776, through 1868, and to the modernized version of the Constitution in 1971, the Constitution has repeatedly affirmed the eligibility of citizens to vote and the constitutional requirement for officeholders to be elected by those eligible citizens. The North Carolina Constitution includes two specific rights in Article I, related to elections. Article I, Section 9 provides for "Frequent elections" and Section 10 provides for "Free elections". In addition to those rights dealing specifically with elections, the State has enacted a myriad of laws regulating the conduct of elections for public offices and empowering the State Board of Elections to protect the sanctity of those election laws. By legislative mandate:

> [t]he State Board of Elections shall investigate when necessary or advisable, the administration of election laws, frauds and irregularities in elections in any county and municipality and special district and shall report violations of the election laws to the Attorney General or district attorney or prosecutor of the district for further investigation and prosecution.

N.C.G.S. § 163-22(d).

Similarly, the concept or right to "fair" elections can be traced through the North Carolina Founding Fathers and to the origins of representative democracy. In framing the initial constitution for the newly independent State of North Carolina, drafters sought advice from John Adams of Massachusetts. Adams published his guidance in "Thoughts on Government" in April of 1776:

> The principal difficulty lies, and the greatest care should be employed in constituting this Representative Assembly. It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this Assembly to do strict justice at all times, it should be an equal representation, or in other words equal interest among the people should have equal interest in it. *Great care should be taken to effect (sic) this, and to prevent unfair, partial, and corrupt elections.* (emphasis added).

In his inaugural address delivered on March 4, 1797, newly elected President John Adams stated:

> In the midst of these pleasing ideas we should be unfaithful to ourselves if we should ever lose sight of the danger to our liberties *if anything partial or extraneous should infect the purity of our free, fair, virtuous and independent elections.*

> (emphasis added). If an election is to be determined by a majority of a single vote, and that can be procured by a party through artifice or corruption, the Government may be the choice of a party for its own ends, not the nation for the national good.

These understandings and admonitions as articulated by John Adams over two hundred years ago, have continued to be an over-arching theme over the course of the centuries. In 1875, in *Van Bokkelen v. Canaday*, 73 N.C. 198 (1875), the Supreme Court struck down unfair election regulations as a "plain violation of fundamental principles…too plain for argument." Writing for the court, Justice Edwin Godwin Reade's opening lines are: "Our government is founded on the will of the people. Their will is expressed by the ballot." This landmark case establishing the unenumerated fundamental right to a fair election has never been repealed.

In 2001, a constitutional challenge was brought on behalf of a group of plaintiffs, individually and in their official capacities, including the Chairman of the North Carolina Republican Party, challenging the legislation passed by the Democratic-controlled General Assembly in 2001 apportioning voters and creating state House and Senate Districts. See *Stephenson v. Bartlett (Stephenson I)*, 355 N.C. 354, 562 S.E. 2d. 377 (2002). While this challenge focused on the state legislative districts and sought the Court's interpretation and application of the North Carolina Constitution's "whole county provision", the plaintiffs in *Stephenson* presented evidence at the trial level pointing out the impact of the legislature's actions on the concept of fair government in North Carolina. This evidence was presented through the testimony of John Davis, Executive Director of NCFREE, a non-partisan membership organization. *See* Plaintiffs/Appellee's Brief to N.C. Supreme Court, pg. 35-39 and attached hereto as Exhibit D. At the time of his testimony, Mr. Davis had been projecting elections results in North Carolina since 1992.

Moreover, in their brief in 2002, the plaintiffs (by and through their attorneys Thomas A. Farr, (the now Honorable United States District Court Judge) James C. Dever III, Terence D. Friedman and Phillip A. Strach) stated as follows: "[t]he 2001 Senate and House redistricting plans completely ignore the role of counties in North Carolina, and are intended to significantly increase the Democrat majorities in both houses of the General Assembly, to protect Democrat incumbents, and to protect a relatively smaller number of Republican incumbents." *Id.*, pg. 39; Exhibit D. After extensively quoting the evidence of the lack of competitive districts created by the challenged plans, the *Stephenson* plaintiffs stated:

> Defendants are fighting to preserve plans that – by design – give the voters no choice in the majority of Senate and House elections. Further, their plans apparently give voters a true chance to elect representatives in only 3 out of 170 races. No wonder one political commentator has likened North Carolina to a third-world country – with the proviso that voters in most third-world countries have more options than the people of North Carolina when it comes to electing candidates of their choice to the Senate or House. John Fund, Red-Light District, Wall St. Journal, Mar. 13, 2002.

Id. Exhibit D.

While the *Stephenson* case focused on the "whole county provision" in the N.C. Constitution and not on the right of citizens to fair elections, the sentiment expressed in the brief lends substantial support to the concept of fair elections. The argument advanced by the *Stephenson* plaintiffs' brief underscores Plaintiffs' position in the case *sub judice*:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. **Other rights, even the most basic, are illusory if the right to vote is undermined.** *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 535, 11 L.Ed.2d 481 (1964) (emphasis added). The 'right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds,* 377 U.S. at 555, 84 S. Ct. at 1378.

Id. at 86. The legislative action challenged in this case and the fundamental right to have elections free from government intervention attempting to "stack the deck", strikes right "at the heart" of representative government and the constitutional underpinnings of that representative government - fair elections.

While the case law over the years has rarely dealt with the constitutional implications and meaning of the Frequent election clause and the Free election clause, *Harper III* did quote from one North Carolina Supreme Court opinion discussing the Free elections clause. The *Harper III* majority quotes from *State ex rel. Swaringen v. Poplin*, 211 N.C. 700, 191 S.E. 746 (1937), a case involving a quo warranto action alleging election fraud. The *Harper III* majority quotes:

> In the present case fraud is alleged. The courts are open to decide this issue in the present action. In Art. I, sec. 10, of the Const. of North Carolina, we find it written: 'All elections ought to be free.' Our government is founded on the consent of the governed. A free ballot *and a fair count* (emphasis added) must be held inviolable to preserve our democracy. In some countries the bullet settles disputes, in our country the ballot." at 702, 191 S.E. at 747.

Harper III, at 363. If a "fair count" is inviolable to preserve our democracy—a fair count being only one small part of the overall election framework—then the concept of a fair election generally must be considered "inviolable" to preserve our democracy. Moreover, what good is a fair count on an unfair ballot.

While Harper *III* involved a challenge, in part, under Article I, Section 10 "Free elections", the holding in no way addresses or concludes anything about the question presented in this case. The *Harper III* majority determined the "Free elections" clause had a narrow meaning in the context of the plaintiffs' challenge, and there is no mention in the holding whether the plaintiffs in that case or the citizens of North Carolina generally have a constitutional right to fair elections. However, can there really be any question that the right to a fair election, as articulated by John Adams, is somehow not a right of the people of this state? What good are frequent elections if they are not fair? What good are free elections, as defined by the *Harper III* majority, if they are not fair elections?

As the *Swaringen* court stated, "*...a fair count must be held inviolable to preserve our democracy.*" *Swaringen*, at 702, 191 S.E. at 747 (emphasis added). What good would a "fair count" be, however, if different aspects of an election were unfair such as stacking the electorate so as to skew the vote in favor of one party or candidate? The right to fair elections is as fundamental as it gets. Fair elections are the foundation upon which representative government rests. Without fair elections, the individuals elected to public office and authorized to exercise the constitutional powers granted them as office holders would have no legitimate authority. They might hold office and exercise the powers of that office, but their legitimacy to be the voice of the people will have been without constitutional validation. The plaintiffs and all citizens of North Carolina have a right under the North Carolina Constitution to fair elections.

The definition of "fair" as applied to the context of this case is simple and straightforward: "just, unbiased, equitable; in accordance with the rules". *Oxford English Dictionary*, 9th Ed. 1995, pg. 484. In the specific context of the allegations of this case, the government, specifically the General Assembly, has the constitutional obligation to provide for a system of elections to the constitutional offices set forth in the Constitution. How that system – from beginning to end – operates for the benefit of the people, is entirely dependent on the standard of fairness. In other words, as the definition above implies, the system must be free from self-interest, injustice or favoritism. The foundational step in an election is a determination as to what group of people are

entitled to vote for a specific office. In the case at hand, the voters in NC 6, NC 13, NC 14, HD 105, and SD 7 are entitled to have the determination as to what group of people—the electorate—can vote in these elections for those specific offices, determined without the government showing favoritism or bias or treating one group more favorably than another. The N.C. Constitution imposes this limitation on the General Assembly through the unenumerated right to fair elections.

As the Court is aware, any election can be won by a single vote. Thus, any action on the part of government to improperly and unconstitutionally manipulate the apportionment of voters in a district to influence the outcome, would constitute a violation of the constitutional right to a fair election. It makes no difference whether the General Assembly "puts its thumb on the scale" or "sits on the scale"—the result is still the same—an unfair election. It is not necessary for any particular outcome to occur which supports the purpose of the unfair apportionment. The favored candidate or favored party need not necessarily win the election. It is the attempt by the governmental entity to influence the results which is the violation–not the result.

The courts of this state have consistently applied the legal concept of fairness in a variety of litigation contexts. Whether discussed in the context of a "fair trial" in a criminal case or an "unfair and deceptive" trade practice in a civil business case, applying the definition and concept of fairness in the scope of an election case is fundamentally straightforward. As our Supreme Court has said: "where a party engages in conduct manifesting an inequitable assertion of power or position, such conduct constitutes an unfair act or practice. See *Johnson v. Beverly-Hanks & Assocs.*, 328 N.C. 202, 208, 400 S.E.2d 38, 42 (1991); *Gray v. N.C. Ins. Underwriting*, 529 S.E.2d 676 (N.C. 2000). As stated in the Introduction to this brief, how this right is "named" is less important than recognizing the fundamental concept of protecting the right of citizens seeking to be free from government interference in "stacking the deck" to try and preordain the outcome of an election. Fair elections, or however one might "name" the right, is the centerpiece of our democratic system of governance.

Likewise, political leaders in this country from Washington, D.C. to Raleigh, N.C. have consistently called for fair elections. As United States Senator and former presidential nominee Mitt Romney said in a speech on the Senate floor in February 2021: "There is a thin line that separates our democratic republic from an autocracy: It is a free and *fair election* (emphasis added) and the peaceful transfer of power that follows it." Even one of the named legislative defendants, House Speaker Tim Moore has said in the context of a variety of political topics on Spectrum

News' Capital Tonight show with Tim Boyum, "Why can't they [the Democrats] agree to have a fair election...." December 20, 2023.

III. Harper III is inapplicable and does not control the question whether this case raises a non-justiciable political question.

Defendants are likely to contend this case should be dismissed under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim upon which relief can be granted as "Plaintiffs' Claim for Relief is non-justiciable." Specifically, Defendants will likely contend the *Harper III* decision controls the outcome of this case and mandates dismissal. Defendants' contentions are simply incorrect. *Harper III* is patently distinguishable from this case. *Harper II* is based on different legislation, a different constitutional standard, and on an alleged different violation of constitutional rights.

As stated in *Harper III*:

> [t]he issue presented in this case is whether the North Carolina Constitution prohibits partisan gerrymandering. Specifically, plaintiffs allege that legislative and congressional redistricting *plans* drawn by the General Assembly in 2021 and then again on remand in 2022 are partisan gerrymanders in violation of specific provisions of the constitution.

Id. at 300 (emphasis added). The *Harper III* majority opinion references the U.S. Supreme Court and states: "[t]hat partisan gerrymandering claims are effectively requests for courts to allocate political power to achieve proportional representation, something that the Federal Constitution does not require." *Id.* at 316.

Next, the *Harper III* majority states:

> Accordingly, partisan gerrymandering claims do not seek to redress a violation of any particular constitutional provision; rather, such claims 'ask the courts to make *their own political judgment* about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end.

Id. at 317 (emphasis original). As discussed more fully below, this standard applied in *Harper III* is predicated on a constitutional claim to proportionate representation in the aggregate creation of the redistricting maps of the state that *political parties* deserve—which is *not* the issue here.

The *Harper III* majority then addresses an aspect of their analysis Defendants may seek to apply here. The *Harper III* majority states: "[e]ssentially, partisan gerrymandering claims ask courts to 'apportion political power as a matter of fairness.' This judgment call is a policy choice.

It is not the kind of 'clear, manageable, and politically neutral' standard required for justiciable issues." *Id.* at 317-318. (internal citation omitted). In the case at bar, Plaintiffs make no such claim for proportionality. The claim here is for the protection of a fundamental constitutional right.

Significantly, the *Harper III* majority conducts a lengthy analysis of "fairness" which is particularly relevant to the claim of "fair elections" in this case. Because of its importance to the analysis in this case, the full quotation is stated as follows:

> "The Court elaborated that settling on a clear, manageable, and politically neutral test for "fairness" is extremely difficult because 'it is not even clear what fairness looks like in this context. (emphasis added) *Rucho [v. Common Cause],* 139 S.Ct. [2484] at 2500 [(2019)]. Fairness could mean increasing the number of competitive districts, in which case the appropriate test would need to accurately identify and 'undo packing and cracking' so that supporters of the disadvantaged party (emphasis added) have a better shot at electing their preferred candidates.' Id. (alterations in original) quoting *Bandemer*, 478 U.S. at 130, 106 S.Ct. at 2809)."
>
> Alternatively, fairness might be measured by the number of 'safe seats' each party receives, in which case the appropriate test would actually require packing and cracking in the redistricting process to ensure each party wins 'its "appropriate" share of "safe" seats." (Citation omitted) This approach, however, reduces the number of competitive districts allocated to the opposing party. Id.
>
> Thus, the Supreme Court concluded that:
>
> [d]eciding among just these different versions of fairness...poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgements, let alone limited and precise standards that are clear, manageable, and politically neutral. And judicial decision on what is *'fair' in this context* (emphasis added) would be an 'unmoored determination' of the sort of characteristic of a political question beyond the competence of the federal courts.'"

Id. at 318 (citations omitted) (emphasis added).

The *Harper III* majority next analyzed whether there is an objective, mathematical metrics for measuring "political fairness". Again, relying on the U.S. Supreme Court's opinion in *Rucho*, the Court stated:

> the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims because the Constitution supplies no objective measure for assessing *whether a districting map treats a political party fairly* (emphasis added). It hardly follows from the principle that each person must have an equal say in the election of representatives that a

> person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

Id. at 318 (quoting *Rucho,* 139 S. Ct. at 2501.)

The U.S. Supreme Court's analysis of a partisan gerrymander claim in *Rucho* thus serves as the foundation for the analysis in *Harper III.* It is worth quoting again to emphasize the distinction in the claims *sub judice*, that the *Harper III* majority relied on in *Rucho*:

> "The claims and arguments at issue in this case are the same as those in *Rucho,* only this time they arise under the state constitution instead of the Federal Constitution. The Declaration of Rights provisions invoked by plaintiffs in this case—the free elections clause, the equal protections clause, and the freedom of speech and assembly clauses, N.C. Const. art. I, SS 10, 12, 14, 19,--are our state constitution's counterparts to the Federal Constitutional provisions invoked in *Rucho*—Article I, Section 4 (Elections Clause); Article I, Section 2 (composition of the U.S. House of Representatives); the Equal Protection Clause of the. Fourteenth Amendment; and the First Amendment, which protects the rights to free speech and freedom of association, see *Rucho,* 139 S.Ct. at. 2491.

In their analysis, the majority in *Harper III* noted, "Moreover, like the Federal Constitution, our constitution does not provide any judicially discernible or manageable standards for determining how much partisan gerrymandering is too much. *See Rucho*, 139 S.Ct. at 2500." *Harper III*, at 53. The Court then held "that claims of partisan gerrymandering are nonjusticiable, political questions under the North Carolina Constitution."

In *Harper III*, the majority consistently described "partisan gerrymandering" as articulated by the U.S. Supreme Court in *Rucho* in the following way:

> Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature....
>
> Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O'Connor put it, such claims are based on 'a conviction that the greater departure from proportionality, the more suspect an apportionment plan becomes." *Rucho,* 139 S.Ct. at 2499 (quoting *Bandemer,* 478 U.S. at 159, 106 S.Ct. at 2824 (O'Connor, J., concurring in the judgment))."

Id. at 339-40.

Harper III is not dispositive here. As Justice Clarence Thomas cited in *Cooper v. Aviall,* 543 U.S. 157, 169 (2004) quoting *Webster v. Fall,* 266 U.S. 501, 511 (1925): "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." In *Webster*, the U.S. Supreme Court further stated:

> Counsel for appellant directs our attention to other cases where this Court proceeded to determine the merits notwithstanding the suits were brought against inferior or subordinate officials without joining the superior. We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since in none of them was the point here at issue suggested or decided. The most that can be said is that the point was in the cases, if anyone had seen fit to raise it.

Webster v. Fall, 266 U.S. at 511.

As in *Webster,* the fundamental issues presented in the Complaint here were neither brought to the *Harper III* Court's attention nor ruled upon. As noted, *Harper III* was addressed to the complete redistricting maps impacting all of the Congressional districts (14 districts), the N.C. State House districts (120 districts) and the N.C. State Senate districts (50 districts), not discrete districts as alleged in the Complaint here. Here, Plaintiffs challenge specific electoral districts and not the maps or proportional representation.

In addition, Plaintiffs herein seek redress for a violation of an individual constitutional right which has been violated—the right to having a fair election for the specific office being voted on, without the government directly and intentionally manipulating the voting pool to attempt to assure the outcome of the election. In *Harper III*, the plaintiffs sought relief from the aggregate map and contended political parties were entitled to the state constitutional right of "proportionality" of seats in the drawing of the maps in their totality. The constitutional provisions relied on in *Harper III* are not part of Plaintiffs' reliance on the unenumerated state constitutional right of fair elections. As the U.S. Supreme Court pointed out in *Webster*, if the claims and issues were neither brought before the Court in *Harper* III nor decided by the Court, they cannot stand as precedent in subsequent litigation.

In sum, this case does not involve a political question. It does not involve reallocating political power. It involves a constitutional right that cannot be abridged by the legislature. "The objection that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage

[denial of the right to a fair election]. That private damage may be caused by such political action and may be recovered in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White*, 2 Ld. Raym. 938, 3 id. 320, and has been recognized by this Court." *Nixon v. Herndon*, 273 U.S. 536 (1927) (Opinion of Justice Holmes). The North Carolina judiciary has a constitutionally assigned duty to protect the right to fair elections. If the court fails to act in this regard, no other actor under the Constitution backstops the court—there is no executive veto or plebiscite opportunity.

Harper III does not control this case. Accordingly, the Legislative Defendants' Motion to Dismiss based upon an argument that this matter involves a non-justiciable political question controlled by *Harper III* must be denied.

IV. The issues raised in this case are justiciable, non-political questions appropriate for the Court to decide.

The Court in *Harper III* analyzed the political question issue by relying on the U.S. Supreme Court's decision in *Rucho* and its standard for deciding whether issues presented constituted a non-justiciable political question. That analysis relied on three factors which the Court analyzed and applied: (1) was there a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) was there a judicially discoverable and manageable standard; and (3) does the decision depend on policy decisions.

A. The textual commitment of redistricting to the General Assembly does not, under the claims presented in this case, constitute a non-justiciable political question.

First, was there a "textually demonstrable constitutional commitment of the issue to a coordinate political department?" *Harper III*, at 327. In *Harper III*, the state constitutional authority granted to the General Assembly is to "revise" the Senate and House districts and "the apportionment" of those legislative offices among the districts, subject to certain limitations set out in the Constitution. N.C. Const., Art. II, §§ 3 & 5. Pursuant to the U.S. Constitution, the General Assembly is tasked with creating districts for the U.S. House of Representatives. (See U.S. Const, Art. I, § 4).

In *Harper III,* the Court discussed the "textual commitment" standard in the context of the General Assembly's authority to "redistrict" or "reapportion" but noted "it does not leave the General Assembly completely unrestrained. The constitution expressly requires that any

redistricting plan conform to its explicit criteria." *Harper III*, at 331. In the analysis of the claims in *Harper III,* the Court noted that neither the Executive nor Judicial branch is given any role in the "redistricting" or "reapportionment" responsibilities of the General Assembly.

Here, Plaintiffs do not claim the Court should in any way intervene or usurp the authority of the General Assembly. Instead, the issue turns on the long-standing constitutional duty of the Courts to determine if an act of the General Assembly violates the constitutional rights of the citizens of this state. *See Bayard, supra*, 1 N.C. 5 (1787). The challenge here is to legislative acts alleged in the Complaint which Plaintiffs assert violates their constitutional right to a fair election under N.C. Const. Art. I, § 36.

While the General Assembly is granted general legislative powers by the Constitution and specific responsibilities throughout the state constitution, these powers and responsibilities do not remain unchecked. Simply being granted constitutional responsibility does not mean the General Assembly's legislation is insulated from constitutional challenge whether the peoples' rights are enumerated or unenumerated. Whether it is "one person, one vote," the Voting Rights Act, or the "whole county provision," the General Assembly's authority to redistrict and apportion is, as noted in *Stephenson, supra*, limited by the Constitution by a host of fundamental rights, both enumerated and unenumerated. Therefore, the textual commitment of redistricting to the General Assembly does not create a non-justiciable political question which precludes the Plaintiffs' rights to consideration of the violation of their constitutional right raised in the Complaint.

B. A judicially discoverable and manageable standard for a Court to review a claim under the right to fair elections is available and straightforward in its application.

The second factor the *Harper III* majority discussed as part of their evaluation of the question of a non-justiciable judicial question is the need for "Judicially Discoverable and Manageable Standards". *Harper III*, at 337. The entire focus of the Court's discussion, however, centers on the gerrymandering claims raised in *Harper III* and the plaintiffs' allegation that proportionality of districts was mandated by the constitutional provisions under which the case was brought. Relying upon *Rucho*, *Harper III* stated:

> [p]artisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature....

Harper III at 339 (quoting *Rucho*,139 S. Ct. at 2499). That is not the claim in this case. This case is about individual citizens' right to fair elections, regardless of their political affiliation or voting intentions. Plaintiffs in their Complaint do not claim a Democrat or a Republican should win. They simply claim that in a democracy based on a constitutional republic, the government cannot unfairly "stack the deck" in an election in order to try and preordain the outcome.

Further the *Harper III* majority extensively reviewed the Mean-Median Difference and Efficiency Gap tests submitted by Plaintiffs and which were approved in the *Harper I* decision. The *Harper III* Court used these two tests to determine whether too much partisanship was involved in the map drawing. Ultimately, the *Harper III* majority flatly rejected the use of these tests, concluding:

> these tests do not provide a clear, judicially manageable standard. Instead, as cautioned by *Rucho,* these tests 'ask[ ] judges to predict how a particular districting map will perform in future elections [which] risks basing constitutional holdings on unstable grounds outside judicial expertise.' *Rucho*, 139 S. Ct. at 2503-04."

Harper III, at 341-42. Accordingly, these tests have no application to the claim presented in this case, and Plaintiffs do not make any such contention. Rather, Plaintiffs in this case contend the "test" for fairness in the context of the constitutional claim presented is straightforward and simple—which is consistent with the *Harper III* mandate that "[a] constitutional standard must be clear and easily applied by the branch assigned the duty in question." *Harper III*, at 343.

As applied to the context of this case, the definition of "fair" is simple and straightforward: "just, unbiased, equitable; in accordance with the rules". *Oxford English Dictionary*, supra at 484. In the specific context of the allegations of this case, the government, specifically the General Assembly, has the constitutional obligation to provide for a system of elections to the constitutional offices set forth in the Constitution. How that system—from beginning to end—operates for the benefit of the people, is entirely dependent on the standard of fairness. In other words, as the definition above states, the system must be free from self-interest, injustice or favoritism. The foundational step in an election is a determination as to what group of people are entitled to vote for a specific office. In the case at hand, the voters in NC 6, NC 13, NC 14, HD 105, and SD 7 are entitled to have the determination as to what group of people—i.e., the electorate—is entitled to vote in these elections. Further, that decision must be determined without self-interest, injustice or favoritism by the governmental body making the decision.

The test for fairness as a clear, manageable, and politically neutral standard is easily determined by evidence presented and is judicially capable of being applied. First, the claims presented are politically neutral as the test for fairness applies equally to all registered voters regardless of political affiliation or unaffiliated status. In *Harper III*, the Court struggled to determine how much unfairness in the map drawing was too much. Here, the single fact to consider is whether the General Assembly apportioned voters to influence the outcome of the elections at issue, regardless of the ultimate results and regardless of the degree of unfairness. In other words, did the Defendant legislative leaders and their agents, as alleged in the Complaint, apportion voters in the challenged districts with the purpose of attempting to create districts which reflected their own self-interest and favoritism toward their political interests by using extensive data about the voters in those districts and their political leanings?

Moreover, as previously noted the courts of this state have consistently applied the legal concept of fairness in a variety of litigation contexts, including in the context of a "fair trial" in a criminal case or an "unfair and deceptive" trade practice in a civil business case. Thus, application of the definition and concept of fairness in the scope of an election case is fundamentally straightforward. Can a court judicially manage such a claim? Absolutely. The Court hears the evidence and determines whether the evidence meets the Plaintiffs' burden of proof. The application of this fairness test is in relation to the *actions* of government. The state constitution is, of course, a limitation on government action which protects the constitutional rights of the citizens of North Carolina.

C. The issue of whether the citizens of the state have a constitutional right to fair elections is not a policy question, and courts reviewing such issues do not have to make any policy choices.

Finally, the *Harper III* majority discussed "Policy Decisions" which is the third part of their test for justiciability. The decision criticizes the prior rulings in *Harper* by stating they "involve a host of 'policy determination[s] of a kind clearly for non-judicial discretion.' *Harper III*, at 345 (quoting *Baker v. Carr,* 369 U.S. 186, 217 (1962)). In rejecting the result of *Harper I,* the *Harper III* majority noted "the majority chose to insert into our constitution a requirement for some type of statewide proportionality based on their view of political 'fairness'". *Harper III*, at 346. The Court then noted the North Carolina Constitution, like the Federal Constitution, "does not contain a proportionality requirement." *Id.*

The other relevant aspect of the *Harper III* majority's opinion is the dismissal of the use of the various "tests" set out in *Harper I* to calculate political science metrics that predict future election results. Utilizing those tests to determine whether too much gerrymandering has taken place in the drawing of the aggregate maps is a policy choice according to the *Harper III* majority which supported its decision of non-justiciability. "The decision to use these 'partisan fairness' tests is a policy determination because it presumes that a voter's or a candidate's partisan affiliation—over all other factors—is the most relevant factor in predicting partisan fairness...." *Harper III* at 347..

Here, none of that reasoning applies. First, Plaintiffs do not contend that those scientific tests should be applied. Instead, Plaintiffs rely on a concept of fairness in elections with the definition and application of "fairness" being a standard which requires no political science tests or a measuring of degrees of "fairness". As previously noted, a single vote can determine the outcome of an election, so the degree of "fairness" is irrelevant. And while all elections in the *non-governmental* (emphasis added) context have varying degrees of "unfairness", this case is centered on the premise that a government cannot manipulate an election by apportioning voters whose voting inclinations are known and applied in the apportionment. The Constitution is the "check", the "restraint", and the "limitation" on government to protect the people from an overreaching unconstitutional practice of manipulating the fundamental elections of people who, when elected, will exercise the very governmental powers being exercised in the challenged apportionment. As the *Stephenson* plaintiffs said in their brief to our Supreme Court in 2002: "What is particularly harmful is that these legislators elected under an unconstitutional scheme will then be given the opportunity in 2003 to revise the illegal redistricting plans and to resolve the public policies of this State." *Stephenson*, Appellant's Brief, p.87; Exhibit D. In other words, the elected official by virtue of, or with the assistance of, the unconstitutional district created by the Legislature is positioned to perpetuate his or her subsequent election to office by virtue of that unconstitutionally apportioned district. Such a result is constitutionally infirm. As the North Carolina Supreme Court recognized in *Bayard*:

> [t]hat by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away and require that he should stand condemned to die, without the formality of any trial at all: *that if the members of the General Assembly could do this, they might with equal authority not only render*

> *themselves the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.*

Bayard, at pp. 7-8 (emphasis added).

If the General Assembly is allowed in the exercise of apportioning voters into districts, to in essence, attempt to preordain the winners in those elections, then "they might with equal authority, not only render themselves the Legislators of the State for life, without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs [] forever." *Id.* Here, it is not about who will win or who does win the election in a particular district. Rather, the fundamental constitutional issue is whether the process of the election is tainted by the manipulation of eligible voters in that election created by the governmental actions of the General Assembly.

V. The complaint on its face states a claim for relief and the Defendants' Motion to Dismiss should be denied.

Applying the standard test for evaluating a Motion to Dismiss, Plaintiffs' Complaint alleges a claim for relief. Taking the alleged facts as true, which this Court must do on a Motion to Dismiss, the Complaint asserts the General Assembly in the exercise of its redistricting and apportionment authority, utilized political data in a secretive process which allowed them to apportion the districts in question in such a way as to virtually guarantee a decided electoral advantage to their favored political party. In essence, the General Assembly attempted to "stuff the ballot box" by virtue of their reapportionment actions in NC 6, NC 13, NC 14, SD 7 and HD 105.

CONCLUSION

Taking the allegations in the Complaint as true, Plaintiffs have stated a claim for a violation of their constitutional right to fair elections and freedom from government action attempting to preordain election results. Accordingly, Defendants Motion to Dismiss should be denied.

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Respectfully submitted this 10th day of May 2024.

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CERTIFICATE OF SERVICE

I, Thomas R. Wilson, hereby certify that I have used e-file and served a copy of the forgoing, and have served a copy on counsel of record via email at the addresses below:

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This the 10th day of May 2024.

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2023 CONGRESSIONAL PLAN CRITERIA

October 2023

- Equal Population. The Committee chairs will use the 2020 federal decennial census data as the sole basis of population for the establishment of districts in the 2023 Congressional Plan. The number of persons in each congressional district shall equal be as nearly as is practicable, as determined under the most recent federal decennial census. *Wesberry v. Sanders*, 376 U.S. 1 (1964).

- Traditional Districting Principles. We observe that the State Constitution's limitations upon redistricting and apportionment uphold what the United States Supreme Court has termed "traditional districting principles." These principles include factors such as "compactness, contiguity, and respect for political subdivisions." *Stephenson v. Bartlett*, 357 N.C. 301 (2003) (*Stephenson II*) (quoting *Shaw v. Reno*, 509 U.S. 630 (1993).

- Compactness. The Committee chairs shall make reasonable efforts to draw districts in the 2023 Congressional Plan that are compact.

- Contiguity. Congressional districts shall be comprised of contiguous territory. Contiguity by water is sufficient.

- Respect for Existing Political Subdivisions. County lines, VTDs and municipal boundaries may be considered when possible in forming districts that do not split these existing political subdivisions.

- Racial Data. Data identifying the race of individuals or voters shall *not* be used in the drafting of districts in the 2023 Congressional Plan.

- Political Considerations. Politics and political considerations are inseparable from districting and apportionment. *Gaffney v. Cummings*, 412 U.S. 735 (1973). The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions…but it must do so in conformity with the State Constitution. *Stephenson II*. To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. *Rucho v. Common Cause,* 588 U.S.____(2019).

- Incumbent Residence. Candidates for Congress are not required by law to reside in a district they seek to represent. However, incumbent residence may be considered in the formation of Congressional districts.

2023 SENATE PLAN CRITERIA

October 2023

- Equal Population. The Committee chairs will use the 2020 federal decennial census data as the sole basis of population for the establishment of districts in the 2023 Senate Plan. In forming new legislative districts, any deviation from the ideal population for a legislative district shall be at or within plus or minus five percent for purposes of compliance with federal "one-person, one-vote" requirements. *Stephenson v. Bartlett*, 357 N.C. 301 (2003) (*Stephenson II*).

- County Groupings and Traversals. The Committee chairs shall draw legislative districts within county groupings as required by *Stephenson v. Bartlett*, 355 N.C. 354 (2002) (*Stephenson I*), *Stephenson II*, *Dickson v. Rucho*, 367 N.C. 542 (2014) (*Dickson I*) and *Dickson v. Rucho*, 368 N.C. 481 (2015) (*Dickson II*). Within county groupings, county lines shall not be traversed except as authorized by *Stephenson I*, *Stephenson II*, *Dickson I*, and *Dickson II*.

- Traditional Districting Principles. We observe that the State Constitution's limitations upon redistricting and apportionment uphold what the United States Supreme Court has termed "traditional districting principles." These principles include factors such as "compactness, contiguity, and respect for political subdivisions." *Stephenson II* (quoting *Shaw v. Reno*, 509 U.S. 630 (1993).

- Compactness. Communities of interest should be considered in the formation of compact and contiguous electoral districts. *Stephenson II*.

- Contiguity. Each Senate district shall at all times consist of contiguous territory. N.C. CONST. art. II, § 3. Contiguity by water is sufficient.

- Respect for Existing Political Subdivisions. County lines, VTDs and municipal boundaries may be considered when possible in forming districts that do not split these existing political subdivisions.

- Racial Data. Data identifying the race of individuals or voters shall *not* be used in the drafting of districts in the 2023 Senate Plan.

- Political Considerations. Politics and political considerations are inseparable from districting and apportionment. *Gaffney v. Cummings*, 412 U.S. 735 (1973). The General Assembly may consider partisan advantage and incumbency protection in the application of its discretionary redistricting decisions…but it must do so in conformity with the State Constitution. *Stephenson II*. To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. *Rucho v. Common Cause,* 588 U.S.____(2019).

- Incumbent Residence. Incumbent residence may be considered in the formation of Senate districts.

GUIDANCE FOR DRAWING STATE HOUSE AND CONGRESSIONAL DISTRICTS

Draw House districts to be within plus or minus 5% of the ideal district population.

Draw Congressional districts to comply with federal standards for equal population.

Draw House and Congressional districts that are contiguous. Contiguity by a point is not permitted but contiguity by water is permissible.

Draw House districts within county groupings as described by *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) and subsequent decisions by the NC Supreme Court. The county groupings used in the 2022 House Plan are sufficient.

Within county groupings, only draw House districts that traverse county lines one time at most.

New districts will be drawn and the map drawer will not be bound by the location of prior district lines.

Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts in the 2023 Congressional and House plans.

To the extent feasible, draw districts that are visually reasonably compact. No mathematical tests are required.

Take reasonable measures to draw districts that respect and follow contiguous municipal boundaries.

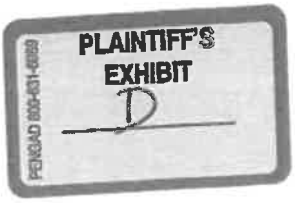
Take reasonable measures to draw districts that do not split VTDs.

Election results from the following elections may be considered:

- 2020 Presidential; 2020 Governor of North Carolina; 2020 Lieutenant Governor of North Carolina; 2020 U.S. Senator from North Carolina; 2020 Attorney General of North Carolina.
- 2022 U.S. Senator from North Carolina; both 2022 elections for Supreme Court of North Carolina.

To the extent feasible, do not doublebunk incumbents of any party into the same district.

An incumbent House member's local knowledge of communities of interest may be considered.



No. 94PA02

ELEVEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

* *

ASHLEY STEPHENSON, individually, and as a resident and registered voter of Beaufort County, North Carolina; LEO DAUGHTRY, individually, and as Representative for the 95th District, North Carolina House of Representatives; PATRICK BALLANTINE, individually, and as Senator for the 4th District, North Carolina Senate; ART POPE, individually, and as Representative for the 61st District, North Carolina House of Representatives, and BILL COBEY, individually, and as Chairman of the North Carolina Republican Party and on behalf of themselves and all other persons similarly situated,

Plaintiff-Appellees,

v.

GARY O. BARTLETT, as Executive Director of the State Board of Elections; LARRY LEAKE, ROBERT B. CORDLE, GENEVIEVE C. SIMS, LORRAINE G. SHINN, and CHARLES WINFREE, as members of the State Board of Elections; JAMES B. BLACK, as Speaker of the North Carolina House of Representatives; MARC BASNIGHT, as President Pro Tempore of the North Carolina Senate; MICHAEL EASLEY, as Governor of the State of North Carolina; and ROY COOPER, as Attorney General of the State of North Carolina,

Defendant-Appellants.

From Johnston County
No. 01 CV 02885

* *

PLAINTIFF-APPELLEES' BRIEF

* *

31

Verified Complaint ¶ 44; Exs. 2, 15A, 36, Irby Affidavit, Table 4 (listing minority districts cited in Ex. 36, State's Section 5 submission to USDOJ regarding the 2001 House Plan); ROA 37, Answer ¶ 43; Gilkeson Dep. at 53, 54, 58, 60, 68, 69, 83.[13]

H. Plaintiffs' Complaint.

Plaintiffs filed suit on November 13, 2001. They alleged that with respect to the creation of both Senate and House districts in 2001, the North Carolina Constitution required the General Assembly initially to identify and create whatever districts had to be created in order to comply with the VRA.[14] In creating VRA districts, in some instances, county lines must be divided in order to comply with federal law and the North Carolina Constitution. *See Shaw v. Hunt*, 517 U.S. 899, 911-16, 116 S. Ct. 1894, 1903-06, 135 L.Ed.2d 207 (1996); *Bush v. Vera*, 517 U.S. 952, 990, 116 S. Ct. 1941, 1968, 135 L.Ed.2d 248 (1996) (O'Connor, J., concurring); *DeWitt v. Wilson*, 856 F. Supp. 1409, 1413-15 (E.D. Cal. 1994) (three-judge court), *aff'd*, 515 U.S. 1170, 115 S. Ct. 2637, 132 L.Ed.2d 876 (1995). After creating such VRA districts, the General Assembly then should have organized the remaining counties or portions of counties into single or multimember county districts which are contiguous, equal "as nearly as may be", and which minimize the division of counties insofar as possible. *See* N.C. Const. Art. I, §§ 2, 3 & 5, Art. II, §§ 3, 5 (1971). In creating such districts, the General Assembly could use a population

[13] Defendants argue that plaintiffs' theory that the state Constitution incorporates federal law raises a federalism problem because federal officials and federal courts will dictate state policy. *See* Def. Br. at 35. Given that the State must comply with the VRA and the U.S. Constitution, the defendants' argument lacks merit. Indeed, because defendants themselves enacted minority districts they thought were needed to comply with federal law, and submitted these plans to the USDOJ for preclearance, defendants' federalism argument is silly.

[14] The "VRA districts" are the minority districts that the State had to create to comply with Section 2 or Section 5 of the VRA. They do not mean all districts included in all or a portion of a county covered by Section 5. Defendants extensively discuss other districts that touch upon covered counties (Def. Br. at 18, 34), but their own submissions to the USDOJ demonstrate that defendants believe that only the districts designated by them as minority districts were those needed to protect minority voting strength in either a Section 5 county or counties like Mecklenburg, Wake, or Forsyth that are subject to Section 2. *See* Exs. 35, 36.

deviation of +/- 8.2% and still satisfy the "as nearly as may be" requirement of the North Carolina and the federal Constitution.[15] Instead of this process, however, the General Assembly created minority districts in order to comply with the VRA and then divided and subdivided counties for other reasons that are not mandated by either the North Carolina Constitution or federal law, such as incumbency protection. *See* Miller Affidavit ¶¶ 5, 6, 12, 14; Sutton Affidavit ¶¶ 5, 6; Ex. 126.

The plaintiffs have proven that it is possible to draft redistricting plans that give the North Carolina constitutional requirement of not dividing counties all possible effect while simultaneously complying with the State's "as nearly as may be" requirement and complying with federal law, including the defendants' understanding -- as explained in their Section 5 submission -- of what is required by the VRA and the Fourteenth and Fifteenth Amendments of the Constitution. Plaintiffs submitted a narrowly tailored House redistricting plan that complies with the North Carolina Constitution to the maximum possible extent **and** adopts the majority black, majority-minority, and black influence districts that the current General Assembly told the USDOJ that it adopted to comply with the VRA. *See* ROA 38, First Amended Verified Complaint ¶ 45; Exs. 15A, 17A (Whole County 5% House Plan); Ex. 36, Irby Affidavit, Table 4; Second Affidavit of Kelly West (confirming that plaintiffs' majority black, majority-minority,

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[15] *See* Ex. 10, p. 9; *Mahan v. Howell*, 410 U.S. 315, 93 S. Ct. 979, 35 L.Ed.2d 320 (1973). In *Mahan*, the Virginia Legislature adopted a redistricting plan for state legislative districts that resulted in a total deviation of 16.4% with respect to state house districts. The justification that Virginia offered was a redistricting policy preference for preserving political subdivisions in creating house districts. Even though the policy preference was **not** grounded in the Virginia Constitution, the Supreme Court held that the 16.4% deviation did not violate the U.S. Constitution. *Id.* at 329, 93 S. Ct. at 987. Notably, although the Legislator's Guide advised the General Assembly to use no more than a 10% deviation (Ex. 10. pp. 8-9, 15), "[w]e can find no case holding that a total deviation – with respect to a legislative plan of apportionment of *state* legislative districts – of less than 16.4% is constitutionally excessive." *Quilter v. Voinovich*, 857 F. Supp. 579, 586 (N.D. Ohio 1994) (three-judge court) (footnote omitted); *see Lockert v. Crowell*, 631 S.W.2d 702, 708 (Tenn. 1982) (explaining that the deviation in the challenged redistricting plan could "increase substantially in order to preserve county boundaries and comply with other constitutional standards"); *In re Apportionment of State Legislature - 1982*, 321 N.W.2d 585 (Mich. 1982).

and black influence districts in Exs. 17A and 23 correspond to the same districts in Ex. 15A, the 2001 House Plan).[16]

The plaintiffs' Whole County 5% House Plan uses the range for population deviation suggested by the Legislator's Guide (*i.e.*, +/- 5% or a total range of 10%) in order to meet the requirements of "one-person, one-vote" and adopts all majority black, majority-minority, and black influence districts included in the 2001 House Plan. The only division of counties in the Whole County 5% House Plan relates to the creation of majority black, majority-minority, and black influence districts taken from the 2001 House Plan. As a result, **the plaintiffs' Whole County 5% House Plan divides only 33 out of 100 counties**. Twenty-three counties are divided into 2 districts and 8 counties are divided into 3 districts, and 2 counties are divided into 4 districts. *See* Ex. 17A. **In contrast, the General Assembly's 2001 House Plan divides 70 counties**. Thus, as the Whole County 5% House Plan demonstrates, the General Assembly divided at least 37 additional counties into separate districts in the 2001 House Plan for reasons other than compliance with federal law (i.e., 70 divided by 2001 House Plan minus 33 divided by Whole County 5% House Plan). *See* ROA 38, First Amended Verified Complaint ¶ 45; Exs. 15A, 17A.[17]

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[16] The only other district mentioned in the State's submission to USDOJ explaining the impact on minority voters of the 2001 House Plan (Ex. 36), Districts 87, is located entirely in Mecklenburg County. Mecklenburg County is not a covered jurisdiction under Section 5. Gilkeson Dep. at 52. District 87 does not meet the State's definition of a black influence district because the total black population is well below 40%.

[17] The number of counties that the General Assembly divided in the 2001 House Plan does not fully explain the extent to which the General Assembly flouted the North Carolina Constitution. A plan narrowly tailored to comply with both federal law and the North Carolina Constitution would divide counties only when division was necessary to create majority black, majority-minority, and black influence districts. For example, under the 2001 House Plan, the division of Bertie and Brunswick Counties is narrowly tailored in that both counties are divided one time to create a minority district and a non-minority district. In contrast, counties such as Catawba (five House districts), Davidson, Gaston, Johnston, Onslow, and Stanly (four House districts) are divided into multiple districts - none of which constitute minority districts needed to comply with Section 2 or Section 5 of the Voting Rights Act. Counties like Forsyth, Guilford, Wake, and Mecklenburg, all of which are divided to create minority districts needed to comply with the Voting Rights Act, also include many other divisions that result in

34

Plaintiffs also have submitted a narrowly tailored Senate redistricting plan that complies with the North Carolina Constitution **and** adopts majority black, majority-minority, and black influence districts that the current General Assembly adopted to comply with the VRA. *See* Exs. 14A, 16A ("Whole County 5% Senate Plan"); Ex. 35, Irby Affidavit, Table 1; Second Affidavit of Kelly West (confirming that plaintiffs' "minority" districts in Ex. 16A and 23 conform to the same majority black, majority-minority, and black influence districts in the Senate 1C plan).[18] The Whole County 5% Senate Plan also uses the range for population deviation suggested by the Legislator's Guide (*i.e.*, +/- 5% or a total range of 10%) in order to meet the requirements of "one-person, one-vote" and adopts all minority districts in the 2001 Senate Plan. The only divisions of counties in the Whole County 5% Senate Plan relate to the creation of the majority black, majority-minority, and black influence districts taken from the 2001 Senate Plan. As a result, **the plaintiffs' Whole County 5% Senate Plan divides only 17 out of 100 counties into different districts**. Fifteen counties are divided into 2 districts, and 2 counties are divided into 3 districts. Ex. 16A. **In contrast, the General Assembly's 2001 Senate Plan divides 51 counties**. Thus, as the Whole County 5% Senate Plan demonstrates, the General Assembly divided at least 34 additional counties into separate Senate districts in the 2001 Senate Plan for reasons other than compliance with federal law (i.e., 51 divided by 2001 State Senate Plan minus

multiple legislative districts in each county that are not required by federal law. *See* Gilkeson Dep. at 112-24; Ex. 15A, Split Counties Report.

[18] The only districts mentioned by the State in its submission to USDOJ explaining the "Effect of Adoption of the 2001 Senate Plan on Minority Voters" (Ex. 35), not included in plaintiffs' whole county plans are Districts 7, 13, and 16. The State's submission argues that District 7 could no longer be maintained as a majority black or influence district and thus asked that USDOJ preclear the 2001 Senate Plan despite the fact that the black population in District 7 had dropped to 28.81%, and that new District 7 only encompasses a part of one Section 5 county (i.e. Onslow). Ex. 35, § S-27N "Effect on Minority Districts" and "Effect on Minority Incumbents." Plaintiffs' whole county plans also do not include District 13 (a 33.44% black district) or District 16 (a 16.62 % black district). Both of these districts have black incumbents. Ex. 35 § S-27N, "Effect on Minority Incumbents." Neither district meets the definition of even a "black influence" district used by the State, and both are largely located in non-covered counties (i.e. Durham and Orange) where racially polarized voting, the touchstone of Section 2 liability, has not taken place. *See Gingles*, 478 U.S. at 54 n.23, 106 S. Ct. at 2768 n.23.

17 divided by Whole County Senate Plan). *See* ROA 37, First Amended Verified Complaint ¶ 43; Exs. 14A, 16A.[19]

Plaintiffs also submitted whole county Senate and House plans that use the +/- 8% deviation that the U. S. Supreme Court approved in *Mahan v. Howell*, 410 U.S. 315, 93 S. Ct. 979, 35 L.Ed.2d 320 (1973). *See* Ex. 23 (Whole County +/- 8% Senate Plan); Ex. 24 (Whole County +/- 8% House Plan). The +/- 8% plans also adopt the majority black, majority-minority, and black influence districts that the General Assembly enacted in the 2001 Senate and House plans. *See* Exs. 14A, 15A, 23 & 24; Second Affidavit of Kelly West. Like the Whole County 5% plans, the Whole County 8% plans only divide 33 out of 100 counties in the House and 17 out of 100 counties in the Senate. *See* Exs. 23 & 24.

I. The Harm to the Voters: Divided Counties and Rigged Elections.

The 2001 Senate and House redistricting plans completely ignore the role of counties in North Carolina, and are intended to significantly increase the Democrat majorities in both houses of the General Assembly, to protect Democrat incumbents, and to protect a relatively smaller number of Republican incumbents. Davis Dep. at pp. 21, 53; *see* Miller Affidavit ¶¶ 5-6, 12, 14. NCFREE is a non-partisan membership organization consisting primarily of private businesses and trade associations with Democrat and Republican members, including Speaker Jim Black, President Pro Tempore, Marc Basnight, and plaintiff Art Pope. Davis Dep. at 6-7, 111. John Davis is the Executive Director of NCFREE and has been projecting election results in North Carolina since 1992.[20] In 2000, he correctly projected 193 out of 200 North Carolina elections.

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[19] As with the division of counties into multiple House districts, the 2001 Senate Plan is not narrowly tailored to the extent it divides many counties into multiple Senate districts that are not required to create majority black, majority-minority, and black influence districts. *See* Gilkeson Dep. at p. 105-111; Ex. 14A (Split County report).

[20] Contrary to defendants' suggestion (Def. Br. at 74), Mr. Davis was not paid by plaintiffs and plaintiffs did not retain Davis as an expert witness. Davis Dep. at 126. However, Mr. Davis' organization did presumably receive membership fees from two of the defendants, Speaker Black and Senator Basnight.

Davis Dep. at 19, 20. Based upon an analysis of party performance, NCFREE projects that the number of Senate seats competitive for both parties has dropped from 14 under the 1992 Senate plan to only 6 under the 2001 Senate Plan. Similarly, NCFREE projects that the number of House seats competitive for both parties has dropped from 32 under the 1992 House Plan to only 14 under the 2001 House Plan. Thus, Mr. Davis projects that out of 170 total elections for the General Assembly, under the 2001 plans, only 20 (or 11%) have the potential to be competitive for both political parties. In the Senate, the number of districts that are either safe or favor the Democratic Party has increased from 17 under the 1992 Senate Plan to 28 under the 2001 Senate Plan. Similarly, NCFREE projects that the number of House districts that are either safe or favor the Democrat Party has increased from 41 to 65. Davis Dep. at 52-53; Ex. 126; *see also* Pope Affidavit, ¶¶ 11, 12; Exs. 39, 40.

Mr. Davis' predictions about the gerrymandered boundaries of legislative districts under the 2001 Senate Plan and the 2001 House Plan have been vindicated by candidate filings made under these two plans. The candidate filings vividly illustrate how the 2001 Senate Plan and the 2001 House Plan have harmed the voters.

In the Senate, 30 out of 50 Senate seats (i.e. 60%) will be uncontested in the November 2002 general election. Twenty-five senators (or 50% of the Senate) do not have primaries and are already effectively "elected." Five senators have primaries, but will not have opposition in the November 2002 general election. *See* Plaintiffs' Motion to Supplement the Record, Second Irby Affidavit Table 7.

In the House, 71 out of 120 House seats (or 59%) will be uncontested in the November 2002 general election. Forty-seven (47) House members (or 39% of the House) do not have primaries and are already effectively "elected." Twenty-four (24) representatives will have primaries, but will not have opposition in the November 2002 general election. *See* Plaintiffs'

37

Motion to Supplement the Record, Second Irby Affidavit Table 9.

Out of 170 seats in the General Assembly, 101 members (or 59%) will not face opposition in the 2002 General Election. Out of 170 seats in the General Assembly, 77 "candidates" (or 42%) do not have primaries and are already effectively "elected." *See* Plaintiffs' Motion to Supplement the Record, Second Irby Affidavit Tables 7 and 9.

In the Senate races, only 6 out of the 20 seats that will actually be contested in the November general election are in districts rated by Mr. Davis as being "swing" or competitive districts for each party. *See* Plaintiffs' Motion to Supplement the Record, Second Irby Affidavit Table 8; Ex. 126. However, all six of these seats are represented by Democrat incumbents who are running for reelection. *Id.* Mr. Davis' projections do not take into account the advantages of incumbency or strength of candidates. Davis Dep. at 105, 109, 119, 120. Given the commonly accepted political benefits of incumbency, there is a real chance that the 2001 Senate Plan has effectively decided all 50 Senate races.

In the House races, only 13 of the 49 races that will be contested in the general election are in districts rated by Mr. Davis as being swing or competitive districts for each party. Six of these seats are represented by Democrat incumbents running for reelection, four are represented by Republican incumbents running for reelection, and three are open seats. *See* Plaintiffs' Motion to Supplement the Record, Second Irby Affidavit Table 10. Given the commonly accepted political benefits of incumbency, there is a real chance that the 2001 House Plan has effectively decided 117 out of 120 House races.

According to Mr. Davis' projections, there are only a total of 19 out of 170 seats that will be contested in the 2002 general election in districts that are competitive for both political parties. Sixteen of these seats are represented by incumbents. Three House seats are open. Given the commonly accepted benefits of incumbency, a real chance exists that the voters of

38

North Carolina will actually decide only 3 out of 170 possible races or less than 2% of the General Assembly.

According to Mr. Davis, in a typical North Carolina legislative district, the Republican candidate is likely to win whenever the Democrat registration drops below 50% because of the number of Democrats and independents who regularly vote Republican. Davis Dep. at 41, 42. This is significant because statewide Democrat registration has dropped from over 70% in 1980 to 49.1% in 2001. Davis Dep. 41; Ex. 125. Thus, North Carolina is at the statewide benchmark at which the Republican candidates can be expected to win if the state was one legislative district. Despite these patterns, Mr. Davis projects that 28 Senate seats are in districts that strongly favor or lean Democrat and that only 16 Senate seats are in districts that strongly favor or lean Republican. Six "swing" seats are represented by Democrat incumbents. Ex. 126. Thus, given the political strength of incumbents, and because of the gerrymandered 2001 Senate Plan, Democrats are likely to elect 34 out of 50 (68%) senators even though the statewide registration statistics show that Republicans should at least be on par in voting strength with Democrats.

A similar disparity exists under the gerrymandered 2001 House Plan, under which Mr. Davis projects that 59 seats strongly favor or lean Democrat, 47 seats strongly favor or lean Republican, and 14 seats are in districts that are swing districts. Ex. 126. One of the fourteen "swing" seats will not be contested in the 2002 general election. Of the thirteen "swing" seats that will be contested in the general election, six are represented by Democrat incumbents seeking reelection, four are represented by Republican incumbents seeking reelection, and three are open. *See* Second Irby Affidavit Table 10.

This evidence shows that the unconstitutional 2001 Senate and House plans have adversely affected the conduct of primary and general elections for Senate and House for the 2002 election cycle in a most egregious manner. Over 42% of the General Assembly has already

been "elected" to the General Assembly by virtue of no primary opposition (i.e. 72 out of 170 seats). After the primaries, over 59% of the General Assembly will have been "elected" prior to the November 2002 general election (i.e. 101 out of 170 seats). **Under the 2001 plans, only 40% of the General Assembly will actually stand for election in November 2002. Only 19 contested seats (or 11% of 170) are in competitive districts. Given the effect of incumbency, the voters of North Carolina will likely have an impact on electing 3 open seats in the House or less than 2% of the General Assembly.**[21]

Defendants are fighting to preserve plans that -- by design -- give the voters no choice in the majority of Senate and House elections. Further, their plans apparently give voters a true chance to select representatives in only 3 out of 170 races. No wonder one political commentator has likened North Carolina to a third-world country – with the proviso that voters in most third-world countries have more options than the people of North Carolina when it comes to electing candidates of their choice to the Senate or House. John Fund, *Red-Light District*, Wall St. Journal, Mar. 13, 2002.

SUMMARY OF ARGUMENT

Article I, Section 3 of the North Carolina Constitution provides that every right under North Carolina law "should be exercised in pursuance of laws and consistently with the Constitution of the United States." Article I, Section 5 provides that "no law or ordinance of the

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[21] Without having filed **any** evidence to contradict Mr. Davis' testimony, defendants now seek to attack Mr. Davis' predictions by challenging his credentials. Def. Br. at 77 n.32. This attack ignores Mr. Davis' excellent track record for accuracy (193 out of 200 elections in the 2000 General Elections) and the vindication of Mr. Davis' opinion that a sizeable majority of races are already over – as reflected by candidate filings and the shocking number of races that will be uncontested in the fall. Defendants also question the reliability of political predictions by referencing the decision of Judge Fox in *Republican Party v. Hunt*, 841 F. Supp. 722 (E.D.N.C.), *aff'd as modified*, 27 F.3d 563 (4th Cir. 1994) ("*RPNC*"). Def. Br. at 17 n.10. *RPNC* involved a challenge to the state-wide election of superior court judges. It is true that Republican candidates did well in the elections immediately following Judge Fox's rulings – because these elections took place state-wide. This is a far cry from the legislative districts at issue in this case which consist of gerrymandered districts specifically created to eliminate voter choice, to guarantee the re-election of most incumbents from both parties, and to ensure an increase in Democrat majorities in

State in contravention or subversion" of the United States Constitution "can have any lasting force and effect." Reconciliation of all sections of the North Carolina Constitution is a "postulate of constitutional... construction." *Sessoms v. Columbus County*, 214 N.C. 634, 638, 200 S.E.2d 418, 420 (1939). Therefore, pursuant to the postulate of the constitutional construction stated in *Sessoms*, Article I, Sections 3 and 5, require that all other provisions of the North Carolina Constitution should be harmonized with any applicable provisions of federal law, so as to avoid any conflict between the North Carolina Constitution and federal law.

Under a harmonized interpretation of Article I, Sections 2, 3, and 5 and Article II, Sections 3(3) and 5(3), the North Carolina Constitution prohibits the General Assembly from dividing counties into separate Senate and House districts, except to the extent that counties must be divided to comply with federal law. This interpretation is supported by the North Carolina Constitution's express incorporation of the federal one-person, one-vote Equal Protection principle in Article II, Section 3(1) and 5(1). Thus, the General Assembly must preserve county lines to the maximum extent possible, except to the extent counties must be divided to comply with Section 5 of the Voting Rights Act, to comply with Section 2 of the Voting Rights Act, or to comply with the U.S. Constitution, including the federal one-person, one-vote requirements as set forth in *Mahan v. Howell*, 410 U.S. 315, 93 S. Ct. 979, 35 L.Ed.2d 320 (1973). This interpretation of the North Carolina Constitution should be applied to all one hundred counties in North Carolina. Based upon this interpretation, the redistricting plans that the General Assembly enacted in November 2001, known as the Senate 1C Plan (Ex. 14A) and the Sutton 3 Plan (Ex. 15A), divide more counties than are necessary to comply with the Voting Rights Act or the federal one-person, one-vote requirements, and therefore violate the North Carolina Constitution. This interpretation is supported by numerous other state supreme courts who have harmonized

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both houses.

whole county provisions in their state constitutions with applicable federal law and permit the division of counties only when necessary to comply with federal law.

North Carolina's constitutional prohibition against dividing counties into separate legislative districts except when necessary to comply with federal law further many important and compelling state interests including: (1) it inhibits political gerrymandering; (2) it reduces voter confusion; (3) it makes representatives more accountable to citizens of a county as a group; (4) it reduces the cost of holding elections and running for office; (5) it provides a bright-line clarity to reapportionment law; (6) it enhances the representation of county governments in the General Assembly; and (7) it encourages voter participation.

The Superior Court properly granted summary judgment to the plaintiffs. Moreover, the Superior Court did not manifestly abuse its discretion when it denied defendants motion to continue the summary judgement hearing that was scheduled one week before the close of discovery.

Defendants' defenses under state and federal law are baseless. The federal district court case of *Cavanagh v. Brock* is not binding on this Court and erroneously interprets both the North Carolina Constitution and the correct interpretation of the state law of severability. *Cavanagh* did not correctly harmonize state constitutional provisions with federal law and misunderstood that the North Carolina Constitution's general requirement to not divide counties is in fact capable of being enforced in all counties, depending upon requirements of federal law. Further, the USDOJ's 1981 objection letter does not preclude the Supreme Court of North Carolina from interpreting the North Carolina Constitution in order to give it a correct interpretation that eliminates any conflict between federal law and the State Constitution. Moreover, this Court's interpretation of the North Carolina Constitution is not subject to preclearance. Any redistricting plans that are enacted based upon this Court's interpretation of the North Carolina Constitution,

however, cannot be administered in any county covered by Section 5 until the plans are precleared under Section 5.

The Court has the power and authority to provide a remedy for the 2002 elections to ensure that voters elect candidates to the General Assembly under precleared plans that comply with the North Carolina Constitution. Plaintiffs should receive this relief for the 2002 election because they have suffered irreparable harm. Further, the balance of hardships tips strongly in favor of voters having constitutional elections as opposed to elections under unconstitutional plans where less than 40% of the General Assembly will actually be elected in the November 2002 general election. Because the General Assembly believes that it is too late to enact legal plans for the 2002 elections and have then precleared, this Court should direct the Superior Court to adopt constitutional plans and submit those plans for preclearance under Section 5 of the VRA.

Defendants arguments concerning the Plaintiff's proposed whole county redistricting plans are premature. In any event, these arguments are baseless. The proposed whole county plans do not violate the one-person one-vote standard. The use of some single member and some mutlimember districts does not violate the Fourteenth Amendment to the United States Constitution. The proposed whole county plans do not violate the Voting Rights Act, and there is no evidence that the minority districts that the General Assembly adopted in 2001 – which are included in the plaintiffs' plans – constitute illegal racial gerrymanders in violation of the standards in *Shaw v. Hunt*. The Superior Court's judgment should be affirmed.

ARGUMENT

I. THIS CASE IS JUSTICIABLE

Defendants concede that redistricting "in a constitutional manner is a matter of vital public importance." Def. Br. at 25 n.12. Amazingly, the defendants then argue that redistricting

is a political question beyond the authority of the North Carolina Judiciary. Def. Br. at 23-27. They principally rely on *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E.2d 316, *appeal dismissed*, 308 U.S. 516, 60 S. Ct. 175, 84 L.Ed.2d 739 (1939).

In 1787, this Court held that it had the power to judicially review a statute that the General Assembly enacted in order to determine whether the statute violated the North Carolina Constitution. *See Bayard v. Singleton*, 1 N.C. 5 (1787). Although *Bayard* involved a statute allegedly conflicting with the constitutional right to a jury trial, the Supreme Court foreshadowed the need for judicial review of redistricting statutes. The Court noted that absent judicial review, the General Assembly "could . . . render themselves the Legislators of the State for life, without any further election of the people." *Id.* at 18. Given that the unrefuted evidence demonstrates that, absent relief, the voters will have no choice in November 2002 in 60% of the 170 races for seats in the Senate and House, the General Assembly has succeeded -- in large measure -- in appointing a majority of legislators, "without any further election of the people." *Id.*

A hypothetical illustrates how ridiculous the defendants' non-justiciability argument is. Under defendants' theory of non-justiciability, the General Assembly could enact a redistricting statute with only 10 Senators and 10 Representatives. Even though Article II, Sections 3 and 5 of the Constitution requires 50 Senators and 120 Representatives, no North Carolina court would be able to review the constitutionality of the hypothetical redistricting statute. In defendants' view, the statute would be "beyond . . . review because it raises a 'political question.'" Def. Br. at 25 n.12.

Maxwell does not help the defendants. In *Maxwell*, the plaintiff was challenging a 1937 sales tax statute. Among other arguments, plaintiff argued that the 1937 sales tax statute was not enforceable because the General Assembly of 1937 was not properly constituted. Plaintiff argued that no reapportionment had been made following the 1930 census; therefore, all laws

STATE OF NORTH CAROLINA

COUNTY OF WAKE

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 24-CVS-003534-910

BEVERLY BARD, *et al.*,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, *et al.*,

Defendants.

LEGISLATIVE DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Defendants Philip E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House ("Legislative Defendants"), hereby submit this Memorandum in Support of their Motion to Dismiss Plaintiffs' Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. Contrary to Plaintiffs' allegations, this case does not present a "major question of first impression." (Compl. p. 2). Rather, Plaintiffs' claims are identical to the claims raised by the plaintiffs and found nonjusticiable by the North Carolina Supreme Court in *Harper v. Hall*, 384 N.C. 292, 886 S.E. 2d 393 (2023) (hereinafter, "*Harper III*"). Because *Harper III* squarely resolves these issues, Plaintiffs' Complaint must be dismissed.

FACTUAL BACKGROUD

As required by the federal and state Constitutions, following the 2020 Census, on November 4, 2021, the General Assembly enacted new redistricting plans for the North Carolina House and Senate as well as the United States House of Representatives (the "2021 Plans"). Three groups of plaintiffs, Common Cause, the Harper Plaintiffs, and the NCLCV Plaintiffs, filed suit challenging the legality of all three plans arguing that they were unconstitutional partisan

gerrymanders under the North Carolina Constitution. More specifically, the plaintiffs argued that the 2021 Plans violated the Free Elections Clause, the Equal Protection Clause, and the Freedom of Speech and Freedom of Assembly Clauses of the North Carolina Constitution. N.C. Const. art. I, §§ 10, 19, 12, 14; *N.C. League v. Hall*, No. 21-CVS-015426, 2021 WL 6883732, at *1-*2 (N.C. Super. Ct. Dec. 3, 2021) (describing *NCLCV* and *Harper* plaintiffs' claims). The case was assigned to a three-judge panel of the Wake County Superior Court. After an expedited review of an order denying plaintiffs' motions for preliminary injunction on December 8, 2021, the North Carolina Supreme Court ordered an expedited trial to take place the first week of January 2022. On January 11, 2022, the panel entered judgment for Legislative Defendants after finding that plaintiffs' partisan gerrymandering claims were nonjusticiable political questions under the North Carolina Constitution. *Harper III*, 384 N.C. at 301-305, 886 S.E.2d at 401-403 (recounting case history).

Plaintiffs appealed.[1] On February 4, 2022, the Court issued a "remedial order" holding that the 2021 Plans were unconstitutional beyond a reasonable doubt under the sections of the state Constitution cited by the plaintiffs. The remedial order enjoined elections under the 2021 Plans and provided the General Assembly with a short opportunity to adopt new plans consistent with a full opinion the Court promised would soon be issued. The "full" opinion was issued ten days later in *Harper v Hall*, 380 N.C. 317, 868 S.E.2d 499 (2022) ("*Harper I*"). *See Harper III*, 384 N.C. at 305-308, 886 S.E.2d at 403-405.

On remand, the General Assembly enacted three new remedial plans (the "2022 Plans"). The 2022 Plans complied with two metrics for measuring so-called partisan fairness cited by the

[1] Plaintiffs were instructed to file a direct appeal to the Supreme Court after the Supreme Court granted a bypass petition on the appeal from the three judge panel's order denying Plaintiffs' motion for preliminary injunction. *See Harper v. Hall,* 379 N.C. 656, 865 S.E.2d 301 (2021) (Mem).

Court in *Harper I*—the "Mean-Median Difference" and the "Efficiency Gap." *Harper III*, 384 N.C. at 308-309, 886 S.E.2d at 405-406. The General Assembly relied upon these two metrics in enacting the 2022 Plans because the Court in *Harper I* explicitly held that plans with a Mean-Medium Difference of less than 1% and an Efficiency Gap of at or less than 7% would be "presumptively constitutional." *Id.* at 305, 886 S.E.2d at 403-04. All three of the 2022 Plans met these metrics. *Id.*

When the case was remanded by *Harper I*, the three-judge panel hired Robert F. Orr (the lead attorney in this case), Robert H. Edmunds, and Thomas W. Ross (a Plaintiff in this case) to serve as court-appointed Special Masters to assist in evaluating the remedial plans. The Special Masters in turn hired four well-known academics as advisors to assist them in evaluating the 2022 Plans.[2] *Harper III*, 384 N.C. at 308, 886 S.E.2d at 405. The Special Masters issued a report finding that the 2022 House and Senate Plans complied with *Harper I*, but that the 2022 Congressional Plan did not. *Id.* at 310, 886 S.E.2d at 406. As a result, the Special Masters, through the assistance of their advisor, Dr. Bernard Grofman, drew an alternative congressional plan as a proposed remedy for the allegedly illegal 2022 Congressional Plan. *Id.* The three-judge panel then adopted the Special Masters' report in full and directed that elections in 2022 proceed under the 2022 Plans for Senate and House and the Special Masters' congressional plan. *Id.* at 310-311, 886 S.E.2d at 406-07.

Following the order by the three-judge panel, all parties appealed to the North Carolina Supreme Court. The Court resolved these appeals in its decision of *Harper v. Hall*, 383 N.C. 89,

[2] Legislative Defendants moved for the exclusion of two of these "Special Advisors" for engaging in *ex parte* communications with the plaintiffs' experts, who acknowledged the communications were in violation of the three-judge panel's order. *Harper II*, 383 N.C. at 100, 104, 881 S.E.2d 156, 166, 168 (2022). The panel denied that motion. *Id.*

881 S.E.2d 156 (2022) ("*Harper II*"). In *Harper II*, the Court affirmed the three-judge panel's rejection of the 2022 Congressional Plan and its approval of the 2022 House Plan. However, the *Harper II* Court found that the 2022 Senate Plan, despite meeting all the fairness measures set forth in *Harper I,* still constituted an illegal partisan gerrymander. *Harper III*, 384 N.C. at 311-12, 886 S.E.2d at 407.

On January 20, 2023, Legislative Defendants timely filed a petition for rehearing under Rule 31 of the North Carolina Rules of Appellate Procedure. The Court granted the petition for rehearing on February 3, 2023. *Harper III*, 384 N.C. at 314, 886 S.E.2d at 409. On April 28, 2023, the Court entered its opinion in *Harper III*, which overruled *Harper I* and withdrew *Harper II*. *Id.* at 379, 886 S.E.2d at 449.

Harper III is now the law of the land. In its robust opinion, the *Harper III* Court unequivocally held that partisan gerrymandering claims are nonjusticiable political questions under the North Carolina Constitution because apportionment is textually committed to the General Assembly, "[t]here *is no judicially manageable standard by which to adjudicate partisan gerrymandering claims[,]" id.* at 378, 886 S.E.2d at 448-49, and, unlike other states, the N.C. Constitution does not contain an express prohibition or limit on partisan gerrymandering. *Id.* at 337, 345-46, 886 S.E.2d at 423, 428. The Court further held that neither the history nor the caselaw interpreting the state's Free Elections Clause, Equal Protection Clause, or Freedom of Assembly and Free Speech Clauses supported a constitutional prohibition on partisan gerrymandering. *Id.* at 369-70, 886 S.E.2d at 443. This opinion in *Harper III* restored alignment with previous decades of jurisprudence, which had previously held similar redistricting claims nonjusticiable. *Leonard v. Maxwell*, 216 N.C. 89, 99, 3 S.E.2d 316, 324 (1939); *Dickson v. Rucho*, 367 N.C. 542, 546, 766 S.E.2d 238, 242 (2014) ("*Dickson I*").

Due to the erroneous interpretation of the North Carolina Constitution adopted by the Court in *Harper I*, the *Harper III* Court determined that the original redistricting plans could not be reinstated and granted the General Assembly an opportunity to enact a new set of legislative and congressional redistricting plans. *Harper III,* at 378, 886 S.E.2d at 448. Following *Harper III*, in October 2023, the General Assembly enacted three new redistricting plans. *See* S.L. 2023-145 ("2023 Congressional Plan"); S.L. 2023-146 ("2023 Senate Plan"); and S.L. 2023-149 ("2023 House Plan") (collectively, the "2023 Plans"). (*See* Compl. ¶¶ 24, 52, 75, 83).

Plaintiffs filed their Complaint on January 31, 2024. The Complaint alleges only one claim for relief: for "Violation of the Right to Fair Elections" under Article I, Section 36 of the North Carolina Constitution. (Compl. p. 24). That claim is based upon Plaintiffs' contention that "there is a right to 'fair' elections secured as an unenumerated right in the North Carolina Constitution." (Compl. ¶94). With a theory far more audacious than those rejected in *Harper III*, Plaintiffs here would have the Court create an entirely new right beyond the text of North Carolina's Constitution that the General Assembly infringes upon when a redistricting plan "gives a specific political party or candidate a determinative advantage in the election by intentionally 'apportioning' voters favorable to that specific political party into the specific district or 'apportioning' voters unfavorable to the specific political party out of the specific district." (Compl. ¶ 95). Plaintiffs contend that the 2023 Plans do not satisfy this constitutional definition of "fairness" because all three maps allegedly intentionally assign voters in four congressional districts, one Senate district, and one House district on the basis of partisanship to benefit Republicans. (Compl. ¶¶ 47-91, 96). Plaintiffs make no claims or provide no new insight into how to measure "determinative

advantage[3]" or when an "advantage" for a party somehow becomes unconstitutional. Nor do Plaintiffs offer any insight into whether this "advantage" should be measured on a district-by-district basis, or statewide. In the end, Plaintiffs offer nothing but an inventive twist on already foreclosed claims of partisan gerrymandering that the North Carolina Supreme Court found non-justiciable just last year, and allege nothing to show why the outcome here should be any different.

ARGUMENT

I. Standard.

Dismissal is appropriate under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction. Courts do not have subject matter jurisdiction to rule on non-justiciable "political" questions which, under the separation of powers doctrine, are assigned for resolution to another branch of government other than the judiciary. *See Bacon v. Lee*, 353 N.C. 696, 698, 549 S.E.2d 840, 843 (2001). Dismissal is also appropriate under Rule 12(b)(6). When considering a motion to dismiss made under N.C. R. Civ. P. 12(b)(6), the court must "consider 'whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.'" *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 7996 (2013) (quoting *Coley v. State*, 360 N.C. 493, 494, 631 S.E.2d 121, 123 (2006)). "As such, when considering a Rule 12(b)(6) motion, the trial court is limited to reviewing the allegations made in the complaint." *Blue v. Bhiro*, 381 N.C. 1, 5, 871 S.E.2d 691, 694 (2022) (internal citations omitted). In any constitutional challenge, a court must presume the

[3] The idea that the phrase "determinative advantage" is somehow judicially manageable (Compl. ¶95), is absurd on its face. Elections, by their very nature, require that one candidate achieve a "determinative advantage" in the form of more votes, even a single vote, to be the determined winner. Moreover, how many members of one party would constitute a "determinative" advantage is left entirely undefined and would certainly depend on the candidates and the preferences of North Carolina's many unaffiliated voters, who Plaintiffs' complaint seemingly ignores.

constitutionality of an act of the General Assembly. *Harper III*, 384 N.C. at 323, 886 S.E.2d at 414 (citing *State v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016)). As Plaintiffs challenge the constitutionality of an act of the General Assembly, they "must identify an express provision of the constitution and demonstrate that the General Assembly violated that provision beyond a reasonable doubt." *Id.* at 298, 886 S.E.2d at 399 (quotation omitted).

II. Plaintiffs' partisan gerrymandering claims are barred by *Harper III*.

First, and dispositively, Plaintiffs only make a claim for partisan gerrymandering thereby raising a "political question that is nonjusticiable under the North Carolina Constitution." *Harper III*, 384 N.C. at 300, 886 S.E.2d at 400-01. Specifically, Plaintiffs contend that the state Constitution is violated when redistricting plans "give a specific political party or candidate a determinative advantage in the election by intentionally 'apportioning' voters favorable to that specific political party into the specific district or 'apportioning' voters unfavorable to that specific political party out of the specific district." (Compl. ¶ 95)[4]. This falls squarely into the category of a claim for partisan gerrymandering, as that term has been defined by the *Harper III* Court. *Id.* at

[4] In their roles as Special Masters, Plaintiff Ross and Plaintiffs' counsel Orr engaged in exactly this behavior, apportioning voters based on their political affiliation to the benefit of Democratic voters to produce a congressional map that they perceived to be more "fair." *Harper III,* 384 N.C. at 292, 886 S.E2d at 393, n. 17; *Harper II,* 383 N.C. 89 at ¶¶48, 52-54. In fact, three justices in dissent accused them of drawing to benefit one political party, claiming that the public "could legitimately question the objectivity of this court-appointed, de facto 'redistricting commission'" because of Counsel Orr's "direct" and "public[]" "participat[ion] in advertisements…for a Democratic congressional candidate in a district he created during this remedial process." *Id.* at ¶152, n.4 (Newby, J., dissenting). It is unclear why apportioning voters based on political affiliation to meet a subjective definition of "fair" is permissible when done by laypersons to the benefit of Democrats, but not permissible, when supposedly done by the duly elected representatives of the people of North Carolina performing their obligations under the North Carolina constitution. *Id.* at ¶¶124, 229 (Newby, J. dissenting). This lack of clarity, and lack of any judicially manageable standard, is precisely the reason Plaintiffs' claims are nonjusticiable and must be dismissed.

315-16, 886 S.E.2d at 410 (distinguishing of partisan gerrymandering claims from other types of redistricting claims (*citing Rucho v. Common Cause*, 139 S. Ct. 2482 (2019)).

Plaintiffs in *Harper III* also brought partisan gerrymandering claims, contending that "the General Assembly violated the state constitution by drawing legislative districts that unfairly benefited one party at the expense of another...." *Id.* at 299, 886 S.E.2d at 400. The substance of the claim alleged here is identical. There is simply no material difference between the "advantage" alleged here and the "unfair benefit" alleged in *Harper*. Because the claims are identical, *Harper III* requires dismissal. 384 N.C. at 326-350, 886 S.E.2d at 416-431.

III. Partisan gerrymandering claims are nonjusticiable political questions.

The North Carolina Supreme Court's opinion in *Harper III* represents an encyclopedic and binding explanation of the General Assembly's redistricting authority and the limited role of the judiciary in reviewing redistricting plans. In the interest of brevity, Legislative Defendants will focus only upon a few major points that highlight the meritless nature of Plaintiffs' claims.

As noted in *Harper III*, there are no state constitutional restrictions on the General Assembly's authority to apportion congressional districts. *Harper III,* 384 N.C. at 330-31, 886 S.E. 2d at 419. The authority to draw congressional districts is granted to the General Assembly by the federal Elections Clause, which contains no express restrictions on how districts must be apportioned. *Id.* at 314, 886 S.E.2d at 409 (citing U.S. Const. art. I, sec. 4, cl. 1). In contrast, Article II of the North Carolina Constitution expressly delegates to the General Assembly the discretion to apportion Senate and House districts. *See* N.C. Const. art. II, §§ 1-5. There are several very specific and direct limits on the General Assembly's districting authority found in Article II. *See* N.C. Const. art. II, §§ 2-5. These are the only express restrictions found in the state Constitution that limit the General Assembly's discretion to draw districts. *Harper III*, 384 N.C. at 322-23, 886

S.E.2d at 413-14; *Stephenson v Bartlett*, 355 N.C. 354, 390, 562 S.E.2d 377, 402 (2002) (*Stephenson I*) (Orr, J., concurring in part).

Separation of powers principles limit judicial review when there is an express delegation of the redistricting power in the text of the state Constitution to the General Assembly. *See Harper III*, 384 N.C. at 323, 886 S.E.2d at 414 (citing *State v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016)). Then-Justice Orr recognized these principles in his concurring opinion in *Stephenson I*, 355 N.C. at 390, 562 S.E.2d at 402 (Orr, J., concurring) (noting the "State Constitution is not a grant of power but serves instead as a limitation of power[.]"). Thus, "all power which is not expressly limited by the people in our Constitution remains with the people and that an act of the people through their representatives in the General Assembly is valid unless expressly prohibited by that constitution." *Id.* Therefore, absent an express prohibition on partisanship considerations in districting in the North Carolina Constitution, which *Harper III* held is nowhere to be found, the General Assembly is free to make the policy decisions required in reapportionment subject to express state and federal law. *Harper III*, 384 N.C. at 334, 886 S.E.2d at 421; *Stephenson I*, 355 N.C. at 371, 562 S.E.2d at 390 ("The General Assembly may consider partisan advantage and incumbency protection in application of its discretionary redistricting decisions, . . . but it must do so in conformity with the State Constitution.").

IV. Article I, Section 36 cannot be used to state a claim in and of itself.

Plaintiffs' legal theory that an unenumerated constitutional right to "fair" elections can be enforced through Article I, Section 36 of the North Carolina Constitution relies on an unprecedented and erroneous interpretation of the Declaration of Rights.

Plaintiffs ignore that the Declaration of Rights merely provides "'a statement of general abstract principles'" and that "many provisions of the Declaration of Rights do not give rise to

justiciable rights." *Harper III*, 384 N.C. at 431-32, 886 S.E.2d at 431-32 (citing N.C. Const. art. I, sec. 6); *Dickson I*, 367 N.C. at 575, 766 S.E.2d at 260. The North Carolina Supreme Court has previously determined that similar provisions of the Declaration of Rights do not place justiciable restrictions on the General Assembly's redistricting authority. First, in *Dickson I*, the Court ruled that Article I, Section 2 (the "Good of the Whole Clause") provided no justiciable restrictions on the General Assembly's redistricting authority. 367 N.C. at 575, 766 at 260. In *Harper III*, the Court reached the same conclusion on partisanship considerations under Article I, Section 10 (the "Free Elections Clause"); Article I, Section 19 (the "Equal Protection Clause"); Article I, Section 12 (the "Right of Assembly and Petition" Clause); and Section 14 (the "Freedom of Speech and Press" Clause). *Harper III*, 384 N.C. at 351-370. 886 SE.2d at 431-443.

Article I, Section 36 is entitled "Other rights of the people" and simply provides that "[t]he enumeration of rights in this Article shall not be construed to impair or deny others retained by the people." N.C. Const. art. I, § 36. Without citing a single case that supports their interpretation, Plaintiffs claim that Section 36 can be used to create an unenumerated justiciable right. But, this argument is nothing more than an invitation to this Court to discard the way the Supreme Court has held the North Carolina Constitution should be interpreted. This Court should decline that invitation.

Proper interpretations of the Constitution look to the "plain text of the constitution" and courts may "not search for a meaning elsewhere." *State v. Webb*, 358 N.C. 92, 97, 591 S.E.2d 505, 510 (2004); *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 479 (1989) (citing *Elliott v. Gardner,* 203 N.C. 749, 753, 166 S.E. 918, 920–21 (1932)). Here, there are "no hidden meanings or opaque understandings" of Article I, Section 36, and because it plainly does not create a justiciable right, it cannot be read to do so. *Harper III,* 384 N.C. at 297, 886 S.E.2d at 399.

Moreover, the history of Article I, Section 36 supports this as, Article I, Section 36 has never been construed to create enumerated rights separately independent from other provisions of the Declaration of Rights that do. *See, e.g., Fearrington v. City of Greenville,* 282 N.C. App. 218, 871 S.E.2d 366 (2022) (combined with substantive due process claim under art. I, sec. 19); *ACT-UP Triangle v. Comm'n for Health Servs. of the State of N. Carolina,* 345 N.C. 699, 483 S.E.2d 388 (1997) (same).

Next, Plaintiffs seemingly allege that the Court should somehow construe Article I, Sections 9 and 10 to impair or deny some unenumerated constitutional right to "fair" elections. But as *Harper III* and other binding precedent cited by Plaintiffs, that the Free Elections Clause implicates election administration, not redistricting plans. *Harper III*, 384 N.C. at 363, 886 S.E.2d at 439 (quoting *Swaringen v. Poplin*, 211 N.C. 700, 702, 191 S.E. 746, 747 (1937)) (recognizing the right to frequent, free elections which includes a "free ballot"); *Clark v. Meyland,* 261 N.C. 140, 143, 134 S.E.2d 168, 170 (1964) (interpreting Free Election Clause under Article I, Section 10 in ballot access case). Tellingly, Plaintiffs suggest no judicially manageable standard for how to measure the unenumerated "fair" provision they want read into the Constitution. And as the North Carolina Supreme Court already noted, so-called fairness tests are fraught with error, which led even the Court in *Harper II,* to abandon the so called "standards" they set forth in *Harper I. See Harper III,* 384 N.C. at 349-350, 886 S.E.2d at 430-31.

CONCLUSION

There is no basis in the text of the North Carolina Constitution to recognize Plaintiffs' reformulated "fairness" standard that has already been condemned by the North Carolina Supreme Court. Plaintiffs' Complaint should be summarily dismissed with prejudice for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

Respectfully submitted, this the 10th day of May, 2024.

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CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have served a copy of the foregoing document upon counsel of record via email pursuant to N.C. R. Civ. P. 5.

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This the 10th day of May, 2024.

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STATEMENT OF TRANSCRIPT OPTION

Per Rules 7(b) and 9(c) of the North Carolina Rules of Appellate Procedure, and by stipulation of the parties, the transcript of the entire proceedings in this case, taken by Joann Bunze, Court Reporter, on 13 June 2024 and consisting of 67 pages, numbered 1-67, bound in one volume, will be electronically filed by Joann Bunze promptly once a docket number is assigned to this appeal.

NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 24CV003534-910

BEVERLEY BARD, RICHARD LEVY, SUSAN KING COPE, ALLEN WELLONS, LINDA MINOR, THOMAS W. ROSS, SR., MARIE GORDON, SARAH KATHERINE SCHULTZ, JOSEPH J. COCCIA, TIMOTHY S. EMERY, and JAMES G. ROWE,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, JEFF CARMON III in his official capacity as Secretary of the North Carolina States Board of Elections, STACY "FOUR" EGGERS in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O'DUFFY MILLEN in her official capacity as a member of the North Carolina State Board of Elections, KEVIN N. LEWIS in his official capacity as a member of the North Carolina State Board of Elections, PHILIP E. BERGER in his official capacity as President Pro Tem of the North Carolina Senate, and TIMOTHY K. MOORE in his official capacity as Speaker of the North Carolina House of Representatives,

Defendants.

ORDER GRANTING LEGISLATIVE DEFENDANTS' MOTION TO DISMISS

THIS MATTER came on to be heard and was heard before the undersigned Three-Judge Panel (the "Panel") upon Legislative Defendants' Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, filed on March 6, 2024. After considering the Motion, briefs, and arguments and authorities cited by the parties therein, the Panel hereby determines as follows:

Procedural History

On October 25, 2023, the General Assembly ratified Senate Bill 757 (Session Law 2023-145), Senate Bill 758 (Session Law 2023-146), and House Bill 898 (Session Law 2023-149).

On January 31, 2024, Plaintiffs filed this lawsuit alleging that Senate Bill 757 (Session Law 2023-145), Senate Bill 758 (Session Law 2023-146), and House Bill 898 (Session Law 2023-149) violated the "unenumerated right to fair elections" implied in Article I, § 36 of the North Carolina Constitution. Plaintiffs' Complaint sought declaratory judgments pursuant to N.C. Gen. Stat. §§ 1-253, *et seq.*, and Rule 57 of the North Carolina Rules of Civil Procedure and a permanent injunction pursuant to Rule 65 of the North Carolina Rules of Civil Procedure.

On February 6, 2024, pursuant to N.C. Gen. Stat. § 1-267.1(b2), the Honorable Judge Paul C. Ridgeway requested a Three-Judge Panel of the Superior Court of Wake County to preside over this matter.

On February 19, 2024, the Honorable Chief Justice Paul Newby assigned this matter to the undersigned Panel for a determination as to the constitutionality of

Senate Bill 757 (Session Law 2023-145), Senate Bill 758 (Session Law 2023-146), and House Bill 898 (Session Law 2023-149).

On March 6, 2024, in lieu of filing an Answer, Legislative Defendants filed the present Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure.

On March 12, 2024, State Defendants filed an Answer to Plaintiffs' Complaint.

The Panel scheduled a hearing for Legislative Defendants' Motion to Dismiss on May 22, 2024, at 10:00 a.m. and a briefing deadline for all parties of April 26, 2024, at 11:59 p.m.

On April 8, 2024, Legislative Defendants filed a Motion to Continue Hearing and Extend Briefing Deadline pursuant to Local Rule 8 of the Local Rules for Superior Court Tenth Judicial District North Carolina and Rule 6 of the North Carolina Rules of Civil Procedure.

On April 30, 2024, the Panel entered an Order granting Legislative Defendants' Motion to Continue Hearing and Extend Briefing Deadline. The parties were provided up to and including May 10, 2024, to submit briefs, and the Motion to Dismiss hearing was continued to June 13, 2024, at 10:00 a.m. The parties timely submitted their briefs.

On June 13, 2024, the Panel heard argument from Legislative Defendants and Plaintiffs on Legislative Defendants' Motion to Dismiss. The State Board of Elections Defendants waived oral argument.

After argument, the parties consented to the Panel's ruling being issued out of session and out of county. The Panel took the matter under advisement.

Analysis

In this action, Plaintiffs allege that the North Carolina General Assembly violated the unenumerated right to a "fair election" implicit in Article I, § 36 of the North Carolina Constitution when it redistricted the following legislative districts: Congressional district NC 6, Congressional district NC 13, Congressional district NC 14, Congressional district NC 12, State Senate district 7, State House district 105, and Congressional district NC 11.

Plaintiffs ask this Panel to consider two issues:

I. Is there an unenumerated right to "fair elections" within Article I, § 36 of the North Carolina Constitution?

II. If such a Right exists, has it been violated by the Legislature through their re-drawing of the voting districts at issue?

Prior to answering the issues above, however, the Panel must address a preliminary issue raised by Legislative Defendants. Pursuant to Article II, §§ 3, 5, as interpreted by the North Carolina Supreme Court decision in *Harper v. Hall*, 384 N.C. 292 (2023)[1]: do the issues raised by Plaintiffs present non-justiciable political questions not appropriate for resolution by the courts?

In *Harper*, our Supreme Court went to great lengths to provide a history of the treatment of political questions by the courts, and to establish the constitutional basis

[1] The *Harper* decision is more prominently known as "*Harper III*" due to prior iterations of that litigation that made their way through the courts. This decision will refer to the case simply as "Harper".

for the non-justiciability of political questions when undertaking redistricting matters. *Harper*, 384 N.C. at 326–331. "A matter is non-justiciable if the constitution expressly assigns responsibility to one branch of government, or there is not a judicially discoverable or manageable standard by which to decide it, or it requires courts to make policy determinations that are better suited for the policymaking branch of government." *Id.* at 350.

In its decision, the *Harper* Court reaffirmed the exclusive role of the Legislature as the body tasked with redistricting in North Carolina. "Under the North Carolina Constitution, redistricting is explicitly and exclusively committed to the General Assembly by the text of the Constitution." *Id.* at 326. "[O]ur constitution and the General Statutes expressly insulate the redistricting power from intrusion by the executive and judicial branches." *Id.* at 331.

In the instant case, the issues raised by Plaintiffs are clearly of a political nature. There is not a judicially discoverable or manageable standard by which to decide them, and resolution by the Panel would require us to make policy determinations that are better suited for the policymaking branch of government, namely, the General Assembly.

Plaintiffs, in their arguments to the Panel, urge us to find that the holdings in *Harper* do not apply to the facts and issues present in this case, but rather to Article I, § 10, Free Elections Clause claims. We do not find these arguments persuasive. This case deals with the same underlying issue that was addressed in *Harper*: the redrawing of districts from which representatives to the Legislature will be elected.

Conclusion

Having considered the briefs and arguments of counsel, as well as the pleadings and filings, the Panel finds that the issues raised by Plaintiffs are non-justiciable political questions, and as such these claims are not appropriate for redress by this Court. Accordingly, the Panel need not reach the two issues posed by Plaintiffs.

THEREFORE, BE IT ORDERED, ADJUDGED AND DECREED THAT:

1. Legislative Defendants' Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) is hereby GRANTED as to all claims with prejudice.

2. Plaintiff's Request for Permanent Injunctive relief pursuant to Rule 65 is DENIED.

3. The costs of this action shall be taxed against the Plaintiffs.

4. Each party shall pay their own attorney fees.

6/27/2024 5:04:09 PM

SO ORDERED, this the 27th day of June, 2024.

Honorable Jeffery B. Foster

Honorable Angela B. Puckett

Honorable C. Ashley Gore

NORTH CAROLINA

WAKE COUNTY

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24-CVS-3534

BEVERLY BARD, RICHARD LEVY, SUSAN KING COPE, ALLEN WELLONS, LINDA MINOR, THOMAS W. ROSS, SR., MARIE GORDON, SARAH KATHERINE SCHULTZ, JOSEPH J. COCCIA, TIMOTHY S. EMRY, and JAMES G. ROWE,

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NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, JEFF CARMON III in his official capacity as Secretary of the North Carolina State Board of Elections, STACY "FOUR" EGGERS in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O'DUFFY MILLEN in her official capacity as a member of the North Carolina State Board of Elections, KEVIN N. LEWIS in his official capacity as a Member of the North Carolina State Board of Elections, PHILLIP E. BERGER in his official capacity as President Pro Tem of the North Carolina Senate, and TIMOTHY K. MOORE in his official capacity as Speaker of the North Carolina House of Representatives.

Defendants.

NOTICE OF APPEAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Plaintiffs, Beverly Bard, Richard Levy, Susan King Cope, Allen Wellons, Linda Minor, Thomas W. Ross, Sr., Marie Gordon, Sarah Katherine Schultz, Joseph J. Coccia, Timothy S. Emry, and James G. Rowe, hereby give notice of appeal to the Court of Appeals of North Carolina from the final judgment of the three judge panel of the North Carolina Superior Court—the Honorable Jeffery B. Foster, the Honorable Angela B. Puckett, and the Honorable C. Ashley Gore—entered 28 June 2024 in the Superior Court of Wake County, which dismissed Plaintiffs' action.

Respectfully submitted this 19th day of July 2024.

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CERTIFICATE OF SERVICE

I, Thomas R. Wilson, hereby certify that I have used e-file and served a copy of the forgoing NOTICE OF APPEAL, and have served a copy on counsel of record via email at the addresses below:

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This the 19th day of July 2024.

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NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 24CV003534-910

BEVERLEY BARD, RICHARD LEVY, SUSAN KING COPE, ALLEN WELLONS, LINDA MINOR, THOMAS W. ROSS, SR., MARIE GORDON, SARAH KATHERINE SCHULTZ, JOSEPH J. COCCIA, TIMOTHY S. EMERY, and JAMES G. ROWE,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, JEFF CARMON III in his official capacity as Secretary of the North Carolina States Board of Elections, STACY "FOUR" EGGERS in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O'DUFFY MILLEN in her official capacity as a member of the North Carolina State Board of Elections, KEVIN N. LEWIS in his official capacity as a member of the North Carolina State Board of Elections, PHILIP E. BERGER in his official capacity as President Pro Tem of the North Carolina Senate, and TIMOTHY K. MOORE in his official capacity as Speaker of the North Carolina House of Representatives,

Defendants.

ORDER

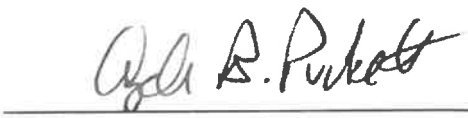
THIS MATTER came on to be heard and was heard before the undersigned Three-Judge Panel (the "Panel") upon Legislative Defendants' Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure, filed on March 6, 2024. After considering the Motion, briefs, and arguments and authorities cited by the parties therein, on June 28, 2024, the Panel granted Legislative Defendants' Motion to Dismiss as to all claims with prejudice. The Panel's Order did not include disposition regarding the remaining Defendants. In any event, the Panel finds that the issues raised by Plaintiffs are non-justiciable political questions, and as such these claims are not appropriate for redress by this Court as to all remaining Defendants.

THEREFORE, BE IT ORDERED, ADJUDGED AND DECREED THAT:

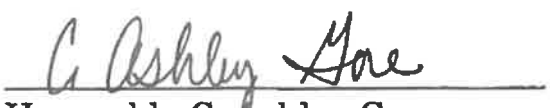
1. Plaintiffs' Complaint is DISMISSED with prejudice as to the remaining Defendants.

SO ORDERED, this the 22nd day of July, 2024.

Honorable Jeffery B. Foster



Honorable Angela B. Puckett



Honorable C. Ashley Gore

NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE No. 24 CR003534-910

BEVERLY BARD, RICHARD LEVY, SUSAN KING COPE, ALLEN WELLONS, LINDA MINOR, THOMAS W. ROSS, SR., MARIE GORDON, SARAH KATHERINE SCHULTZ, JOSEPH J. COCCIA, TIMOTHY S. EMRY, and JAMES G. ROWE,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, JEFF CARMON III in his official capacity as Secretary of the North Carolina State Board of Elections, STACY "FOUR" EGGERS in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O'DUFFY MILLEN in her official capacity as a member of the North Carolina State Board of Elections, KEVIN N. LEWIS in his official capacity as a Member of the North Carolina State Board of Elections, PHILLIP E. BERGER in his official capacity as President Pro Tem of the North Carolina Senate, and TIMOTHY K. MOORE in his official capacity as Speaker of the North Carolina House of Representatives.

Defendants.

AMENDED NOTICE OF APPEAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Plaintiffs, Beverly Bard, Richard Levy, Susan King Cope, Allen Wellons, Linda Minor, Thomas W. Ross, Sr., Marie Gordon, Sarah Katherine Schultz, Joseph J. Coccia, Timothy S. Emry, and James G. Rowe, hereby give *amended* notice of appeal to the Court of Appeals of North Carolina from the final judgment of the three judge panel of the North Carolina Superior Court—the Honorable Jeffery B. Foster, the Honorable Angela B. Puckett, and the Honorable C. Ashley Gore—entered 22 July 2024 in the Superior Court of Wake County, which dismissed Plaintiffs' action as to all Defendants.

Respectfully submitted this 12th day of August 2024.

/s/ Robert F. Orr
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Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I, Thomas R. Wilson, hereby certify that I have used e-file and served a copy of the forgoing Amended NOTICE OF APPEAL, and have served a copy on counsel of record via email at the addresses below:

COUNSEL FOR LEGISLATIVE DEFENDANTS
Phillip J. Strach, philstrach@nelsonmullins.com
Alyssa M. Riggins, alyssa.riggins@nelsonmullins.com
Cassie A. Holt, cassie.holt@nelsonmullins.com
Alex M. Bradly, alex.bradly@nelsonmullins.com

COUNSEL FOR THE STATE BOARD OF ELECTION DEFENDANTS
Assistant Attorney General Terrance Steed, tsteed@ncdoj.gov
Assistant Attorney General Mary Carla (Hollis) Babb, mcbabb@ncdoj.gov

This the 12th day of August 2024.

GREENE WILSON CROW & SMITH, P.A

/s/ Thomas R. Wilson
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twilson@nctriallawyer.com

Counsel for Plaintiffs

STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
No. 24CV003534-910

BEVERLY BARD, RICHARD LEVY, SUSAN KING COPE, ALLEN WELLONS, LINDA MINOR, THOMAS W. ROSS, SR., MARIE GORDON, SARAH KATHERINE SCHULTZ, JOSEPH J. OCCIA, TIMOTHY S. EMRY, and JAMES G. ROWE,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS, ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections, JEFF CARMON III in his official capacity as Secretary of the North Carolina State Board of Elections, STACY "FOUR" EGGERS in his official capacity as a member of the North Carolina State Board of Elections, SIOBHAN O'DUFFY MILLEN in her official capacity as a member of the North Carolina State Board of Elections, KEVIN N. LEWIS in his official capacity as a Member of the North Carolina State Board of Elections, PHILLIP E. BERGER in his official capacity as President Pro Tem of the North Carolina Senate, and TIMOTHY K. MOORE in his official capacity as Speaker of the North Carolina House of Representatives,

Defendants.

LEGISLATIVE DEFENDANTS' NOTICE OF CROSS-APPEAL

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Defendants Philip E. Berger, in his official capacity as President *Pro Tempore* of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives ("Legislative Defendants"), by and through the undersigned counsel,

hereby give notice of cross-appeal to the North Carolina Court of Appeals pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure from the portion of the order entered on 28 June 2024 and the subsequent final judgment by the three-judge panel entered on 22 July 2024 by Superior Court Judges Jeffery B. Foster, Angela B. Puckett, and C. Ashely Gore that orders each party to pay their own attorneys' fees.

Respectfully submitted, this the 20th day of August, 2024.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/ Phillip J. Strach
Phillip J. Strach (NCSB No. 29456)
Alyssa M. Riggins (NCSB No. 52366)
Cassie A. Holt (NCSB No. 56505)
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Counsel for Legislative Defendants

CERTIFICATE OF SERVICE

I, Phillip J. Strach, hereby certify that I have served a copy of the foregoing document upon counsel of record via email pursuant to N.C. R. Civ. P. 5 as follows:

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Terence Steed
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mcbabb@ncdoj.gov

This the 20th day of August, 2024.

NELSON MULLINS RILEY & SCARBOROUGH LLP

/s/ Phillip J. Strach
Phillip J. Strach
NC State Bar No. 29456

STATE OF NORTH CAROLINA Wake _____ County	File No. 24-CVS-3534 Additional File No.(s) In the General Court of Justice ☐ District ■ Superior Court Division
Name of Plaintiff ("STATE OF NORTH CAROLINA" if a criminal case) BEVERLY BARD, et al., **VERSUS** Name of Defendant NC STATE BOARD OF ELECTIONS, et al. Codefendant(s) If Tried Jointly	**CERTIFICATE OF TRANSCRIPT DELIVERY**

The undersigned hereby certifies that the transcript of proceedings in the above-captioned action was delivered as herein described.

Description of Transcript(s) Delivered

Date(s) of Trial/Hearing(s)	Date Transcript(s) Ordered/Requested	Transcript Ordered/Requested by
06/13/2024	8/6/2024	Thomas Wilson, Esq.
Date Transcript(s) Delivered	**Number of Volumes Delivered**	**Total Number of Pages Delivered**
9/30/2024	1	67

Parties to Whom Transcript(s) Delivered

For the *(specify)* Plaintiff *(Name and Address)*	For the *(specify)* Plaintiff *(Name and Address)*	For the *(specify)* Plaintiff *(Name and Address)*
Robert Orr, Esq. Telephone No. E-mail Address Orr@rforrlaw.com	Thomas Wilson, Esq. Telephone No. E-mail Address Twilson@nctriallawyer.com	Ann Smith, Esq. Telephone No. E-mail Address Ann.Smith@jacksonlewis.com
For the *(specify)* Plaintiff *(Name and Address)*	**For the *(specify)* Legislative Defendants *(Name and Address)***	**For the *(specify)* Board of Elections Defendants *(Name and Address)***
Andrew Simpson, Esq. Telephone No. E-mail Address andrew.simpson.ch@gmail.com	Phillip Strach, Esq. Alyssa Riggins, Esq. Cassie Holt, Esq. Telephone No. alyssa.riggins@nelsonmullins.com & E-mail Address philstrach@nelsonmullins.com	Terrance Steed, Esq. Mary Carla Babb, Esq. Telephone No. mcbabb@ncdoj.gov E-mail Address tsteed@ncdoj.gov

Date	Name of Court Reporter/Transcriptionist (printed)	Signature of Court Reporter/Transcriptionist
9/30/2024	Joann Bunze, RPR	Joann Bunze

STIPULATION SETTLING RECORD ON APPEAL

Counsel for Plaintiffs-Appellants/Cross-Appellees and Defendants-Appellees/Cross-Appellants and State Board of Elections/Members-Appellees stipulate as follows:

1. The proposed record on appeal was timely served on **31 October 2024**. A certificate showing service of the proposed record may be omitted from the settled record.

2. The Parties are in agreement as to which documents will be included in the printed record on appeal to address the issues appealed by Plaintiffs-Appellants/Cross-Appellees and the issue cross-appealed by Defendants-Appellees/Cross-Appellants.

3. All captions, summons, affidavits of service, signatures, headings of papers, certificates of service, and documents filed with the trial court that are not necessary for an understanding of the appeal may be omitted from the record except as required by Rule 9 of the North Carolina Rules of Appellate Procedure.

4. The Parties stipulate that the following documents constitute the agreed-upon Record on Appeal to be filed with the Clerk of the Court of Appeals:

   (a) This printed Record on Appeal, consisting of pages 1-165;

   (b) the hearing transcript described in the Hearing Transcript Option, which will be submitted upon receipt of a docket number for the appeal.

This 23rd December 2024.

For the Plaintiffs-Appellants/Cross-Appellees: /s/Thomas R. Wilson
Robert F. Orr
Andrew Simpson
Ann H. Smith
Thomas Wilson

For the Defendants-Appellees/Cross-Appellants: /s/Phillip J. Strach
Phillip J. Strach
Alyssa M. Riggins
Cassie A. Holt

For the Defendants-Appellees: /s/Mary Carla Babb
Mary Carla Babb
Terrence Steed

PROPOSED ISSUES ON APPEAL

Pursuant to Rules 10 and 9(a)(1) of the North Carolina Rules of Appellate Procedure, Plaintiff-Appellants intend to present the following proposed issues on appeal:

1. Did the trial court err in granting Legislative Defendants-Appellees' Motion to Dismiss and dismissing all claims as to all parties on the same grounds?

2. Did the trial court err in concluding the claims brought in Plaintiffs-Appellants' Complaint against Legislative Defendants-Appellees are non-justiciable political questions?

3. Did the trial court err in concluding the claims brought in Plaintiffs-Appellants' Complaint against the North Carolina State Board of Elections and its named members in their official capacity are non-justiciable political questions?

Pursuant to Rules 10 and 9(a)(1) of the North Carolina Rules of Appellate Procedure, Legislative Defendants-Appellees/Cross-Appellants intend to present the following proposed issue on appeal:

1. Did the trial court err in foreclosing Legislative Defendants-Appellee/Cross-Appellants' ability to make a motion for attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.5?

IDENTIFICATION OF COUNSEL

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CERTIFICATE OF SERVICE OF FINAL PRINTED RECORD ON APPEAL

I, Thomas R. Wilson, hereby certify that I have used e-file and served a copy of the forgoing PRINTED RECORD ON APPEAL, and have served a copy on counsel of record via email at the addresses below:

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This the 23rd day of December 2024.

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